



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2016**

LATE

ON THE FOLLOWING MEASURE:

H.B. NO. 1556, H.D. 1, RELATING TO THE UNIVERSITY OF HAWAII.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Thursday, March 3, 2016

TIME: 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Russell A. Suzuki, First Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General has concerns about this measure and asks that it be deferred.

This bill would prevent the University of Hawaii from prohibiting its employees from running for, or serving in, non-statewide elected office. We note that this bill is inconsistent with the doctrine of incompatible offices, which as a matter of common law prohibits persons from holding two jobs in public employment where the duties of each job are inconsistent, incompatible, or in potential conflict. See, e.g., In re Water Use Permit Applications, 94 Hawai'i 97, 120, 9 P.3d 409, 432 (2000) ("The common law doctrine of incompatible offices prohibits an individual from serving in dual capacity if one office is subordinate to the other or the functions of the offices are inherently inconsistent and repugnant to each other.") (internal quotation marks and citations omitted); 63C Am. Jur. 2d *Public Officers and Employees* § 58 ("In determining incompatibility, a crucial question is whether the occupancy of both offices by the same person is detrimental to the public interest or whether the performance of the duties of one interferes with the performance of those of the other. Offices are generally considered incompatible where their duties and functions are inherently inconsistent and repugnant, so that because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both.") (footnotes omitted).

As a general matter, it is within the Legislature's authority to change the common law. For this bill, however, the Department is concerned that changing the common law will be

insufficient to address the potential conflicts of interest or potentially inconsistent responsibilities that are implicit in the dual employment apparently intended by the bill. For example, a University of Hawaii professor would have inherently inconsistent responsibilities when, as a legislator, she considered the University's budget, laws governing the University's authority and power, or the Legislature's decision to fund the University of Hawaii Professional Assembly collective bargaining agreement. In addition, we question how a full-time University professor could teach courses or otherwise serve in that role if he served as a legislator at the same time.

The doctrine of incompatible offices serves an important purpose that protects elected officials and the public from potential conflicts of interest and ensures that each public job receives the attention it requires for the execution of the assigned duties. For these reasons we ask that the bill be deferred.



UNIVERSITY OF HAWAI‘I SYSTEM

Legislative Testimony

Testimony Presented Before the
House Committee on Judiciary
March 3, 2016 at 2:00 p.m.

by

Carrie Okinaga, Vice President for Legal Affairs/General Counsel
and

Kalbert K. Young, Vice President for Budget and Finance/Chief Financial Officer
University of Hawai‘i System

HB 1556 HD1 – RELATING TO THE UNIVERSITY OF HAWAII

Chair Rhoads, Vice Chair San Buenaventura, and Members of the Committee on
Judiciary:

Thank you for the opportunity to provide testimony on this measure. HB 1556 HD1 prohibits the University of Hawai‘i (UH) from prohibiting a person from certain employment at UH solely because that person is a candidate for, or person elected to, a non-statewide public office.

The University of Hawai‘i Board of Regents Policy 9.205 restricts employees of the University of Hawai‘i from political campaigning for themselves and employment as elected officials while also being a University of Hawai‘i employee. The intent of the policy is to reduce any appearance of conflict in interests and the public perception of conflicts of interest. Being a legislator, county council member, etc., are inherently political positions and the University has previously been criticized in its hiring practices - including by legislators who now seek employment consideration via this measure.

Board of Regents Policy 9.205 underscores the importance of exercising political rights, but balances that individual’s interest along with that of other University employees. Campaigning or serving in elected offices takes dedication and is acknowledged as time consuming. Similarly, employees of the University of Hawai‘i need to recognize their public responsibilities to: (1) perform their duties, and (2) be careful not to attribute their own personal political opinions to the University. In keeping with that balance, the policy requires that an employee request leave of absence without pay while campaigning for political office, but resign from university service when elective office is assumed. Furthermore, the policy and its requirements are cited and incorporated by reference in the current contract between the University of Hawai‘i Professional Assembly and the University of Hawai‘i (Article III Section G).

The policy has been challenged, and has been affirmed. In Alcon vs. Harlan Cleveland, et al., the Circuit Court of the First Circuit, State of Hawai'i, issued a decision in 1970 upholding the Regents policy requiring a faculty member to resign upon being elected to the State legislature. And the Department of the Attorney General (ATG) affirmed in 1992 and 1994 the incompatibility of certain employees at the UH holding legislative office. See Attachment 1, which is a memorandum from the ATG to the Secretary of the UH Board of Regents, attaching two prior AG opinions and the Alcon decision.

The intent of HB 1556 HD1 is understandable. It could be beneficial for UH to have employees who are also elected officials so that they could have a more direct support of UH perspectives on matters concerning the University. However, it is for this very reason that Regent Policy 9.205 seeks to avoid compromising the integrity of the University or raising questions to the conflict in interests of the individual in elected office. As currently drafted this measure would require wholesale revision by the Board of Regents longstanding University policy, possible amendment to the State Constitution, and deviation to the current UH philosophy of conflicts in interest by its public employees.

UH defers to the State Attorney General's Office on whether the Hawai'i Constitution (Article III, Section 8) would allow legislators to be employed at both the legislature and UH as a regular employee. Employment for legislators with other State departments is already restricted and limited. Carving out specificity for University employment is clearly of special interest. The UH has the right and duty to establish policies and guidelines that ensure the integrity and appropriate operations of the University.

Thank you for your time and consideration on this matter.

Attachment 1

OHM WAHLEE
GOVERNOR

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1255
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ROBERT A. MARIK

ATTORNEY GENERAL

RUTH L. TSUTSUMURA

DEPUTY ATTORNEY GENERAL



October 31, 1994

TRANSMITTED VIA TELEFACSIMILEMEMORANDUM

TO: Tatsuki "Pepper" Shiramizu
Secretary
Board of Regents, University of Hawaii

FROM: Harriet Yoshida Lewis *Harriet*
Deputy Attorney General

RE: State executive branch employee serving on State legislature

Attached for your information are two opinions and a State Circuit Court decision that address the issue of whether a State executive branch employee would have to resign from the State position, if elected to the State legislature. According to the enclosed material, the "doctrine of incompatibility" (incorporated in Haw. Rev. Stat. §76-106) applies not only to two jobs being physically exclusive in terms of simultaneous performance, but also to conflicts arising from the chain of command structure of state government.

The enclosed 11/5/92 opinion states:

"Offices" may be incompatible if one interferes in some way with the duties of the other or where there is an inconsistency in the functions of the two offices. The inconsistency, which at common law makes offices incompatible, is not necessarily restricted to the physical impossibility of discharging the duties of both offices, but may lie also in a conflict of interest between the two positions. [citation omitted.]

Tatsuki "Pepper" Shiramizu
October 31, 1994
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In Emilio S. Alcon vs. Harlan Cleveland, et al., the Circuit Court of the First Circuit, State of Hawaii, upheld the BOR election policy requiring a faculty member to resign his position upon being elected to the state legislature and held:

The job of a legislator conflicts with that of a teacher at the University in that the two jobs are physically exclusive in terms of simultaneous performance, in that they are conflicting in terms of quality performance, and in that the legislative office is superior to that of the Regents in the chain of command structure of state government.

The rationale of this holding was relied upon in the enclosed two opinions, which express the opinion that if an executive branch employee were elected to a legislative office, the employee would have to resign from his or her State executive branch position to avoid the prohibition against simultaneous holding of incompatible positions.

This rationale would apply to a civil service position, as noted in the 11/5/92 opinion regarding a Clinical Psychologist VIII civil service position.

Encs. (3)

1. 11/25/92 opinion
2. 11/5/92 opinion
3. 5/23/70 Decision and Order in Alcon v. Cleveland

JOHN WAIHEE
GOVERNOR



ROBERT A. MARKS
ATTORNEY GENERAL

RUTH I. TSUNAMURA
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
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(808) 586-1600

November 25, 1992

Dear [REDACTED]:

Re: Clinical Psychologist VIII

By letter dated November 5, 1992, we gave you our opinion on the issue of whether a Clinical Psychologist VIII with the Adult Mental Health Division for the Department of Health may simultaneously occupy a House of Representative seat for the 32nd District. Our answer was in the negative.

By letter dated November 13, 1992 to Attorney General Marks, [REDACTED], requested an opinion on the issue left unanswered by the footnotes of our opinion. The issue was whether an elected officer may simultaneously hold an executive position if he takes leave from his executive position for the duration of his elected term (assuming such a leave were permissible). For reasons cited in our November 5, 1992 opinion, we answer in the negative.

Section 79-19, Hawaii Revised Statutes, permits the Governor to grant a leave of absence to any employee of the State, if the employee's services are requested by a member of the legislature. However, there is no similar statutory authorization for State employees to be given a leave of absence to serve as a member of the legislature. Moreover, it is clear that an employee who is given a leave of absence is still deemed to hold his or her position and has the right to reinstatement into his or her former position or to a comparable position. See section 79-19, Hawaii Revised Statutes, and section 14-8-20, Hawaii Administrative Rules. Thus, taking a leave of absence from an executive post to assume a position as a legislator will not cure the incompatibility discussed in our earlier letter to you. Thus,

[REDACTED]

November 25, 1992
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for all of the reasons cited in our November 5, 1992 opinion, including the doctrine of incompatibility, an executive employee, under the circumstances presented in this opinion, is required to resign his or her executive position during the term of his or her elected office.

If you have any other questions, please do not hesitate to call me.

Very truly yours,



Sherri-Ann Loo
Deputy Attorney General

APPROVED:



Robert A. Marks
Attorney General

SAL:sst

c: [REDACTED]
[REDACTED]
[REDACTED]

ERD01/100

JOHN WAINER
GOVERNOR



ROBERT A. MARKS
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STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL

425 QUEEN STREET
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(808) 586-1500

November 5, 1992

Dear Dr. Lewin:

Re: Clinical Psychologist VIII

By letter dated August 24, 1992, [REDACTED] requested our opinion with regard to whether a Clinical Psychologist VIII with the Adult Mental Health Division for the Department of Health may occupy a House of Representative seat for the 32nd District and also hold his position.

We answer your question in the negative.

Section 8 of Article III of the Hawaii State Constitution provides in part:

No member of the legislature shall hold any other public office under the State, nor shall the member, during the term for which the member is elected or appointed, be elected or appointed to any public office or employment which shall have been created, or the emoluments whereof shall have been increased, by legislative act during such term.

If the Clinical Psychologist VIII position which Dr. Pepper occupies is a public office, as distinguished from public employment, then Dr. Pepper cannot be a member of the legislature and retain his position as a clinical psychologist.

The Honorable John C. Lewin, M.D.
November 5, 1992
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The general rule regarding the existence of a public office as distinguished from employment has been stated as follows:

A position is a public office when it is created by law, with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and not occasional or intermittent; while a public employment on the other hand, is a position which lacks one or more of the foregoing elements.

140 A.L.R. 1078. See also 42 Am.Jur., 2d Public Officers § 12.

In the instant case, the Clinical Psychologist VIII position is a civil service position which was not specifically created by law, nor does it appear to involve the delegation and exercise of sovereign power.

The primary function of a Clinical Psychologist VIII is to serve as an expert consultant on matters relating to clinical psychology. The duties in this position consist of developing and monitoring clinical psychology services and participating in special studies and other related activities. This position does not entail any exercise of sovereign power.

For these reasons, we are of the opinion that a Clinical Psychologist VIII with the State Department of Health is not a public officer within the proscription of section 8, Article III of the Hawaii State Constitution.

Although a Clinical Psychologist VIII is not a public officer and, therefore, not barred by Article III of the State Constitution from holding his position as clinical psychologist, the issue then is whether a Clinical Psychologist VIII, as a public employee, may also hold a seat on the legislature.

Section 76-106, H.R.S., states:

Any other law to the contrary notwithstanding, an employee subject to any provision of this chapter may engage in outside employment after working hours, but is prohibited and restricted from engaging in any outside employment which is inconsistent or incompatible with or interferes with the proper

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discharge of the employee's duties to the state or the county as the case may be. This provision shall supersede all rules and regulations on the subject of outside employment. (Emphasis added.)

The issue is whether simultaneous holding the positions of Clinical Psychologist VIII and legislator is inconsistent or incompatible with or interferes with the proper discharge of the employee's duties to the state.

"Offices" may be incompatible if one interferes in some way with the duties of the other or where there is an inconsistency in the functions of the two offices. The inconsistency, which at common law makes offices incompatible, is not necessarily restricted to the physical impossibility of discharging the duties of both offices, but may lie also in a conflict of interest between the two positions. Words v. Treadway, 31 Haw. 792, 794 (1931).

Although section 76-106, H.R.S., is directed towards "employment" and not an "office" the general rule governing dual offices should apply to dual positions in public employment. Haw. Att'y. Gen. Op. 81-13.

It is well-established that the holding of a position in the State executive branch is incompatible with the performance of duties as a Representative in the State legislative branch. There is an inherent conflict when an employee is at the same time an elected official in the Legislative branch with power over his superior in the Executive branch. 63A Am.Jur.2d, Public Officers § 80; Haskins v. State Ex Rel. Harrington, 516 P.2d 1171 (Wyo. 1973); Coyne v. State, 595 P.2d 970 (Wyo. 1979); Gryzik v. State, Fla. App., 380 So.2d 1102 (1980). Furthermore, as an elected official in the legislative branch, the Clinical Psychologist may be responsible for introducing and drafting legislation that may directly or indirectly affect the Department of Health. Thus, as a Clinical Psychologist VIII, the employee is subordinate to the Director of the Department of Health. However, as a representative, the employee could have decision-making authority over the Department and its programs. Therefore, it is incompatible for employees to hold a State legislative office and the position of Clinical Psychologist VIII simultaneously. As a result, the employee would have to resign from his or her Executive branch position upon being sworn in to the elected office to avoid the prohibition against simultaneous holding of incompatible positions.

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Based on the foregoing reasons, a Clinical Psychologist VIII would not be able to hold a House of Representative seat and continue to hold his State position. 1/

We hope this answers your question. Please feel free to contact me if you have any questions.

Very truly yours,



Sherri-Ann Loo
Deputy Attorney General

APPROVED:



Robert A. Marks
Attorney General

SAL/KSM:sst
8754T

c: 

1/ This opinion does not address the situation where an executive employee takes leave from his/her executive position (assuming such a leave is permissible) for the duration of his/her term in elected office.

U.S. M.

PAU

CIVIL NO. 30128

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

EMILIO S. ALCON,)
Plaintiff.)

vs.)

HARLAN CLEVELAND, et al)
Defendants.)

STATE COURT

1270 MAY 25 PM 1994
Wickham

DECISION AND ORDER
(insert)

File
10/31/94

CIVIL NO. 1012A

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

EMILIO S. ALCON,)
Plaintiff.)
vs.)
HARLAN CLEVELAND, et al)
Defendants.)

DECISION AND ORDER

Petitioner was a teacher at Kapiolani Technical School of the Department of Education since 1957, and while in such position, was transferred in 1964 to the University of Hawaii's community college system pursuant to Act 39, Session Laws of 1964.

Upon transfer, Petitioner came under the jurisdiction of the Regents of the University, and his teaching contract was renewed annually each fall at the Kapiolani Community College, the last renewal being for the year beginning September 1, 1968.

On August 30, 1966, upon request for clarification of University policy towards faculty members who seek election to the state legislature, the Regents adopted the following (hereinafter referred to as the "Election Policy") as an extension or elaboration of existing policy: "Any faculty member seeking a legislative seat shall...if elected, resign his position with the University effective on the first day of the month of February immediately following his successful

election."

Petitioner knew and was aware of the Election Policy when, in the fall of 1968, he became a candidate for the House of Representatives. He was elected to a two year term.

On January 6, 1969, Petitioner asked for a leave of absence without pay for two years beginning January 16, 1969, which was denied. The University took the position that Petitioner had voluntarily and automatically resigned his position.

Petitioner asks this Court to order the Regents to reinstate Petitioner and place him on leave without pay for two years beginning January 15, 1969.

The petition is dismissed.

The Election Policy is articulated by oral motion and preserved in the form of minutes of the Regents, and it can well stand to be worked over for legal clarity. However, it must be given a fair, reasonable and common sense interpretation. The Election Policy clearly was intended as a clarification of the general policy on leaves of absence without pay as contained in the Faculty Handbook to a specific situation: that in which a faculty member seeks election to the state legislature. The proposition rejected was that of granting leave without pay upon election, and the proposition adopted was that of dissociation from employment with the University upon election with the effective date geared to the commencement of the legislative session. It is clear that dissociation was not to depend some act on the part of Petitioner

other than voluntarily becoming a successful candidate, contrary to Petitioner's claim that it contemplated some further act of "resigning".

The Election Policy became a part of the rules governing faculty employment which the Regents had the authority to impose and which the prohibition against loss of "employee benefit or privilege" contained in Act 39 does not inhibit because the "benefit or privilege" contemplated by the Act does not include a right to hold two conflicting jobs.

Petitioner's principal contention is that he has a constitutional right to political activity and expression and that it is unconstitutional for the University to make him choose between giving up his faculty job or giving up that right.

Political activity embodying concepts of free speech is a completely different thing from assuming the office of a state legislator. A legislative office is not an expression. It is a job, with appurtenant powers and obligations. And there is no constitutional right to hold two jobs in government just because one of the two is the concededly important one of a legislator.

The job of a legislator conflicts with that of a teacher at the University in that the two jobs are physically exclusive in terms of simultaneous performance, in that they are conflicting in terms of quality performance, and in that the legislative office is superior to that of the Regents in the chain of command structure of state government. So that there is ample basis for the Election Policy.

Finally, Petitioner contends that he should have been

given a hearing before termination. There is no dispute as to Petitioner's awareness of the Election Policy, his voluntary candidacy, election and assumption of office. The only issue is that of the validity and interpretation of the Election Policy as it impinges on Petitioner's teaching position. Since I find it valid and that under it Petitioner voluntarily resigned his position by becoming a successful candidate for the state legislature, there is nothing to be heard.

The petition is dismissed.

Dated: Honolulu, Hawaii, this 7th day of May,
1970.



Judge of the above entitled Court



To The House Committee on Judiciary
Thursday, March 3, 2016
2:00 p.m., Room 325

RE: HB 1556, HD1, Relating to the University of Hawai'i

Attention: Chair Karl Rhoads, Vice Chair Joy San Buenaventura and
Members of the Committee

The University of Hawaii Professional Assembly (UHPA) urges the committee to **support the passage of HB1556, HD1** that provides faculty the opportunity to serve their communities not only as an educator but as a public servant.

The value added to the student of a faculty member who has experienced the process of being elected to public office, serving the people through knowing the community needs and crafting the language for county ordinances or state statutes that improve their lives is not found in academic text. This experience is where praxis intersects with theory and excellence is achieved.

The University of Hawai'i faculty are members of communities throughout the State of Hawai'i and must be provided equal opportunity, just like other citizens of Hawai'i to hold public office.

UHPA urges **passage of HB1556, HD1**.

Respectfully submitted,

A handwritten signature in black ink that reads "Kristeen Hanselman".

Kristeen Hanselman
Executive Director

**University of Hawaii
Professional Assembly**