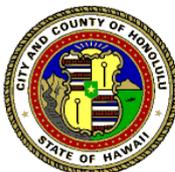


ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

715 SOUTH KING STREET, SUITE 211, HONOLULU, HAWAII 96813-3091
Phone: (808) 527-5573 \$ Fax: (808) 527-6936 \$ EMAIL: ethics@honolulu.gov
Internet: www.honolulu.gov/ethics

JEREMY HARRIS
MAYOR



CHARLES W. TOTTO
EXECUTIVE DIRECTOR & LEGAL COUNSEL

Advisory Opinion No. 2004-7

I. Summary

City officers and employees who modeled products in a feature article did not violate the city's ethics laws because they neither knew nor should have known that their official positions would be used to promote the products and stores featured, and because their appearances did not result in actual or apparent conflicts of interest.

II. Introduction

The [date] issue of a print media company ran an article that featured photographs of several high-ranking city officers and employees modeling fashionable products (Feature). The photos were accompanied by captions that identified: (1) the officers'/employees' names and city positions; (2) the brands, models and prices of the products; and (3) the stores at which the products could be purchased.

Shortly after the Feature ran, the Ethics Commission (Commission) received an inquiry from a member of the public as to whether participation in the Feature constituted a violation of the city's ethics laws. Each of the participants in the Feature (Participants) was given a copy of the inquiry in compliance with Revised Ordinances of Honolulu (ROH) § 3-6.7(b). Corporation Counsel, on behalf of the Participants, submitted a written response and waived the Participants' rights to request a hearing. The Commission staff conducted an investigation. Pursuant to ROH § 3-6.7(c), the Commission renders this opinion based on the information available to it.

III. Question Presented

Did the Participants' appearances in the Feature constitute violations of the fair and equal treatment or the conflicts of interest provisions of the Revised Charter of the City and County of Honolulu?

IV. Facts

In [date], a reporter (Reporter) for a print media company contacted a high-ranking city official (Official) to ask if certain city officers and employees would participate in a photo session in which they modeled various products. The Reporter told the Official that the photos would be published in an upcoming issue as an “editorial feature” rather than as an “advertising feature.” An editorial feature apparently differs from an advertising feature in that the former is presented as an article written by a reporter (which might incidentally promote particular products or services), while the latter is presented as a paid-for advertisement. The Official agreed to the Reporter’s request with the specific understandings that: (1) the photos would be published as an editorial feature and not an advertising feature, (2) the Participants would receive no compensation or benefits and (3) the Feature would include a disclaimer that the Participants did not endorse any of the products they modeled. The Official acknowledges that at the time she agreed to the Feature, she assumed that the Participants would be identified by their official positions.

Over the course of the next few weeks, photo sessions were held and the Participants were photographed modeling various products. Each photo “shoot” took no more than five to ten minutes. There is no evidence that any of the Participants took leave for the brief photo sessions. Two city officers were photographed in their departmental uniforms.

The Feature was published on [date]. Prior to publication, none of the Participants reviewed the Feature. As the Reporter had indicated to the Official, the photos were accompanied by a very short article written by the Reporter entitled [name of article]. The article contained quotes regarding product fashion trends from employees of two retail stores and referred the reader to the accompanying pictures by stating, “Here are some of the latest styles of [products] modeled by top city officials.” The article’s last sentence stated, “The City does not endorse any of these products.” This disclaimer was included in the article at the request of the Official.

All of the products modeled by the Participants and highlighted in the Feature were sold at two retail stores. Moreover, each photograph was accompanied by a caption that identified: (1) the city officer/employee by name and city position or title; (2) the maker and model of the product; (3) the price of the product; and (4) which of the two stores carried the product.

None of the Participants knew that the Feature would include the vendors’ names and the prices of the products. They maintain that, if the Reporter had disclosed that information, they would not have participated in the Feature.

V. Analysis

A. Fair and Equal Treatment

The city’s fair and equal treatment policy, embodied in 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.

The provision's core purpose is to "prevent favoritism by government officials." Advisory Opinion No. 2001-1 (March 15, 2001).

1. The Feature created a misleading impression that the Participants endorsed the stores and products promoted.

Even though the Feature was styled as an "editorial feature," it clearly operated as a promotional vehicle for the stores and products publicized. By identifying the individual product's brand, model and price, as well as the store where the product could be purchased, the Feature had the same effect and objective as a conventional paid-for advertisement: the promotion of the stores and products featured. *See Revised Guidelines for Appearances in Advertisements* (July 13, 1995) ("Under [RCH] Section 11-102(c), an advertisement is a business activity because businesses use advertisements to foster a public market for their services or products."). In effect, the media company used the prestige of the Participants' official titles and positions to create a false impression that the Participants endorsed the featured products and stores in their official capacities. This misleading impression was clearly aided by the appearances of the two officers in their official uniforms.

The question is whether the Participants' appearances in what, for all intents and purposes, turned out to be an advertisement constituted a violation of the fair and equal treatment policy. We conclude that it did not.

2. A city employee or officer violates the ethics laws if he or she knew or should have known that his or her conduct would constitute a violation.

As an initial matter, we take this opportunity to clarify the relevant "mental state" required to violate the ethics laws. The Participants argue that they did not violate the city's fair and equal treatment policy because they did not know that the vendors' names and the prices of the products would be included and therefore they lacked the subjective intent to grant special treatment to the businesses promoted in the Feature. This argument misapprehends the appropriate standard for determining whether a violation of the ethics laws occurred. In general, a city employee or officer violates the ethics laws if he or she *knew or should have known* that his or her conduct would constitute a violation. *See* Advisory Opinion No. 306 (June 16, 2000) (deputy corporation counsel's use of official corporation counsel stationery for a personal letter supporting a nominee for a state board violated RCH § 11-104 notwithstanding the fact that the deputy claimed he "failed to think about the personal nature of the letter at the time [he] signed it."). The subjective intent (or lack thereof) to violate the ethics laws goes to the seriousness or degree of the violation and is a factor to be taken into account in determining the appropriate penalty to be imposed; it is not a required element of an ethics violation.

3. **The Participants did not violate the city's fair and equal treatment policy.**

In this case, there is an insufficient basis to conclude that under the circumstances any of the Participants knew or should have known that their participation in the photo sessions would be turned into a *de facto* advertisement, *i.e.*, that their official positions would be used to give a special advantage to the particular businesses and products featured.

First, the request to participate in the Feature came from a Reporter, not the media company's advertising or marketing department. Second, the Official was told that the Feature would be an "editorial feature" rather than as an "advertising feature." Third, none of the Participants was told that the Feature would include the vendors' names and the prices of the products. Fourth, the Participants received no personal benefits or compensation for their participation. Finally, the Official specifically required that a disclaimer be included in the Feature.

These circumstances were not enough to put a reasonably prudent person in the Participants' position on notice that the Feature would use their official positions to give a special advantage to stores/manufacturers featured. Thus, none of the Participants violated RCH § 11-104.

B. Prohibited Conflicts of Interest

Because the Feature has the appearance of being an advertisement, the Commission must determine whether the city's conflicts of interest laws have been violated. In pertinent part, RCH § 11-102(c) provides:

No elected or appointed officer or employee shall:

...

- (c) Engage in any business transaction or activity or have a financial interest, direct or indirect, which is incompatible with the proper discharge of such person's official duties or which may tend to impair the independence of judgment in the performance of such person's official duties.

First, there is no evidence that any of the Participants had a direct or indirect financial interest in any of the vendors or manufacturers promoted in the Feature. Thus, RCH § 11-102(c) is implicated only if the Participants, by appearing in the Feature, engaged in a "business transaction or activity."

The Commission's *Revised Guidelines for Appearances in Advertisements* note that "[u]nder Section 11-102(c), an advertisement is a business activity because businesses use advertisements to foster a public market for their services or products."

If we assume, for the purposes of our analysis, that the Feature constituted an advertisement (*i.e.*, a "business activity"), RCH § 11-102(c) is violated only if the Participants'

appearance in the advertisement: (1) is “incompatible with the proper discharge of [their] official duties” or (2) “may tend to impair the independence of judgment in the performance of [their] official duties.”

There is no evidence that any of the vendors or product makers promoted in the Feature have any business or any other interests before the Participants or their respective offices that would potentially require the Participants to choose between their own interests or those of the any of the businesses. *See* Advisory Opinion No. 2001-2 (June 22, 2001) (“One purpose of the ethics laws is to prevent conflicts of interest because city officers and employees should not serve two masters.”). That is, there is no evidence that the Participants’ appearance in the Feature was either incompatible with the proper discharge of their official duties or may tend to impair their independent judgment in performing their official duties.

Indeed, the facts in this matter do not suggest even the appearance of a conflict of interest. “The appearance of a conflict arises when one may reasonably perceive that the officer's public duty may be interfered with or compromised by a personal or financial interest.” *Id.* The Commission has consistently interpreted RCH § 11-101¹ as prohibiting appearances of conflicts of interest. *Id.* Here, the Feature was a one-time event, the Participants were not compensated for their appearances, and the Participants apparently did not know beforehand which vendors or manufacturers were being promoted. Those facts do not create a reasonable perception that the Participants had any personal or financial interests that could interfere with or compromise the discharge of their public duties.

In sum, under the circumstances, the Participants’ appearances in the Feature did not result in actual or apparent conflicts of interest.

V. Conclusion and Recommendation

Based on the foregoing, we conclude that none of the Participants violated the city’s ethics laws by appearing in the Feature.

Although we conclude that there was no ethics violation, we believe it is appropriate to remind all city employees and officers to exercise caution when considering opportunities to participate in media events that have the possibility of creating an impression of an official endorsement. As the facts in this case demonstrate, without the appropriate safeguards in place, there is a risk that even well-intentioned cooperation with media requests can lead to unintended results.

¹ **Section 11-101. Declaration of Policy –**

Elected and appointed officers and employees shall demonstrate by their example the highest standards of ethical conduct, to the end that the public may justifiably have trust and confidence in the integrity of government. They, as agents of public purpose, shall hold their offices or positions for the benefit of the public, shall recognize that the public interest is their primary concern, and shall faithfully discharge the duties of their offices regardless of personal considerations.

We understand that the city administration and Corporation Counsel already have taken steps to establish a protocol for handling requests from the media for city employees and officials to participate in activities that might erroneously suggest official endorsements of commercial products.

In formulating the specific terms of the protocol, we recommend that the administration and the Corporation Counsel include a provision that prohibits all uniformed city officers and employees from wearing their uniforms in media events unless they are on official duty or there is some clear connection between the event and the discharge of their official duties. As part of our recommendation, we request a report from the Official on the status of the protocol within fifteen (15) days of receipt of this opinion.

As this case shows, the appearance of a city officer or employee in official uniform implies that the uniformed officer or employee is acting in an official capacity. The conduct of the uniformed officer or employee may easily create the impression of an official endorsement. City officers and employees who wear uniforms have an obligation to ensure that their uniforms are not used to connote official endorsements.

Dated: 6/22/04

/S/_____
ROBIN DAVID LIU, Chairperson
Ethics Commission