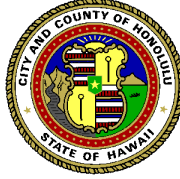


ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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MAYOR

CHARLES W. TOTTO
EXECUTIVE DIRECTOR & LEGAL COUNSEL

November 10, 2005

TO: CHAIR ROBIN D. LIU AND MEMBERS OF THE ETHICS
COMMISSION

FROM: CHARLES W. TOTTO, EXECUTIVE DIRECTOR
AND LEGAL COUNSEL

SUBJECT: AGENDA ITEMS FOR NOVEMBER 17, 2005 MEETING,
EXECUTIVE SESSION

V. EXECUTIVE SESSION

- A. Approval of the minutes of the executive session of the October 18, 2005 meeting
- B. Report and recommendation regarding possible violation of RCH Section 11-104 (misuse of city resources) by Janice Nago, an employee of the Department of Environmental Services, EC No. 05-147(o)

Janice Nago, a wastewater service inspector at the Department of Environmental Services, has been selling Avon products to City employees for 23 years, often during city office hours and on city premises and sometimes using city resources. You will find a basic statement of the facts in the enclosed draft

agreement that was transmitted to **Ms. Nago**, but which she would not sign.

(Attachment 1)

1. Jurisdiction over oral complaints

This complaint was brought to the Commission through an anonymous telephone complaint. The threshold issue is whether the EC has jurisdiction over the oral complaint in this case. Simply stated, may the EC investigate and render an advisory opinion that is based on an oral complaint? As described below, it is within the EC's discretion to do so.

ROH Section 3-6.7(a) states in relevant part that a complaint “**shall be in writing and shall be signed by the person making the [complaint]; . . .**”

(Emphasis added.)¹ In addition, ROH Section 3-6.5(a) reads: “in no case, however, shall the commission entertain a request that is not in writing and not signed by the person making the request.” At first blush, the law appears to limit the Commission's jurisdiction to written complaints signed by the requesting party.

However, the revised Charter, at RCH Section 11-107, states:

The commission is authorized to hold hearings and to conduct investigations concerning the application of this article of the charter

¹ **ROH Sec. 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.

[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. (Emphasis added.)

Based on RCH Section 11-107, the Commission has broad authority to conduct investigations regarding misconduct and to render an opinion “on its own initiative.” It is easy to imagine the EC using its investigative powers to do fact finding and then giving an employee a Notice of Possible Violation based on the Commission’s investigation.

This section also draws a distinction between, on one hand, a written request by an officer or employee for which the EC “shall” render an opinion and, on the other hand, a request by any person for which the Commission “may” render an opinion. Note that in the case of a “request by any person,” there is no requirement that it be in writing or signed. If the intent was to limit the EC to rendering opinions only pursuant to a written request, the Charter language would have said so.

The Charter and ordinances may be inconsistent. The inconsistency arises because the ordinances require a written complaint in all cases, but the Charter

affords the EC discretion to investigate and render an opinion on misconduct that does not come by way of a written complaint. Under these circumstances the Charter will control, thereby allowing the EC to investigate and render an opinion.²

Under the Charter, the EC has jurisdiction to examine an oral complaint if it so desires. The Charter approach permits the Commission to carry out its mission to investigate, advise and enforce the ethics laws. The law supports the Commission's flexibility to be alerted to a potential ethics violation from any source and allows the Commission the discretion whether to investigate or render an advisory opinion. For example, if the Commission finds that unethical conduct is reported in a news story, it could investigate, allow notice and an opportunity for a hearing and then render an opinion. This process is allowed under the broad powers created in RCH Section 11-107. Similarly, the EC could investigate an oral complaint of misconduct. It would not be under a requirement to render an advisory opinion, but may do so.

2. A Notice of Possible Violation should be sent to Ms. Nago

Based on her interview, Ms. Nago has been selling Avon products for many

² When an ordinance is inconsistent with a Charter provision, the Charter provision controls. *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 that conflicts with or restricts an express provision of the Charter is invalid.

years, primarily to customers who are city employees. She does this by visiting the work sites of her customers or by telephoning them for orders, delivery and payment. Although she states that she only does this during her breaks and at lunchtime, she has no control over whether her customers are “on duty” when she meets with them. She also has access to city buildings that other solicitors do not have. A written policy by the Department of Facility Maintenance has prohibited solicitation for commercial enterprises since at least 1982. There is a potential breach of RCH Section 11-104³ because **Ms. Nago** misused her city position, city resources and city premises to help her conduct her Avon sales.

A final point: **Ms. Nago** says she has suspended her Avon business with city employees. However, she refused to sign a letter stating that she would no longer use city resources to benefit her business.

Recommendation: As stated above, the Commission has the discretion not to render an advisory opinion in this case because the complaint was oral. **Ms. Nago** has stated that she is no longer selling Avon to city employees. On balance, however, I believe the matter should go through the standard Commission process because she would not agree that she had violated the standards of conduct or sign

³ **RCH 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.

the settlement letter that she would cease her improper sales. The Commission should transmit a Notice of Possible Violation to Ms. Nago, to which she may respond.

Should you have any questions, please contact me.