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Advisory Opinion No. 2006-1

I. Summary

A city employee who sells personal care and home cleaning products as a private business may not do so during city work hours, on city premises or by using any city resource.

II. Facts

On June 1, 2005, the Honolulu Ethics Commission (Commission) received an oral complaint that [name] (Respondent), Wastewater Service Investigator, Department of Environmental Services, sold Avon products to city employees while she and/or her customers were on city property, during their city work-time and/or used other city resources, such as telephone and email, to effect the sales.

The Commission found that probable cause existed that Respondent had violated the standards of conduct and, therefore, on November 22, 2005, issued a Notice of Potential Violation of the Standards of Conduct informing her of allegations that she had engaged in conduct that violated Section 11-104 of the Revised Charter of Honolulu (RCH).[1]

Respondent did not request a hearing in this case. Accordingly, the Commission may render an opinion based on the information available to it.[2] The Commission and Respondent entered into a stipulation to resolve the issues raised in this case, the facts of which are stated below.

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[1] Section 11-104. Fair and Equal Treatment --

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.

[2] Section 3-6.7. Requests by third parties.

(c) Where no hearing is requested by the officer or employee involved, the commission shall render its opinion on the basis of the information available; provided, that the commission may request for additional information when deemed necessary.

Respondent had been selling Avon products since 1987. Her sales were mainly to city employees who work on the 1st floor of the Board of Water Supply (BWS) main building at South King Street; the 1st and 2nd floors of the BWS Engineering Building; the basement, 1st, 5th, 7th, 8th, 12th and 15th floors of the Honolulu Municipal Building; and the 1st and 3rd floors of Honolulu Hale. Respondent had about 40 city employee customers. As of the June 17, 2005 interview with Commission staff, Respondent stated she had stopped her Avon sales on city premises as a result of the complaint in this matter.

In tax years 2003 and 2004, Respondent reported gross revenues from her Avon sales of $19,618 and $20,420, respectively. However, Respondent reported a net loss for her business of $2,121 for 2003 and $1,134 for 2004.

Respondent claimed that she used only her daily break times (two at 20 minutes each) and her lunch break to conduct her Avon business with city workers. Although Respondent may have attempted to use only her break time to conduct business, she understands that she is unable to control how or when her city employee customers contact her.

She also stated that no one ever told her that there was any problem with her conducting her Avon business on city premises or using city equipment, time or other resources. Respondent noted that, when they became aware of the sales, neither her immediate supervisors nor former Mayor Jeremy Harris objected to her sales of Avon products on city grounds. When interviewed by Commission staff, two of Respondent's supervisors stated that they did not inform Respondent that she could not carry on her private business on city premises or during city work time, even though they were aware of such sales.

Respondent states that she understood that, per a memorandum from BWS to its private security company, she and the "popcorn man" were not permitted to enter the premises of the BWS main building to sell products. Respondent stated that, to avoid this restriction hindering her Avon business, she would have BWS personnel from within the building receive the Avon products from her and distribute them to her customers within the building.

At times, Respondent's customers used her city telephone number and/or email address to contact her. In addition, a complainant has claimed, but Respondent disputes, that customers would sometimes leave messages or payments with co-workers in her office.

III. Questions presented

The threshold question is whether the Commission has jurisdiction to examine a complaint against a city employee that was submitted orally. If the Commission has jurisdiction, it must determine whether Respondent misused city resources for the benefit of her private business in violation of RCH Section 11-104.

IV. Discussion

A. The Commission may accept jurisdiction over oral complaints

There appears to be a conflict between the provisions of the revised Charter and those of the revised ordinances regarding whether the Commission may investigate and render an opinion based on an oral complaint like the one that triggered this matter. Sections 3-6.5(a) and 3-6.7(a), Revised Ordinances of Honolulu (ROH),[3] require that a complaint be in writing and signed by the person making the request.

However, the relevant ordinance sections are not internally consistent. ROH Section 3-6.3(a) describes the powers of the Commission to render an advisory opinion involving unethical conduct of government personnel at the request of an officer or employee.[4] ROH Section 3-6.3(b) also empowers the Commission to render an advisory opinion in circumstances where unethical conduct is alleged on the part of a city officer or employee. Neither section requires that the request be in writing.

More important, limiting the Commission's authority to render opinions pursuant to a written request is inconsistent with the Charter provisions on the topic. First, RCH Section 11-107[5] authorizes the Commission to use its investigative powers and render advisory opinions "on its own initiative" -- in other words, without any request or complaint to the Commission. If the Commission may render an advisory opinion where

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[3] Section 3-6.5. Requirements applicable to the rendering of opinions.

(a) Except in the case of a written request by the elected or appointed officer or employee concerned, the commission may for good cause refuse to entertain a request for an advisory opinion. Without limiting the generality of the foregoing, the commission may refuse to entertain a request where: (1) the request is speculative or purely hypothetical and does not involve an actual situation or (2) the request is frivolous. In no case, however, shall the commission entertain a request that is not in writing and not signed by the person making the request.

Section 3-6.7. Requests by third parties.

(a) A request for an advisory opinion submitted by a person other than the officer or employee involved in the request shall be in writing and shall be signed by the person making the request; provided, that the name of the person making the request shall not be disclosed. Such request shall relate to an actual situation and shall set forth the pertinent facts, including the names of those involved.

[4] Section 3-6.3. Powers, duties and functions.

(a) The commission shall render advisory opinions at any time at the request of an officer or employee of the city involving the possible conflict of interest or unethical conduct on the part of or the solicitation, acceptance, or receipt of a gift by such officer or employee.

[5] RCH Section 11-107 reads in relevant part:

The commission is authorized to hold hearings and to conduct investigations concerning the application of this article of the charter [that is, the standards of conduct] and shall have the powers provided in Section 13-114 of this charter.

The commission may, on its own initiative, render advisory opinions with respect to this article of the charter. Advisory opinions shall be rendered pursuant to a written request of any elected or appointed officer or employee concerned and may be rendered pursuant to the request of any person.

no request or complaint has been lodged, logically, an oral complaint to the Commission may be a sufficient basis to trigger an investigation and advisory opinion. On the other hand, if a written complaint were a prerequisite, the Commission would be precluded from rendering an opinion on its own initiative.

Second, the specific language used in RCH Section 11-107 does not require that a complaint be in writing if it is a "request by any person." Had the intent of the Charter been to allow the Commission to render opinions only pursuant to a written request, the Charter language would have so stated.

To the extent that the ordinances are inconsistent with the Charter, the Charter will control. *See, Fasi v. City and County of Honolulu*, 72 Haw. 513, 518-519, 823 P2d. 742, 744-745 (1992). In that case, the Hawaii Supreme Court ruled that an ordinance is invalid if it conflicts with or restricts an express provision of the Charter. Therefore, under RCH Section 11-107, the Commission may investigate and render an opinion when no written, signed complaint has been submitted.

Finally, we conclude that our interpretation advances the public interest in having the Commission review potential unethical conduct by government officials. RCH Section 11-107 permits the Commission to be alerted to a potential ethics violation reported from any source or by any means. For example, if the Commission finds that the media reports the unethical conduct of a city official, it could investigate and render an opinion. Similarly, the Commission could investigate an oral complaint of misconduct. The Commission would not be under a requirement to render an advisory opinion in either example, but may do so. [6]

B. Misuse of city resources

RCH Section 11-104 prohibits the use of city resources for an employee's private business. *See* Advisory Opinion No. 273 (September 27, 1996) (use of a city office by a city employee to display sales products was a misuse of city resources and gave the sales representative a special advantage over other sales agents) and Advisory Opinion No. 305 (April 28, 2000) (city officer's use and promotion of an electric car provided car's manufacturer with a competitive advantage not available to other fuel efficient vehicle vendors).

RCH Section 11-104 exists to prevent employees like Respondent from using taxpayer-funded resources for her personal benefit and that of her city employee customers. Her marketing Avon products to city employees during city work hours on city premises and using her city position to access city buildings violated this standard of conduct

[6] RCH Section 11-107 clarifies the circumstances under which the Commission is required to render an opinion or may render an opinion. If a city officer or employee submits the request in writing, the Commission must render an opinion. The Commission need not render an opinion if the request is oral or is one made on its own initiative.

V. Conclusion

Respondent has agreed to cease and desist from any sales or other business activity during her work hours, on city premises or with the use of any city resources. Respondent understands she will not be allowed discuss her product line or make sales, take, fill or deliver orders or any other conduct related to her private business during work hours, on city premises or using city resources. Furthermore, Respondent realizes that she will be limited to conducting her business during her personal time before or after work, but not on city premises and not through city resources, including telephones, faxes, email or other means to solicit or facilitate a sale.

We also note that a supervisor is not helping his or her employee by tacitly allowing the employee to violate the standards of conduct. As in the case of Ms. Nago, the supervisors were responsible for informing her that she was violating the law and to have her cease the use of city resources. In certain circumstances, a supervisor may become responsible for the unethical conduct of his or her employee. Yet even if the supervisor is not personally responsible, the failure to correct misconduct exposes the employee to discipline that could have been avoided.

A copy of this opinion will be transmitted to Respondent and the director of the Department of Environmental Services.

Dated: February 24, 2006

/S/
LEX R. SMITH, CHAIRPERSON
Ethics Commission