



**STATE OF HAWAII
CAMPAIGN SPENDING COMMISSION**

235 SOUTH BERETANIA STREET, ROOM 300
HONOLULU, HAWAII 96813

June 30, 2016

Brian A. Kang, Esq.
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First Hawaiian Center
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Re: Advisory Opinion No. 16-03

This is in response to the General Contractors Association of Hawaii's ("GCA") request for an advisory opinion dated May 4, 2016.¹ The GCA has registered a noncandidate committee, the GCA Political Action Committee ("GCA PAC"), with the Campaign Spending Commission ("Commission"). The GCA PAC is governed by a board of directors ("Board"). The Board has five members. All decisions of the Board, including decisions on the recipients and amounts of political contributions from the GCA PAC, require the approval of a majority of Board members. The questioned posed by the GCA is:

Whether the contributions of the GCA PAC and the personal contributions of the Board members are aggregated, both between the GCA PAC and the Board members and amongst the Board members themselves?

The short answer is that the contributions of GCA PAC will be aggregated with the contribution of the individual Board members, but the contributions of a Board member will not be aggregated with the contributions of another Board member, unless it can be shown that one of the Board members financed, maintained, or controlled another Board member's contributions.

Hawaii Revised Statutes ("HRS") § 11-361(a) provides:

All contributions and expenditures of a person whose contributions or expenditures are financed, maintained, or controlled by any corporation, labor organization, association, party, or any other person, including any parent, subsidiary, branch, division, department, or local unit of the corporation, labor organization, association, party, political committees established and maintained by a national political party, or by any group of those persons shall be considered to be made by a single person.

Hawaii Administrative Rule ("HAR") § 3-160-31(e) provides:

¹ Attachment "A" is a copy of the GCA's request.

Contributions or expenditures made by a person “financed, maintained, or controlled” by another person shall be aggregated. Whether a person is “financed, maintained, or controlled” by another person is determined by the totality of the factual circumstances, including but not limited to the following:

* * *

(2) Whether a sponsoring organization or committee has the authority or ability to direct or participate in the governance of another sponsoring organization or committee through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures;

* * *

[Emphasis added.]

The individual Board members’ personal contributions will be aggregated with the contributions of GCA PAC. The Board is a committee.² The Board members clearly have the authority to direct or participate in the governance of GCA PAC. Even if the Board members are considered to be individuals, rather than a committee, although HAR § 3-160-31(e)(2) speaks to the relationship between “sponsoring organizations or committees,” the Commission believes that paragraph 2, as well as the other paragraphs under subsection (e), should apply to individuals. Subsection (e)³ regulates the contribution of a “person.” Under HRS § 11-302, the definition of “person” includes individuals. Thus, it would be absurd to only look at the conduct of “sponsoring organizations or committees” when faced with the question of whether the contributions of individuals (or other persons) should be aggregated. Whether one considers the Board a committee or the Board members as individuals, HAR § 3-160-31(e)(2) applies and the contributions of GCA PAC and the Board members will be aggregated.

The personal contributions made by the individual Board members would not be aggregated amongst themselves simply by being members of the GCA PAC Board.⁴ However, aggregation would be appropriate if it could be shown that one Board member “financed, maintained, or controlled” another Board member’s contributions.

The Commission provides this Advisory Opinion as a means of stating its current interpretation of the Hawaii campaign finance law in §11-301, *et seq.*, HRS, and the

² “Committee” means “[a]n individual or body to whom others have delegated or committed a particular duty, or who have taken upon themselves to perform it in the expectation of their act being confirmed by the body they profess to represent or act for.” Black’s Law Dictionary 248 (5th ed. 1979).

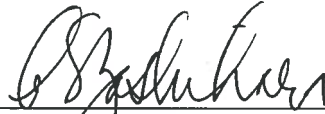
³ HRS § 11-361(a) also applies to “persons.”

⁴ Similarly, HAR § 3-160-31(d) provides in part: “A contribution from a partner’s personal funds will not be aggregated with a contribution from another partner’s personal funds.”

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Commission's rules in chapter 3-160, Hawaii administrative Rules. The Commission may adopt, revise, or revoke this Advisory Opinion if provisions of the campaign finance law or administrative rules are amended or repealed.

CAMPAIGN SPENDING COMMISSION



By: ADRIENNE S. YOSHIHARA
Its Vice Chair

CAMPAIGN SPENDING
COMMISSION

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RECEIVED

Watanabe Ing^{LLP}
A LIMITED LIABILITY LAW PARTNERSHIP

May 4, 2016

VIA HAND DELIVERY

Gary Kam, Esq.
General Counsel
Campaign Spending Commission
235 South Beretania Street, Room 300
Honolulu, Hawaii 96813

Re: Contributions by Noncandidate Committee Board Members

Dear Mr. Kam:

On behalf of the General Contractors Association of Hawaii ("GCA"), and as previously discussed, the GCA requests the Campaign Spending Commission's review and guidance on the contribution aggregation provisions of the campaign spending law as those provisions may relate to contributions made by a noncandidate committee and personal contributions made by the board members of that committee. To the extent that the Commission deems it necessary in order to advise the GCA on this matter, the GCA requests that the Commission deem this letter as a request for an advisory opinion pursuant to Hawaii Revised Statutes § 11-315.

As the Commission is aware, on February 13, 2013, the Commission issued Advisory Opinion No. 13-02, which addressed several issues raised by GCA with respect to its contemplated noncandidate committee, and on December 17, 2014, the Commission issued Advisory Opinion No. 15-01, which addressed various proposed sources of funding for the committee. For purposes of this request, the facts previously considered by the Commission (in connection with considering the issues discussed in AO Nos. 13-02 and 15-01) remain the same to the extent those facts may be relevant in considering the present request.

In conformance with AO Nos. 13-02 and 15-01, GCA has established, registered and funded a noncandidate committee, the General Contractors Association of Hawaii Political Action Committee ("GCA PAC"). The activities of the GCA PAC, including decisions on the recipients and amounts of contributions from the GCA PAC, are administered through a board of

directors, consisting of the officers of the board (a chairperson and a treasurer), and three board directors. Only individuals eligible under the campaign spending law serve on the GCA PAC Board (i.e. board officers do not serve as officers on another committee which supports or opposes the same candidate, and sole proprietors with government contracts do not serve on the board). All decisions by the GCA PAC Board (including decisions on the recipients and amounts of contributions by the GCA PAC) require the approval of a majority of the board members.

The GCA PAC requests the Commission's guidance as to whether, and if so, to what extent, the aggregation provisions of Hawaii Revised Statutes §11-361(a) and Hawaii Administrative Rules § 3-160-31(e) apply to a situation where the GCA PAC, in conformance with the decision-making process above, makes a contribution to a political committee, and any individual board member, using his or her personal funds, makes a contribution to the same committee within the same election period.

As a hypothetical example, if the GCA PAC decides, through its board of directors, to make a \$2,000 contribution to a state senator's candidate committee ("Committee X"), and a GCA PAC board member (in his or her individual capacity and using his or her personal funds) ("Board Member Y"), subsequently makes a contribution of \$2,000 to the same Committee X within the same election period, would the two contributions (totaling \$4,000) be deemed aggregated by operation of HRS §11-361(a) and/or HAR § 3-160-31(e) (or any other provision of the state campaign spending law) such that the GCA PAC and Board Member Y will be deemed to have met the contribution limit to Committee X for the applicable election period? In addition, if, under the same facts, a second GCA PAC board member (in his or her individual capacity and using his or her personal funds) ("Board Member Z") decides to also make a \$2,000 contribution to Committee X during the same election period, would Board Member Z's contribution be aggregated in any manner with either the GCA PAC's contribution and/or Board Member Y's contribution?

The GCA PAC respectfully submits that, under the Campaign Spending Law and under the specific facts provided above, the Commission may properly conclude that the contributions by the GCA PAC, Board Member Y and Board Member Z should not be aggregated: 1) as between the GCA PAC on one hand and Board Member Y and Board Member Z on the other hand; and 2) as between Board Member Y and Board Member Z.

As the Commission is aware, a "person" is defined in HRS § 11-302 as including (among other categories) an individual as well as a noncandidate committee and an organization.

Further, HRS §11-361(a) provides, in pertinent part, that :

All contributions and expenditures of a person whose contributions or expenditures are financed, maintained, or controlled by any corporation, labor organization, association, party, or any other person, including any parent, subsidiary, branch, division, department, or local unit of the corporation, labor organization, association, party, political committees established and maintained by a national political party, or by any group of those persons shall be considered to be made by a single person.

Hawaii Administrative Rules § 3-160-31(e) further provides in pertinent part that:

Contributions or expenditures made by a person “financed, maintained, or controlled” by another person shall be aggregated. Whether a person is “financed, maintained, or controlled” by another person is determined by the totality of the factual circumstances, including but not limited to the following: . . .

Although the rule provides various examples of factors to be considered in determining whether a person is “financed, maintained or controlled” by another person, the examples do not appear to specifically address the situation raised by the hypothetical facts in this request.

Although, under the hypothetical facts provided above, Board Member Y and Board Member Z are members of the board of directors that administers the financing of the GCA PAC and “maintains and controls” the GCA PAC, neither Board Member Y nor Board Member Z, as either individual natural persons or individual board members acting in that capacity, have the sole authority to “finance, maintain or control” the GCA PAC. Stated another way, it is the board of directors, deciding and acting collectively as a body through a majority vote, that “finances, maintains and controls” the GCA PAC, not any individual director (who cannot take action related to the GCA PAC solely as either an individual natural person or as an individual board member). A contrary opinion that an *individual* member of the board may “finance, maintain or control” the GCA PAC ignores the functions and purpose of the board of directors as a *collective* governing body for GCA PAC that acts through a majority vote of its members.

Accordingly, GCA PAC submits that, consistent with HRS § 11-361(a) and HAR § 3-160-31(e), and under the hypothetical facts provided above, the Commission may determine that the contributions to Committee X by the GCA PAC on one hand, and Board Member Y and Board Member Z on the other hand, should not be aggregated.

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Similarly, GCA PAC believes that the Commission may properly conclude that Board Member Y's contribution to Committee X should not affect (nor be aggregated) with Board Member Z's contribution to the same committee (and vice versa). Although Board Member Y and Board Member Z both serve on the GCA PAC board of directors, neither member finances, maintains or controls the individual, personal contributions of the other member. Stated another way, although Board Member Y and Board Member Z serve as members of the board, and the board acts collectively to govern the GCA PAC, neither member finances, maintains or controls the other member as they may act in their individual capacity and using their own personal funds to make contributions. Accordingly, GCA believes that the Commission may properly conclude that under these facts, Board Member Y's and Board Member Z's personal contributions to Committee X are not required to be aggregated under the campaign spending law.

GCA requests confirmation of its understanding of the application of HRS § 11-361(a) and HAR § 3-160-31(e) to the hypothetical facts above.

Thank you for your assistance with this matter, and please contact me should the Commission have any questions regarding this request or need any additional information for its review and analysis.

Very truly yours,

WATANABE ING LLP


BRIAN A. KANG

cc: General Contractors Association of Hawaii