

ETHICS COMMISSION
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Advisory Opinion No. 2002-5

I. Summary

It is not a violation of the ethics laws for a non-supervisory civilian employee of the Honolulu Police Department (HPD), who generally has no contact with the public and does not wear a uniform, to display a political button while at work showing the picture of a candidate for city office.

II. Facts

A non-supervisory civilian employee of HPD who generally has no face-to-face contact with the public and is not required to wear a uniform wore a political button at work showing the picture of a political candidate for city office.

III. Questions presented

The issue is whether the wearing of a political button by a non-supervisory civilian employee of HPD who generally has no contact with the public and does not wear a uniform is in violation of the ethics law?

IV. Analysis

A. Political activities at work or using city resources are prohibited

RCH § 6-1112.2¹ states:

(a) No person in the civil service shall (1) use official authority or influence for

¹ROH § 3-8.2(f) incorporates into the ethics law the provisions of RCH § 6-1112.2 restricting political activities of persons in the civil service.

the purpose of interfering with an election or affecting the result thereof; (2) use official authority or influence to coerce the political action of any person or party; (3) be obliged to contribute to any political fund or to render any political service, nor shall such person be removed or otherwise prejudiced for refusing to do so;

(4) solicit or receive any political contribution from any officer or employee or from any person in any city building or from any person receiving any benefit under any law of the State appropriating funds for relief or public assistance; or (5) discriminate in favor of or against any officer or employee on account of any political contribution.

This section also notes the employee=s right to free speech:

(b) The foregoing prohibited activities shall not be deemed to preclude the right of any person in the civil service to vote and to express opinions such as such person chooses on all political subjects and candidates or to be a member of any political party, organization or club.

It is clear that civil service employees may not campaign or participate in political activities at work.

In addition, RCH § 11-104, the fair and equal treatment policy, states:

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.

This law prohibits the use of a city officer=s or employee=s position or time or any other city resource for political purposes. See, Advisory Opinion No. 2000-1.

The pertinent sections of the Charter and ordinances prohibit city employees from campaign activities while working and from utilizing city resources for campaigning. In the present inquiry, wearing a political button while working could be considered a form of campaigning B an expression of one=s political opinion to those who see the button. However, a nonverbal statement of a political opinion is not necessarily contrary to the ethics law, as the right to express a political opinion is protected in RCH § 6-1112.2(b). We are required to balance the employee=s right to express a political opinion against the city=s interest in avoiding political campaigning at work.

B. Employee=s right to free speech

A government employee=s right to free speech is contained in the First Amendment of the United States Constitution and the Constitution of the State of Hawaii. The applicable law

states that A...government may not condition public employment on a basis that violates the First Amendment rights of its employees. A Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1864, **1867**, 75 L.Ed.2d 708 (1983); see also, Pickering v. Board of Education, 391 U.S. 563 (1968); American Federation of Government Employees, AFL-CIO v. Pierce, 586 F.Supp. 1559 (**1984**).

Nevertheless, government, as an employer, has an interest in regulating the speech of its employees so that it may efficiently discharge its responsibilities to the public. Free speech rights for public employees should not differ significantly than that of the rest of its citizens, but the right of public employees to speak is narrower than that of private citizens. Martin v. Lauer, 222 U.S. App.D.C. 302, 686 F.2d 24 (D.C. Cir. 1982).

In Pickering v. Board of Education, supra, the U.S. Supreme Court utilized a balancing test between the interest of the employee in commenting on matters of public concern and the interest of the state as an employer in promoting the efficiency of the public service it performs through its employees. AThe balancing test differs depending upon the type of expression, the nature of the agency, and the context in which the expression is made.≡ Martin, supra at 686 F.2d 31.

1. Type of expression

A government employee=s right to free speech is afforded more weight in the balancing test when it concerns a matter of general, not personal, interest. An interest is considered Apersonal≡ when the actor is merely trying to advance his interest as an employee, which is limited to employment, location or labor issues, as opposed to a matter of public concern such as an election.

The act of wearing a political button and nothing more, although showing a personal preference for a candidate, does not advance an interest of the employee in as much as it promotes the interest of the general public in exercising the right to vote for a particular candidate. In light of this, the courts generally afford more weight to the employee=s right to express a political opinion and less to the government=s interest in efficient operations. Pickering v. Board of Education, supra; American Federation of Government Employees, AFL-CIO v. Pierce, supra.

2. Nature of the agency

HPD enforces the laws of the city and state. Because of the discretionary authority of the sworn officers of HPD, the department must be cautious to avoid appearances of impropriety or conflict of interest. One such appearance could occur if a uniformed officer were to wear a political button in the view of the public. This action would likely politicize some of those who see the button or at least raise questions about the propriety of HPD=s permitting political comments by its officers. To this end, HPD has adopted strict standards of conduct, including restrictions on political activities for its sworn officers.

The employee in this matter, however, is a non-supervisory civilian employee who does not wear a uniform and generally has no contact with the public. This employee is not a police officer and does not represent herself to the public as law enforcement or as a representative of the law enforcement community. The concerns regarding appearances of conflict of interest or impropriety are not significant under these circumstances.

IV. Context of expression – it is the third factor to be evaluated in this type of case

The context of the expression is the employee=s preference of a political candidate. The choice of mayoral candidates is a public concern; it is not limited to the employee=s job or job site and it is not a labor issue.

On balance, we find the employee=s right to express her political opinion to outweigh HPD=s interest in efficiently performing its duties on behalf of the public. In this case, we do not find that the non-supervisory civilian employee wearing a candidate=s button would likely undermine HPD=s efficiency or operations.² Because she is non-supervisory, her wearing the button would unlikely be seen as coercive. Because she does not have face-to-face contact with the public, her action will not confuse the public or raise the issue of whether HPD has a position on the political race.

We also find other support for our conclusion regarding the display of political buttons. First, RCH 6-1112.2(b) states that an employee has a right to express his or her political opinion. The display of a political button is not much different than a statement of whom the employee intended to vote for. Both are protected forms of speech. In addition, the federal civil service and several states and municipalities that receive federal funding fall under the provisions of the Hatch Act, which provides rules for government employees= behavior regarding political activity and permits the display of political buttons. American Federation of Government Employees, AFL-CIO v. Pierce, supra, at 1661. For example, 5 C.F.R. 673.111(a), a regulation issued by the Civil Service Commission, provides that Each employee retains the right to . . . display a political button.≡

V. Conclusion

Although political activities during work hours or using city resources are prohibited under city law, there is no law specifically prohibiting the wearing of political buttons while working. Furthermore, RCH 6-1112.2(b) codifies an employee=s right to express his or her

²There is no evidence that the employee attempted to carry out conventional unlawful political chores such as asking other employees to work on the campaign, handing out political buttons or offering fund raiser tickets while at work.

political opinions. Where the agency should permit an employee=s political opinion, federal case law provides the use of a balancing test between the interest of the employee in commenting upon matters of public concern and the interest of the government in promoting the efficiency of the public service it performs through its employees. We conclude that, under the specific facts of this case, wearing a political button is not a political activity prohibited by the ethics laws.

The same finding may not apply had the facts been different. For instance, had the employee maintained contact with the general public, worn a uniform or represented an agency, our answer may be different.

Dated: December 17, 2002

/S/
ROBIN DAVID LIU, CHAIRPERSON
Ethics Commission