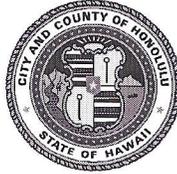


ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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Advisory Opinion No. 2009-2

I. Summary

City officers did not have conflicts of interest where the inference that their personal interests might have interfered with the discharge of their official duties was too speculative.

II. Introduction

On November 30, 2008, the Ethics Commission received a complaint relating to a vote by the Neighborhood Commission. The vote was on the issue of whether the 2009 elections for neighborhood boards could take place via the internet (with proxy phone voting), as opposed to the conventional mail-in ballot method. Essentially, the complaint questioned whether three of the Neighborhood Commission commissioners who voted had conflicts of interest because they were also current members of neighborhood boards. The complaint stated that none of the three commissioners disclosed his/her alleged conflict of interest before voting.

On December 15, 2008, the Ethics Commission received a request for advice relating to the same issue raised in the complaint (*i.e.*, whether the three Neighborhood Commission commissioners had conflicts of interest with respect to the voting methods vote). The request suggested that none of the three commissioners had a conflict of interest, primarily because none was a declared candidate for the 2009 neighborhood board elections at the time of the vote and their "potential" candidacy was not enough to create an actual or apparent conflict of interest.

III. Background

The Neighborhood Commission consists of nine members. Under the Revised Charter of Honolulu (RCH) § 14-102, four of the members are appointed by the mayor (one of whom shall have served on a neighborhood board before); four of the members are appointed by the city council (one of whom shall have served on a neighborhood board before); and the ninth commissioner (who also must have had neighborhood board experience) is appointed by the mayor and confirmed by the council.

The Neighborhood Commission is charged with developing and evaluating the neighborhood plan, assisting neighborhoods in the formation and operation of their neighborhood boards, and evaluating the effectiveness of the various neighborhood boards. RCH § 14-103. Neighborhood Commission commissioners are officers of the city and are therefore subject to the Standards of Conduct, as set forth in Article XI of the RCH. *See* Advisory Opinion No. 277.

Neighborhood boards are intended to increase civic participation in government and serve as a mechanism through which each neighborhood communicates its needs and desires to the government. 2008 Neighborhood Plan § 2-13-102. The boards are purely advisory. Neighborhood board members are not officers of the city and thus are not subject to the Standards of Conduct.

Neighborhood board members are elected every two years. The process for elections is set forth in the 2008 Neighborhood Plan. To be eligible for election, a candidate must be a primary resident of the neighborhood covered by the board running he/she is running for; 18 years old; and a registered voter. 2008 Neighborhood Plan § 2-17-204(a).

Under the 2008 Neighborhood Plan (§ 2-17-101(b)), elections for neighborhood boards are to be held by “mail ballot unless otherwise directed by the commission.” At the Neighborhood Commission’s November 24, 2008 meeting, the commissioners considered a motion that would authorize the Neighborhood Commission Office to conduct the 2009 neighborhood board elections online, with a proxy phone voting option. This was the method recommended by the Neighborhood Commission’s Elections Permitted Interaction Group.

Seven of the nine Neighborhood Commissioner commissioners voted. Among the seven were Ron Mobley, Robert Finley and Sylvia Young. At the time of the vote, Mr. Mobley was a member of the Aiea Neighborhood Board; Mr. Finley was a member of the Waikiki Neighborhood Board; and Ms. Young was a member of the Nu`uanu Neighborhood Board. Although these three board members were incumbents on neighborhood boards, none had filed to run in the 2009 neighborhood board elections as of the November 24, 2008 vote (the deadline to file is February 20, 2009). In fact, none of the other four commissioners who voted had filed to run in the election to the 2009 elections.

None of the commissioners declared any conflicts of interest prior to participating in the vote. Mr. Mobley and Ms. Young voted in favor of the proposal and Mr. Finley voted against it. The motion passed by a 6 to 1 vote. Thus, the 2009 neighborhood board elections will be conducted online, with a proxy phone voting option.

IV. Question Presented

Did Neighborhood Commission members Mobley, Finley and Young have conflicts of interest arising from their status as members of neighborhood boards that disqualified them from voting on the method by which the 2009 neighborhood board elections would be conducted?

V. Analysis

A. Relevant Ethics Laws

There are several provisions in the Revised Charter of Honolulu that set forth the basic rules concerning conflicts of interest.

Revised Charter of Honolulu (RCH) § 11-102 expressly sets forth prohibited conflicts of interest for city officers and employees. In pertinent part, RCH § 11-102 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.

RCH § 11-102(c). The central purpose of RCH § 11-102(c) is to prohibit city officers and employees from placing themselves in situations where their personal business or financial interests conflict, or may conflict, with their official responsibilities. *See* Advisory Opinion No. 2001-2.

In addition to the conflicts of interest specifically identified in RCH § 11-102, the revised charter recognizes that conflicts that arise from other relationships or interests that are not directly covered by RCH § 11-102 can also undermine the public's confidence in the integrity of the government and should therefore be prohibited. Thus, the Commission has relied on RCH § 11-101¹ and § 11-103² to rule that conflicts that arise from personal relationships or interests that might reasonably tend to create a conflict with the public interest are prohibited. As the Commission stated in Advisory Opinion No. 2007-1:

¹ RCH § 11-101, which declares the general policy behind the ethics laws, provides:

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.

(Emphasis added.)

² RCH § 11-103, which contains the basic requirement that conflicts of interest be fully disclosed, provides that

any elected or appointed officer or employee who possesses or who acquires *such interests as might reasonably tend to create a conflict with the public interest* shall make full disclosure in writing to such person's appointing authority or to the council, in the case of a member of the council, and to the ethics commission, at any time such conflict becomes apparent.

(Emphasis added.)

[T]he Commission has expansively interpreted the conflict of interest laws in the past. A "conflict of interest" may be defined as any circumstance in which the personal interest of a public official in a matter before him in his official capacity **may prevent or appear to prevent** him from making an unbiased decision with respect to the matter."

Advisory Opinion No. 2007-1 (citing and quoting Advisory Opinion No. 131) (emphasis in original). *See also* Advisory Opinion No. 2008-1 (city board member was required to disqualify himself from participating in decision that could reasonably be seen as being in conflict with his personal relationship).

Under the Ethics Commission's precedent, circumstances that create the appearance of a conflict of interest are treated the same as those that create an actual conflict of interest. "The possibility – or the reasonable appearance -- of impairment through conflicting loyalties is sufficient to establish a violation." Advisory Opinion No. 2008-1 (citations omitted). In analyzing whether an apparent conflict of interest exists, the Ethics Commission determines whether, under the totality of the circumstances, a reasonable person/taxpayer would perceive that the business, financial, or personal interest of the officer or employee is incompatible with the proper discharge of such person's official duties or may tend to impair the independence of judgment in the performance of his/her official duties. *See id.*

B. Application of Relevant Ethics Laws to Facts Presented

The complainant alleges that the neighborhood board incumbencies of Messrs. Mobley and Finley and Ms. Young constituted personal interests that conflicted with their duties to cast unbiased votes at the November 24, 2008 Neighborhood Commission meeting. In other words, the complaint contends that the fact that the three commissioners would potentially be personally impacted by the method by which the 2009 neighborhood board elections were conducted – if they chose to run – might have influenced their votes at the November 24, 2008 meeting.

Under the Ethics Commission's precedent, the critical inquiry is whether a reasonable person could conclude that the Neighborhood Commission commissioners' incumbencies may have prevented them from making an unbiased decision with respect to the November 24, 2008 vote. Under the circumstances, it is difficult to conclude that the three commissioners had conflicts of interest. First, it is unclear whether the online voting method favors or disfavors incumbents. We have no information that suggests that online voting creates an advantage or disadvantage to incumbents or even whether the three commissioners believed that it would work to their advantage or not in the 2009 neighborhood board elections. Moreover, the fact that the three commissioners did not vote uniformly on the proposal (two were in favor, one against) suggests that there was no consensus on the point.

Based on the information before the Ethics Commission, therefore, the most that can be said is that the method of voting might have some effect on the candidacies of the three

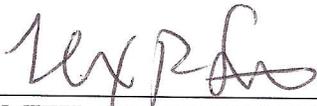
neighborhood board commissioners in the 2009 elections – if they chose to run. But the mere fact that the voting method might have some undetermined future impact on the commissioners is, in our view, insufficient to create a reasonable belief that their votes at the November 24, 2008 meeting were influenced by their personal interests.

Any inference that the three commissioners' personal interests prevented them from voting impartially on the measure is further weakened by the fact that none of the three had filed to run in the 2009 neighborhood board elections prior to the November 24, 2008 vote. While the complaint presumes that the fact that the three commissioners were on neighborhood boards at the time of the vote means that they certainly will be running for "re-election", this presumption is not necessarily true. We would be entering the proverbial slippery slope were we to find a present conflict of interest based on an assumption or speculation about the commissioners' future plans. Stated otherwise, until the commissioners actually filed to run for the 2009 neighborhood board elections, any potential conflict of interest had not yet ripened, and we therefore would have no objective basis to find that they had any existing conflicting personal interests at the time of the November 24, 2008 vote.

VI. Conclusion

We conclude that there is an insufficient basis to find the three Neighborhood Commission commissioners had conflicts of interest relating to their votes at the November 24, 2008 Neighborhood Commission meeting.

DATED: April 9, 2009



LEX SMITH, CHAIRPERSON
Honolulu Ethics Commission