



HAWAII STATE ETHICS COMMISSION

State of Hawaii · Bishop Square, 1001 Bishop Street, ASB Tower 970 · Honolulu, Hawaii 96813

Jodie Maesaka-Hirata
Deputy Director, Corrections
Department of Public Safety

May 24, 2019

Re: Solicitation of subordinate employees to support Director's re-confirmation

Dear Deputy Director Maesaka-Hirata,

The Hawai'i State Ethics Commission ("Commission") received a complaint regarding your solicitation of support of the re-confirmation of Nolan Espinda as the Director of the Department of Public Safety ("PSD"). I am writing today to provide guidance to you to avoid any future concerns under the Hawai'i State Ethics Code, Hawai'i Revised Statutes ("HRS") chapter 84.

As we understand the facts, on or around March 30, 2019, you sent text messages to sixteen subordinate employees, asking that they support Director Espinda's re-confirmation. While you indicated that you sent these messages from a personal phone on your own time, at least some of the messages were sent to PSD-issued phones of subordinate employees. The text messages requested that PSD employees "surround" and "protect" the Director and his supporters at the upcoming confirmation hearing before the Senate Committee on Public Safety, Intergovernmental, and Military Affairs. Additionally, in those messages, you indicated your wish that PSD employees isolate some community activists from the Director so that the Director would not see those activists during the hearing.

Further, on or around April 3, 2019, you sent e-mail messages to fourteen subordinate employees,¹ asking that they attend Director Espinda's confirmation hearing. Specifically, in your April 3 e-mail, you wrote: "I need the names of those coming . . . to the confirmation [h]earing tomorrow. . . . If you are not coming please tell me." You sent these e-mail messages from your PSD e-mail account to other employees' PSD accounts.

You believed you were asking (rather than directing) your subordinates for support; indeed, several recipients of these text and e-mail messages did not interpret your messages as directives and did not feel coerced by your communications. On the other hand, several

¹ The lists of employees who received text messages and who received e-mail messages largely overlapped, though some individuals received only the text message and others received only the e-mail message. In total, you sent messages to eighteen different PSD subordinate employees.

recipients of these text and e-mail messages interpreted them as directives from a supervisor and, as a result, felt pressure to comply.

The Ethics Code exists “to promote high standards of ethical conduct in state government.” HRS § 84-1. One of its provisions, the Fair Treatment law, prohibits state officials from using, or attempting to use, the “employee’s official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself[.]” HRS § 84-13.

The Fair Treatment law does not prohibit a state employee from soliciting support for a nominee for public office, but it does prohibit an employee from using her or his official position to pressure or coerce others into supporting a nominee. Whether an employee’s solicitation for support of a nominee violates the Fair Treatment law depends on the circumstances of the solicitation.

At one end of the spectrum, if a supervisor e-mails subordinate employees to notify them of the time and date of a nominee’s hearing, and informs these employees of the method by which they may submit either favorable or unfavorable testimony, it is unlikely that the solicitation would violate the Ethics Code: there is a legitimate state purpose in having state employees give the Legislature feedback on nominees with whom they have served, and there is also a legitimate state purpose in trying to recruit and maintain quality executive officials to lead state agencies.

At the other end of the spectrum, if a supervisor orders or directs subordinate employees to submit testimony in support of a nominee – and if the supervisor declares that there will be negative consequences for failure to do so – it is likely that the solicitation would violate the Ethics Code: this type of coercion to support a nominee would be a prohibited use of the supervisor’s official position. This is particularly true when the order or directive comes from a supervisor whose own employment status may be jeopardized if the nominee is not confirmed, insofar as the supervisor may be using her supervisory authority to try to preserve her own employment.

Although state employees *may* solicit others to provide testimony on a nominee, they should be very cautious in doing so because of the potential for abuse – especially where, as here, a supervisor is soliciting subordinates. Even if the supervisor does not intend the solicitation as a direct order, it may be received as such by some subordinate employees.

The Commission has not made any findings on this matter and does not conclude that any violations of the Ethics Code occurred. However, your conduct raised serious ethics questions. Your actions fall closer to the prohibited end of the spectrum outlined above, as several factors increased the likelihood that your subordinates would feel coerced. Specifically:

- you directed the solicitations to subordinate employees on their work phones and/or work e-mail addresses;

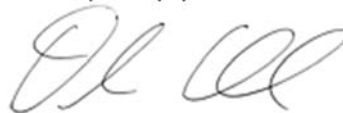
- your communications were clearly intended to garner support for the Director at his confirmation hearing, whereas there was no indication that employees could also freely choose not to participate;
- you directed subordinate employees to inform you whether they would or would not attend, suggesting that responses would be monitored (*i.e.*, that a failure to respond would be noticed and, impliedly, viewed negatively);
- your own employment may have been in jeopardy if the Director had not been re-confirmed;
- you named several community activists – opponents of the Director’s re-confirmation – and asked for your subordinates’ assistance in isolating them from the Director; and
- several of your subordinate employees reported feeling coerced or pressured to participate.

We also note that you fully cooperated with the Commission’s investigation, you have taken responsibility for your actions, and you have not previously been the target of any Commission investigation. You indicated that you never intended your solicitations to be viewed as directives, and you now recognize how others can (and did) perceive the solicitations as coercive.

The Commission does not believe that further enforcement proceedings or administrative penalties are necessary in this case. Instead, you have agreed with the Commission to resolve this matter by the publication of this guidance letter. You are aware that PSD may take further action should you be found to have violated any internal PSD policies.

Thank you for your attention to these important matters. As always, please contact us should you have additional questions regarding the Ethics Code.

Very truly yours,



Daniel M. Gluck
Executive Director and General Counsel

cc: Nolan Espinda, Director, Department of Public Safety