

ETHICS COMMISSION  
**CITY AND COUNTY OF HONOLULU**

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**Advisory Opinion No. 2008-4**

**I. Summary**

The practice of the Office of the City Clerk to encourage its staff to sign nominating petitions for candidates who do not have a sufficient number of signatories may change the role of the staff from regulators of the election process to apparent supporters of a candidate. Therefore, it is a practice that should be discontinued to avoid a violation of Section, 11-104, Revised Charter of Honolulu. Under the facts in this case, however, the officers and employee who followed the practice neither knew nor should have known that their conduct would be in violation of the ethics law.

**II. Facts**

The Honolulu Ethics Commission (Commission) received questions about whether certain personnel within the Office of City Clerk (Clerk's Office) and employees may have misused their city positions, paid time and other resources in support of campaign activities involving the petition for nomination of Candidate A to run for [description of elective office ("Elective Office")].

[Name] threw his/her hat in the ring for [elective office] on [date] the last day for nominations for elective public office. Within a few hours of [name]'s announcement, Candidate B filed his papers to run for Elective Office. Around 4:00 p.m. that day, Candidate A submitted his petition for nomination for Elective Office. Candidate A's candidacy was later declared invalid by [government agency] for reasons not relevant to this opinion.

Candidate A's candidacy required that he submit a petition for nomination signed by 15 registered voters residing in [Elective Office district]. Upon review by the [title of city position], Employee A, he noted that Candidate A's petition was short one signature. He informed Denise De Costa, the City Clerk, of this fact. Ms. De Costa knew that Employee B, [title of city position], lived in [Elective Office district].

Shortly after 4:30 p.m., when Employee B was heading out the office after finishing work for the day, Ms. De Costa asked Employee B to stop by and see Employee A, which she did.

Employee A informed Employee B that Candidate A's petition was short one signature and offered her the opportunity to sign the petition. Employee B had not worked in the Elections and Voter Registration division of the Clerk's Office and asked whether it was proper for her to sign the petition. Employee A told her that the practice of the office for as long as he could remember was for staff to sign nomination papers when a candidate was short a name or two. The practice was voluntary for each employee. Employee B stated that, although she did not know Candidate A, she signed his petition to help him get on the ballot, consistent with office practice. She did not feel in any way coerced or required to sign. Employee B signed after the 4:30 p.m. cut off for candidate nomination petitions.

In her interview, Ms. De Costa confirmed that the practice to permit staff to sign nomination petitions was intended to maximize the number of names on the ballot for any elective office and, thus, enhance political participation. There is no written policy memorializing the practice. Ms. De Costa also noted that 3 out of 4 counties and the state Office of Elections employed this practice.

Ms. De Costa submitted a written request on August 4, 2008, asking whether an employee of her office could sign a nomination petition on the employee's own time. Also on August 4, the Commission received a complaint alleging misuse of city resources for political activities against Clerk's Office personnel.

### **III. Question presented**

The issue in this case is whether there is sufficient evidence to find probable cause<sup>1</sup> that Ms. De Costa, Employee B or Employee A used her/his city position, paid time or other city resources to support a political campaign activity in violation of RCH Sec. 11-104. In other words, did Candidate A's campaign receive special treatment or an unwarranted benefit as a result of the Clerk's Office's practice to ask and permit an employee to sign a petition that would otherwise not have had sufficient signatures?

### **IV. Analysis**

The *Revised Guidelines on Campaign Activities* ("*Guidelines*") notes that RCH Sec. 11-104<sup>2</sup> prohibits the use of city resources for political activities or purposes.

#### Denise De Costa

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<sup>1</sup> The standard applied by the Commission for a finding of probable cause is whether there is sufficient evidence such that a reasonable person could conclude that the subject violated an ethics law. The standard for probable cause is less stringent than the standard needed to find that the alleged violator is responsible for the misconduct. Proof of a violation requires a showing that the preponderance of the evidence supports the finding of misconduct.

<sup>2</sup> **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.

As the City Clerk, Ms. De Costa is responsible for the policies and practices of the office. Therefore, she is responsible for the practice whereby staff would be asked if they wanted to sign the petition for nominees who did not have enough valid signatures. In this case, Ms. De Costa also requested that Employee B talk to Employee A, knowing that he would ask Employee B if she wanted to sign the Caldwell petition.

Is the Clerk's Office's petition signing practice a prohibited political activity? The *Guidelines* do not cover this specific practice. The *Guidelines* state that:

**No City officer or employee is permitted to:**

1. Use City time, equipment, material, or premises for campaign activities or purposes . . .

d. *City premises* include City offices, conference rooms, and working areas. City premises or facilities that are available for public use may be used for political activities on the same basis as the facilities are available to the public.

Candidate "walk throughs" are no longer permissible.

e. *Campaign activities or purposes* include: (1) selling, purchasing, or distributing campaign fundraiser tickets; (2) conducting political meetings; (3) distributing campaign literature or materials; (4) soliciting campaign assistance, support, or contributions; or (5) producing campaign literature or materials.

(Emphasis in original.)

An important factor in determining whether a city official's conduct is a campaign activity or supports a political purpose is whether it advances the interests of a candidate for elective office. In this case, an office practice whereby city employees are asked or permitted to sign a petition that would otherwise be invalid would assist the nominee by putting him or her in the race.

The petition signing practice is based on a desire to promote the democratic process by helping those who can run for office, but do not satisfy a technical rule. In that sense, the petition signing practice levels the playing field and maximizes the number of candidates. It is reasonable to infer that increasing the pool of candidates is part of the duties of the Clerk's Office. As Ms. De Costa pointed out, the practice was common among the election offices in Hawaii. The practice appears intended to be neutral. In this way it sharply contrasts with political activity abuses. *See* Advisory Opinion No. 2001-1 ( a councilmember uses Council staff on city paid time to regularly conduct all aspects of reelection campaigns); Advisory Opinion No. 235 (asking

applicants for deputy Corporation Counsel or Prosecuting Attorney positions whether the applicant would object to campaigning for mayor found improper); Advisory Opinion No. 231 (city official misused city stationery to inform legislators about his position on a bill should he be elected as legislator); and, Advisory Opinion No. 230 (city manager misused position by distributing cards to city staff during non-city time that stated amount of contribution to be paid to a political campaign by each employee).

The petition signing practice is like the past practice of allowing all candidates to walk through city offices so that city employees could meet the candidates. The justification for the practice was that each candidate would be permitted access to city employees on the same terms. Thus the practice would comport with RCH Section 11-104. Although the practice sounded reasonable in theory, it was not always executed fairly. For example, some candidates were given the opportunity to address city personnel in large meetings, while others were not. Also, some candidates were escorted by department heads, while others were not. As a result of the inequities in how the “walk throughs” were handled, both the Hawaii State Ethics Commission and the Commission prohibited the practice some years ago.

Like candidate walk throughs, the petition signing practice is also open to differing treatment of candidates. First, it is up to the individual Clerk’s Office employee to decide if he/she will sign a petition. Second, and more importantly, the public may reasonably perceive that some candidates may be favored, but others not. This perception could be exacerbated if staff’s signatures or lack thereof were the difference between one candidate’s petition being accepted and another’s rejected. The practice could place the staff in the precarious position of looking like supporters of a candidate rather than regulators of the election process.

Consequently, the petition signing practice at least appears to allow Clerk’s Office staff to support one political candidate over another and, therefore, should be discontinued as contrary to RCH Section 11-104 and the *Guidelines*.

Next, we must determine if there is sufficient evidence to support a finding of probable cause that Ms. De Costa misused her position by permitting the petition signing practice. As the Commission has noted, to be found in violation of an ethics law, the standard is whether the official knew or should have known that the conduct constituted a violation. *See*, Advisory Opinion No. 2004-7.

In this case, the petition signing practice had been used in the Clerk’s Office for many years. However, an unethical past practice cannot justify the misconduct of those who follow it. *See* Advisory Opinion No. 2005-2 (following questionable past practice of awarding city contracts to family and political supporters does not justify misconduct). The Commission notes that Ms. De Costa reasonably believed that the practice would promote a larger field of candidates in elections. This is a valid public purpose related to the duties of her office and one that advanced the democratic process by increasing the choice of candidates. Almost all of the other election offices maintained the same practice. Finally, we have no evidence that personnel in the Clerk’s office treated the Candidate A petition differently than any other petitions that

needed signatures. Given the specific circumstances in this case, we find that Ms. De Costa neither knew nor should have known that the petition signing practice would constitute an ethics violation.

Employee A

Employee A was the employee who asked Employee B if she wanted to sign the Candidate A petition. The analysis for Ms. De Costa applies equally for Employee A. In other words, he was carrying out the practice of the office and neither knew nor should have known that he was in violation of RCH Section 11-104.

Employee B

Employee B signed the Candidate A petition after being informed that such was the practice of the Clerk's Office when a petition was short a signature or two. Employee B did not have reason to believe that the practice was in violation of RCH Section 11-104, especially after she asked for advice from Employee A. Factually, all witnesses agree that Employee B was done with work and, therefore, not on city paid time when Employee A pointed out that she could sign if she wished.

**V. Conclusion and recommendation**

As described above, neither the individual officers nor the employee violated RCH Section 11-104. However, the petition signing practice could be subject to abuse because there is no way to ensure that each candidate receives fair and equal support from the staff of the Clerk's Office. Therefore, the practice should immediately cease.

Finally, we respond to Ms. De Costa's question whether Clerk's Office staff may sign nominating petitions that will be presented to the Clerk's office. A city employee retains the First Amendment right to support a political candidate, as long as it is not done on city paid time or with other public resources. Given our statement that the petition signing practice should be discontinued, we would expect that a Clerk's Office employee would sign a nominating petition as a result of a personal decision, not in response to an office practice.

DATED: December 8, 2008

BY: /S/  
SUSAN HEITZMAN, Vice Chair  
Honolulu Ethics Commission