

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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Advisory Opinion No. 2012-3

I. SUMMARY

The Honolulu Ethics Commission (“Commission”) found that Councilmember Ikaika Anderson violated Revised Charter of Honolulu (“RCH”) Section 11-104¹ on December 22, 2010 at the Fasi Municipal Building Parking Office (“Office”) because he used his city position to obtain favorable treatment for himself (i.e., evading a parking violation warning) and to threaten retaliation against the Office employees.

II. FACTUAL BACKGROUND

Councilmember Anderson parks his car in a reserved parking stall in the civic center parking garage (“Garage”). The Garage is under the jurisdiction of the Chief Engineer of the Department of Facility Maintenance (“DFM”) ². DFM’s Parking Operations Section (“Section”), Division of Public Building and Electrical Maintenance, oversees and carries out the day-to-day operations of the Garage which includes assigning stalls, maintenance, administration, and security.

In January 2003 (as a legislative aide) and May 2009, Councilmember Anderson signed revocable permits that allow him to park his car in the Garage.³ Everyone who parks in an assigned, tandem, or car pool stall in the Garage is provided a Notice to City and County Employees – Assigned, Tandem, Car Pool Parking (Revised Mar. 30, 2009) (“Notice”).⁴ The Notice requires the holder of the permit to comply with certain rules including, but not limited to:

¹ RCH Sec. 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.”

² ROH Sec. 15-16.5 (d) (Bates No. 000034).

³ Revocable Permit (Jan. 3, 2003; May 12, 2009) (Bates Nos. 000017-19).

⁴ Notice: City and County Employees – Assigned, Tandem, Car Pool Parking; Notice: City and County Employees – Unassigned Parking (Bates Nos. 000029-30).

- Please park your vehicle in the designated area.
- If your hanging placard is lost, stolen, misplaced, etc., it must be reported immediately to your department's Parking Coordinator and/or the Department of Facility Maintenance, Parking and Security Office. THERE MAY BE A \$15.00 REPLACEMENT FEE.
- If you have a loaner vehicle, you MUST obtain a loaner permit from the Motor Pool Office, located on the street level of the parking structure. PUT A NOTE ON YOUR DASHBOARD, with contact information while you are obtaining a loaner permit.
- Your parking stall may not be rented out or loaned to anyone for any reason. You may park only one (1) vehicle, primary or alternate in the employee parking area.
- FAILURE TO ABIDE BY THE ABOVE RULES WILL RESULT IN VEHICLES BEING CITED AND/OR TOWED AND PARKING PRIVILEGES REVOKED.

In 2008 and early 2009, Councilmember Anderson had a few disagreements with the Section about parking procedures. In 2008, he purchased a new vehicle. His parking sticker was left on the old car and he left his loaner placard in his wife's car which he had been using for work. Councilmember Anderson therefore needed another loaner placard. When he went to the parking office, parking staff required him to pay \$15 for another placard and would not let him park without paying for another placard. He wrote the check to the City. Mr. Garrett Ogawa, Section Supervisor, out of courtesy, did not cash his check until he brought the other loaner placard back. Despite the requirements in the Notice that provides, "If your hanging placard is lost, stolen, misplaced, etc.... THERE MAY BE A \$15.00 REPLACEMENT FEE.", Councilmember Anderson believed that he shouldn't have had to pay for the second loaner placard.⁵

In a later unrelated event, one of Councilmember Anderson's staff received an email from [Employee A], [position], of the Section. Employee A requested that the staff member return his loaner placard or DFM would revoke his parking privileges. Despite the requirements in the Notice that provides, "FAILURE TO ABIDE BY THE ABOVE RULES WILL RESULT IN VEHICLES BEING CITED AND/OR TOWED AND PARKING PRIVILEGES REVOKED", Councilmember Anderson believed that DFM was overstepping its authority and should not have made this statement to his staff member.⁶

Following these two disagreements, on July 28, 2009, Councilmember Anderson introduced Bill 62⁷ which would amend the city's parking ordinance by adding Revised

⁵ Interview of I. Anderson (Feb. 16, 2011).

⁶ Interview of I. Anderson (Feb. 16, 2011).

⁷ The Commission does not question the propriety of Bill 62 itself. Councilmember Anderson's motives behind the introduction of Bill 62 are irrelevant to this case. "It is fundamental that courts will not look into the motives of a legislative body in the exercise of its legislative powers, except in extraordinary cases where public policy imperatively demands it on the ground of palpable fraud." *Ex parte Yung*, 7 Cal.App. 440, 442 (2 Dist. 1908); "It is,

Ordinances of Honolulu (“ROH”) Section 15-16.5(l)⁸. Bill 62 provided the Council Chair with administrative powers and oversight over the legislative branch including the Council and staff parking stalls in the Garage in lieu of the Chief Engineer, DFM.

During second reading of Bill 62 before the Council Planning Committee, Councilmember Anderson provided his reasoning for introducing the bill. He stated that he introduced Bill 62 due to concerns that he received from other staff members. Further, he stated the following:

I think the Council and the legislative branch should be able to do with our parking stalls whatever we see fit...I don't think that we should have to go through the bureaucracy of the [DFM] Motor Pool in regards to how we're going to handle our parking...I just feel that the legislative branch should be able to control our own parking, much the same way it's done at the Legislature.⁹

During second reading, then DFM Director, Jeffrey Cudiamat testified. Mr. Cudiamat voiced concern that Bill 62 would cause inefficiencies in the administration and management of the stalls.¹⁰ Mr. Ogawa also expressed concern that the Bill would cause Section staff to lose control over the parking Garage which would cause confusion, unnecessary citations, and towed cars.¹¹

Councilmembers Gary Okino and Rod Tam both urged Councilmember Anderson to work on this matter without enacting an ordinance.¹² Councilmember Okino further stated that would be the “sensible” way to deal with the problem.¹³ The Planning Committee agreed to defer any action on Bill 62. Councilmember Anderson agreed to work out his parking issues with the DFM Director. Thereafter, Councilmember Anderson and DFM administration had a few meetings to discuss the issue, but a formal parking policy for the legislative branch was never established.

however, the general, if not the universal, rule that the motive of the legislator may not be inquired into.” Hadacheck v. Alexander, 169 Cal. 616, 617 (1915); Ex parte Sumida, 177 Cal. 388, 390 (1918); Anderson v. City Council of City of Pleasant Hill, 229 Cal.App.2d 79, 91 (1964); Schroeder v. Municipal Court, 73 Cal.App.3d 841, 847 (1977). The Commission focuses its inquiry on Councilmember Anderson’s conduct that occurred on December 22, 2010.

⁸ Bill 62 (2009) at Sec. 15-16.5(l) (Bates Nos. 000004-8).

⁹ Transcript of Committee on Planning Meeting (Sep. 3, 2009) (Bates Nos. 000009-10).

¹⁰ Transcript of Committee on Planning Meeting (Sep. 3, 2009) (Bates No. 000009).

¹¹ Transcript of Committee on Planning Meeting (Sep. 3, 2009) (Bates Nos. 000012-13).

¹² Transcript of Committee on Planning Meeting (Sep. 3, 2009) (Bates Nos. 000015).

¹³ Transcript of Committee on Planning Meeting (Sep. 3, 2009) (Bates Nos. 000016).

Subsequently, Councilmember Anderson had two more disagreements with the Section. In early December 2010, Councilmember Anderson requested his staff member to park his car for him. The staff member accidentally parked his car in another councilmember's parking stall instead. Both councilmembers approved of switching parking stalls, but Mr. Ogawa would not grant permission to switch stalls. Councilmember Anderson believed that Mr. Ogawa should have allowed the switch since he received permission from the other councilmember¹⁴ despite the fact that the Notice provides, "Your parking stall may not be rented out or loaned to anyone for any reason."

On December 22, 2010 at about 4:00 pm, Councilmember Anderson entered the Office to address a parking violation warning he had just taken off his parked car and carried in his hand. The warning was for a violation of ROH Sec. 15-16.5(b)(1) which provides, "it is unlawful for any person to park a vehicle outside of a designated parking stall within the areas provided for parking by city and county officials and employees described in subsection (d)." The warning directed him to, "Please come to the motorpool office to update your parking record."¹⁵ Apparently, Councilmember Anderson had a visitor attending a City Council meeting that day and instructed his visitor to park in his stall. As a result of his visitor parking in his stall, Councilmember Anderson parked in an unassigned stall in the Garage.¹⁶

According to all six witnesses that were present¹⁷, he addressed Section employees, in a loud and threatening voice. He inquired, "What is this!"¹⁸ Employee B responded that it was a warning that he needed to update his vehicle information and that he could not park in an unassigned stall.¹⁹ As a courtesy, Mr. Ogawa informed him that in the future, his guests could park in the Motorpool Area.²⁰

Councilmember Anderson replied that since he pays for the assigned stall, he can do what he wants with it including trading stalls with other councilmembers and having guests park there.²¹ Witnesses reported that he stated that the warnings and rule enforcement were "baloney"

¹⁴ Interview of I. Anderson (Feb. 16, 2011).

¹⁵ Parking Violation Warning (Dec. 22, 2010) (Bates No. 000028).

¹⁶ Interview of I. Anderson (Feb. 16, 2011).

¹⁷ Garret Ogawa, Section Supervisor, was meeting with Employee C, [position], BFS, and Employee D, [position], BFS, regarding an accident that occurred with one of the city's motorpool vehicles in the Motorpool Office. Several employees were also present in the office: Employee A, [position], DFM, Employee B, [position], DFM, and Employee E, (city contract hire).

¹⁸ Memo to [name] from G. Ogawa re Workplace Violence (Dec. 22, 2010); Witness Statement of Employee C (Bates No. 000046-49).

¹⁹ Memo to [name] from G. Ogawa re Workplace Violence (Dec. 22, 2010); Witness Statement of Employee B (Bates Nos. 000046, 48).

²⁰ Memo to [name] from G. Ogawa re Workplace Violence (Dec. 22, 2010) (Bates No. 000046).

²¹ Witness Statement of Employee D (Bates No. 000049).

and that these warnings from the Section need to stop, otherwise he will bring back Bill 62.²² The following witness statements were made regarding his reference to Bill 62:

- “This needs to stop – I can easily bring up Bill 62.”²³
- “This needs to stop and threatened to bring back Bill 62.”²⁴
- “I’ll bring back to the table Bill 62 and we’ll see what happens to your job.”²⁵
- “I’ll show you, I’ll bring Bill ## back and show you.”²⁶
- “He will bring back Bill 62 if this doesn’t stop.”²⁷
- “If he brought back a bill, people will be without a job.”²⁸

Councilmember Anderson admitted in a prior interview with Commission staff that on December 22, 2010, he stated, “If you are not going to work with us, then maybe we need to address this legislatively, I’ll reintroduce the Bill.”²⁹

During its March 14 and May 14, 2012 meetings, the Commission conducted an investigatory hearing in which Councilmember Anderson addressed the Commission regarding the allegations contained in the Notice of Possible Violation of RCH Sec. 11-104 (issued on Jan. 20, 2012). Councilmember Anderson informed the Commission during the investigatory hearings that he did not intend for his statement to be a threat, and that he did not threaten any employee’s job. Councilmember Anderson also denies asking for any special treatment, and that he regrets that Mr. Ogawa feels that Councilmember Anderson threatened him.

III. ANALYSIS

RCH Section 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 what 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).

The standard used to determine if someone has violated an ethics law is whether a reasonable person knew or should have known that he was using his position to provide himself with an advantage that was not available to anyone else. Advisory Opinion No. 2004-7 (Jun. 22,

²² Witness Statement of Employee C (Bates No. 000050).

²³ Memo to [name] from G. Ogawa re Workplace Violence (Dec. 22, 2010) (Bates No. 000046).

²⁴ Witness Statement of Employee B (Bates No. 000048).

²⁵ Witness Statement of Employee C (Bates No. 000049).

²⁶ Witness Statement of Employee D (Bates No. 000050).

²⁷ Witness Statement of Employee A (Bates No. 000051).

²⁸ Memo from Employee E (Bates No. 000052).

²⁹ Interview of I. Anderson (Feb. 16, 2011).

2004) (In general, a city employee or officer violates the ethics laws if he/she knew or should have known that his/her conduct would constitute a violation.); 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 Sec. 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."). See e.g., Advisory Opinion No. 2005-5 (a reasonable city plant superintendent would know that he had no authority to unilaterally increase pay for city employees in plant); Advisory Opinion No. 2008-2 (a reasonable city dead animal collector would know he is prohibited from going on personal errands while on city work time).

Therefore, Councilmember Anderson violated RCH Sec. 11-104 if it is more likely than not³⁰ that he knew or should have known that he was using the authority of his city position in an attempt to intimidate Mr. Ogawa and Employee B into exempting himself from city parking policies which prohibited him from loaning his reserved stall to a visitor and further prohibited him from parking in an unassigned stall.

The Commission analyzed and addressed a similar misuse of city position in Advisory Opinion No. 2003-4 in which the Commission found that an employee ("Employee") of the Department of the Prosecuting Attorney ("PAT") violated RCH Sec. 11-104 because she used her position and apparent access to non-public information to intimidate the Complainant into backing down in a dispute and to "compel the sort of deference to authority that is not otherwise given to an ordinary citizen." (Emphasis added.) In Advisory Opinion No. 2003-4, the dispute arose between the Complainant and the Employee who were neighbors. They had a disagreement over the work Employee and her husband were doing on their property. During a physical altercation between the Complainant's boyfriend and the Employee's husband, the Employee, who was wearing a PAT polo shirt which bore the official logo of PAT, stated to the Complainant, "You don't know who you are messing with" and proceeded to call someone to run official license plates checks on vehicles parked at Complainant's residence. Although, it was determined that Employee had only called a personal friend when she referenced the license plates, the Commission found that her "bluff" still constituted a violation of RCH Sec. 11-104.

The evidence shows that Employee presented herself in such a way that a person in Complainant's position would reasonably have believed that Employee was using her official position to gain an advantage in their dispute...Employee clearly intended to use the feigned inquiries...to gain an upperhand in the dispute with Complainant. Further, Employee was aided in accomplishing that unfair advantage by the apparent authority of her position with PAT.

Id. at Sec. IV. Analogously, on December 22, 2010, Councilmember Anderson used his position and status as a legislator, who is responsible for serving and advancing the general welfare, health, happiness, and safety of the people through exercising its legislative power, to instead intimidate Mr. Ogawa and Employee B into backing down in the dispute over the parking

³⁰ Commission staff has the burden of proof to show that Councilmember Anderson violated the Ethics laws. The applicable standard of proof is by a preponderance of the evidence, which means is it more likely than not (greater than 50% likelihood) that there was an ethics violation.

violation warning and to “compel the sort of deference to authority that is not otherwise given to an ordinary citizen.”

First, Councilmember Anderson knew or should have known in general of DFM’s parking policies. He has been a city employee and/or officer who parked in the Garage since January 2003. He had been provided notice on at least two occasions that DFM parking policies applied to him: once when he was assessed a \$15.00 fee to replace a parking placard and second, when Employee A informed his staff that their parking privileges could be revoked if they failed to return a parking placard.

Second, Councilmember Anderson knew that the DFM parking policies applied to him just as it applied to all others who park in the Garage. It appears that in order to avoid being subject to DFM’s parking policy which caused the two above-described situations, Councilmember Anderson introduced Bill 62 (2009) to transfer jurisdiction of the legislative branch parking stalls from DFM to Council Chair. After Councilmember Anderson and DFM Director Jeoffrey Cudiamat made an oral agreement during a Bill 62 hearing to work together on revising parking policies to address Councilmember Anderson’s concerns, little was done by either side to make any formal changes.

Third, Councilmember Anderson knew or should have known that until a formal parking policy was established exempting the legislative branch from DFM jurisdiction, the parking policies continued to apply to him just as they apply to everyone else who parks in the Garage. Councilmember Anderson had notice that DFM parking policies still applied to him even after the deferral of Bill 62 when he was instructed by Mr. Ogawa that he could not switch stalls with another councilmember in early December 2010, less than a month before the December 22, 2010 incident.

Fourth, Councilmember Anderson knew or should have known that he was using his official position to try to intimidate Mr. Ogawa and Employee B to exempt him from the parking policies. In making this determination, the Commission weighed all of the relevant evidence and found the six witness statements, particularly those of Employees C and D particularly credible and persuasive. Employees C and D appear to be the most neutral witnesses as they do not work for the Section, DFM, or the legislative branch. Councilmember Anderson’s tone of voice and substance of statements as recalled by the witnesses may reasonably be interpreted as threatening legislative action unless the Parking Office exempted him from the types of parking regulations that apply to everyone else who parks in the Garage.

IV. CONCLUSION AND RECOMMENDATION

Based on the evidence presented, it is more likely than not that on December 22, 2010, Councilmember Anderson knew or should have known that he used his city position as councilmember to intimidate the Parking Office personnel with legislation which he knew DFM and the Office personnel opposed, and that may affect their jobs. Thus, he used his position to obtain favorable treatment for himself (*i.e.*, evading a parking citation) and to threaten retaliation against the Parking Office employees in violation of RCH Sec. 11-104.

A. The Commission is Authorized to Publish a Formal Advisory Opinion Revealing the Identity of Councilmember Anderson

The Commission's policy is to publish the identity of the ethics violator where the state open records law would require identification if requested by the public. In this case, the factors would lead to disclosure because one of the most powerful positions in city government was used to avoid following the parking rules and to threaten unemployment unless he was exempted from the rules that apply to everyone. Disclosure of Councilmember Anderson's identity would likely be required under the guidance provided by the Office of Information Practices in Opinion Letter No. 2010-3 as discussed below.

The Commission must weigh the public's interest in knowing the conduct of its government officials and the Commission's work to enforce the ethics law against the privacy interests of the government official. A government record, such as a formal advisory opinion, may not be disclosed if disclosure would constitute "a clearly unwarranted invasion of personal privacy." However, disclosure of a government record does not constitute a "clearly unwarranted invasion of personal privacy" if the public interest in disclosure outweighs the privacy interest of the individual. Public interest in disclosure includes official information that sheds light on the conduct of government officials (Councilmember Anderson) and on an agency's (the Commission) performance of its statutory purpose.

In balancing a government employee's privacy interests against the public's interest in disclosure, a court should consider several factors, including: (1) the government employee's rank; (2) the degree of wrongdoing and strength of evidence against the employee; (3) whether there are other ways to obtain the information; (4) whether the information sought sheds light on a government activity; and (5) whether the information sought is related to job function or is of a personal nature. The factors are not all inclusive, and no one factor is dispositive.

See Office of Information Practices ("OIP") Op. Ltr. No. 10-03, at 7 citing Perlman v. United States Dept. of Justice, 312 F.3d 100, 107-08 (2d Cir. N.Y. 2002), vacated, 541 U.S. 970 (2004). See also, National Archives and Records Administration v. Favish, 541 U.S. 157 (2004) (holding that "where there is a privacy interest protected by [Freedom of Information Act] Exemption 7(c) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must . . . produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.").

Councilmember Anderson is in a high ranking elected position. The evidence against Councilmember Anderson is strong as there are six witnesses that support the allegations. There are no other means for the public to find out if Councilmember Anderson violated the city's ethics laws and what is being done to resolve the violations. Finally, Councilmember Anderson's identity and the details of the Advisory Opinion would shed more light on what the Ethics Commission is doing to enforce the city's ethics laws.

All of the factors above weigh in favor of identifying Councilmember Anderson in an advisory opinion pursuant to the Uniform Information Practices Act, HRS Chapter 92F. Under the Commission's Opinion Policy, Councilmember Anderson will be given notice and a copy of the opinion 10 days before the opinion is published.

B. The Commission will not Impose a Civil Fine on Councilmember Anderson

In determining an appropriate penalty for violations of the city's ethics laws, the Commission weighs the twelve mitigating and aggravating circumstances of the individual case: the nature and seriousness of the violation, the duration of the violation; the effort taken by the officer or exempt employee to correct the violation; the presence or absence of any intention to conceal, deceive or mislead; whether the violation was negligent or intentional; whether the officer or exempt employee demonstrated good faith by consulting with the ethics commission or another government agency or an attorney; whether the officer or exempt employee had prior notice that his or her conduct was prohibited; the amount, if any, of the financial or other loss to the city as a result of the violation; the value of anything received or sought in the violation; the costs incurred in enforcement; and whether the officer or exempt employee was cooperative in the investigation. See RCH Section 11-106 and ROH Section 3-8.5(a); ROH Sec. 3-8.5(d)(2).³¹ Below we examine the factors in light of Councilmember Anderson's conduct.

Here, the violation is more serious based on Councilmember Anderson's status as a high ranking elected city official. There has been no effort by Councilmember Anderson to correct the violation because he feels as if he has done nothing wrong, except to say to the Commission in executive session that he is sorry that the DFM employees feel that he was threatening them.

On the other hand, the incident happened only one time, and Commission staff does not believe that there has been any intent to conceal, mislead or deceive this investigation; to the contrary, Councilmember Anderson has been fully cooperative and has offered much information to the Commission.

³¹ Section 11-106. Penalties and Disciplinary Action for Violations –

The failure to comply with or any violation of the standards of conduct established by this article of the charter or by ordinance shall be grounds for impeachment of elected officers and for the removal from office or from employment of all other officers and employees. The appointing authority may, upon the recommendation of the ethics commission, reprimand, put on probation, demote, suspend or discharge an employee found to have violated the standards of conduct established by this article of the charter or by ordinance.

ROH Sec. 3-8.5 Violation--Penalty.

(a) The failure to comply with or any violation of the standards of conduct of this article or of Article XI of the revised charter shall be grounds for impeachment of elected officers and for the removal from office or from employment of all other officers and employees. The appointing authority may, upon the recommendation of the ethics commission, reprimand, put on probation, demote, suspend or discharge an employee found to have violated the standards of conduct established by this article. Nothing contained herein shall preclude any other remedy available against such officer or employee.

