

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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Advisory Opinion No. 2001-3

I. Summary.

This matter stems from a request from a member of the public (A) to the Ethics Commission (Commission) whether he or she could serve as a member of city board (Board) and also appear before city agencies on behalf of private interests. Based upon the advice of the Department of Corporation Counsel (COR), the Commission stated in Advisory Opinion No. 291 that such appearances would violate § 11-102(e), Revised Charter of Honolulu (RCH) and § 3-8.2(c), Revised Ordinances of Honolulu (ROH).

In reviewing the information contained on A's confidential financial disclosure forms, it appeared that A continued representing private interests before city agencies in order to maintain his/her livelihood. This was confirmed by a letter from A to the Ethics Commission (Commission) dated [date], although A also noted that A has attempted to minimize the number of contacts with city agencies on behalf of his/her private clients.

This case illustrates the difficulties that may result from competing public policies. The current law strictly prohibits any city officer or employee from appearing before city agencies on behalf of private interests. However, when this prohibition is applied to a volunteer board or commission member whose livelihood depends upon appearing before city agencies on behalf of private interests, the member risks violating the ethics law or, as a practical matter, must not offer his or her service to the city. This situation excludes a significant pool of potential volunteers from using their knowledge and expertise to the benefit of the city's boards and commissions.

We understand that the city administration may submit legislation to the Council to resolve the conflict between the prohibition against city officers representing private interests before city agencies and the need for qualified

members of boards and commissions. The Commission supports efforts to modify the law by removing the strict prohibition on appearances by board or commission members. Until the legislation becomes law, however, and consistent with the opinion of COR and as stated in Advisory Opinion No. 291, we are required to recommend to the appointing authority and A that A either cease representing clients before city agencies or resign or be removed from the Board.

II. Facts.

A is a member of the Board. As required by ROH [section], A is a registered professional in a specific field. Prior to A's Council confirmation in 1998, A sought a Commission opinion whether he/she could serve on the Board and continue to appear before city agencies on behalf of A's clients. A's request was made, in part, to clarify what impact his/her serving on the Board would have on A's livelihood. At the request of the Commission, COR examined certain legal issues and its response was received on August 17, 1998. COR concluded that, under RCH § 11-102(e), A would not be permitted to both serve on the Board and appear before city agencies on behalf of private interests. The Commission rendered Advisory Opinion No. 291 on October 22, 1998, finding that A could not serve both on the Board and appear before city agencies on behalf of private interests because that conduct is prohibited by the express language of RCH § 11-102(e). Copies of Advisory Opinion No. 291 were transmitted to A and his/her appointing authority after A had been confirmed to the position.

On [date], the Commission received A's financial disclosure form covering the calendar year [date]. On that form A reported that he/she conducted the following activities on behalf of private clients before city agencies as an employee of [name of business] (XYZ), on behalf of XYZ's clients and for compensation. A's disclosure form for calendar year [date], received [date], revealed virtually the same business activities. For [date] and the first part of [date], A informed the Commission staff that A had two permit requests before a city agency and at times requested interpretations from a city agency. A also stated that A has attempted to minimize the contacts on behalf of his/her clients with this city agency.

In [date], A and A's appointing authority presented information to the Commission and noted that the public interest requires a sufficient applicant pool from which to select qualified members for service on the Board. The Board membership is required by law to consist of subject matter experts. Each of these members typically are people who rely on their ability to

appear before city agencies to request permits and code interpretations. Because the expert members of the Board are limited by the ethics law in practicing their professions during their appointments, it significantly reduces the number of qualified potential appointees. Most practitioners in the affected professions would be sacrificing a significant portion of their income in order to volunteer for the Board because they could not represent their clients before city agencies. In A's most recent response to the Commission, A reiterated the financial burden the ethics law places on A as a volunteer member of the Board.

The Commission has tried to develop and implement a practical resolution of the conflicting policies represented in the standards of conduct and the requirement for expertise in the members of the Board. In [date], the Commission recommended to the Charter Review Commission that RCH § 11-102(e) be amended to create an exception that would allow the affected professionals to practice while sitting on the Board. No response was received from the Charter Review Commission.

The Commission staff examined whether an ambiguity existed in either of the standards of conduct that would permit the Commission to interpret the prohibition in light of the Board membership requirements. We are of the opinion that RCH § 11-102(e) and ROH 3-8.2(c) are not ambiguous. Therefore, we are precluded from interpreting them to exempt expert members of the Board from the appearance prohibition.

Finally, on [date] we asked COR to advise the Commission whether ROH § 3-8.2(c) could be amended to exempt expert members of a commission or board from the prohibition against appearing before city agencies on behalf of private interests. COR responded in the affirmative on [date].

III. Whether A's conduct violates the prohibition against city officers appearing on behalf of private clients before city agencies.

The standards of conduct state that "[n]o elected or appointed officer or employee shall . . . appear in behalf of private interests before any agency, except as otherwise provided by law." RCH § 11-102(e). This prohibition is restated in ROH § 3-8.2(c), with certain exceptions not applicable in this case. Based on the [dates] disclosure statements, A continued to represent private clients before city agencies, contrary to the standards of conduct and the Commission's prior opinion.

The policy underlying the employment restriction stated in RCH § 11-102(e) and ROH § 3-8.2(c) is to prevent a direct or indirect advantage in favor of city officials or employees who represent private clients before a city agency. The concern is that representations made by city officers to a city agency may carry more weight or be allowed more credence than others in the same business or profession who are not city officers.

On the other hand, the Commission is mindful that the city law requires that the Board include subject matter experts of which A is one. This law ensures the appointment to the Board of professionals who bring significant experience and technical expertise to the deliberative process. In this context, the prohibition against appearing before city agencies while serving as a city officer may place a financial hardship on the very candidates whose membership on the Board the law requires. As a result, the restriction appears to substantially limit the pool of qualified professionals for membership on the Board and, ultimately, impede carrying out the public interest.

We recognize the potential hardship on Board members and the public and the city administration's desire to correct the problem. We have worked with the city administration to draft an amendment to modify the prohibition, while retaining the independence and integrity of boards and commissions. Until the law is changed, however, the Commission and city personnel, including board and commission members, are obligated to follow the prohibitions contained in RCH § 11-102(e) and ROH § 3-8.2(c). We repeat our finding in Advisory Opinion No. 291 -- in representing private interests before city agencies during A's term as a member of the Board, A violated RCH § 11-102(e) and ROH § 3-8.2(c).

IV. Recommendation to the appointing authority.

The Commission is mandated to ". . . recommend appropriate disciplinary action against officers and employees found to have violated the standards of conduct . . ." ROH § 3-6.5(e).

In this case, the Commission is obligated to follow the language of RCH § 11-102(e) and ROH § 3-8.2(c) in rendering its opinion. Therefore, we are required to recommend that the appointing authority remove A from the Board, accept A's resignation or ensure that A will not represent private interests before city agencies while A is a member of the Board, until the applicable law is amended to permit such activity.

The Commission will transmit copies of this opinion to the appointing authority and A. In turn, the appointing authority is required to take ". . . whatever action is deemed necessary" to correct the violation and report the action to the Commission within 15 days of receipt of the advisory opinion. ROH § 3-6.5(e).

Dated: October 8, 2001

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LOLINDA D. RAMOS, Chairperson
Ethics Commission