

Report of the Investigative Committee
In the matter of complaint by Party member Michael Golojuch, Jr.
against members State Senators Michael Gabbard and Donna Mercado Kim, and State
Representatives Sharon E. Har, Henry J.C. Aquino, Karen Awana, Ty J.K. Cullen, Ken Ito, John
M. Mizuno, Calvin K.Y. Say, K. Mark Takai, and Clift Tsuji. June 8, 2013.

Findings

A. The Complaint was submitted by member Michael Golojuch, Jr. on behalf of himself and the GLBT Caucus of the Democratic Party of Hawai'i (DPH) in a timely manner in the required format. The matter was referred to the OCC standing committee on Rules as the Investigative Committee by the O'ahu County Chair in accordance with Article I, Section 8B. (5) of the Democratic Party of Hawai'i Bylaws. The complaint is based upon the DPH Bylaws, Article I, Section 8A. (2), " A member of the Democratic Party of Hawai'i may be expelled, reprimanded or censured for ... Failure to abide by the Constitution of the Democratic Party of Hawai'i and / or platform of the Party."

The Bylaws permit individual members to file complaints, but not Caucuses. The filing by the GLBT caucus, therefore, is found to be defective on that basis and recommended for dismissal. The filing by member Golojuch is in compliance with the Bylaws and accepted for processing.

The Bylaws also require complaints to be filed with the county secretary in which the respondent resides. Representative Clift Tsuji is a resident and representative of Hawai'i County. O'ahu County does not have jurisdiction with respect to complaints against Representative Tsuji. The complaint against him is recommended for dismissal on that basis.

B. Specifically the complaint alleges that the respondents introduced either SB1292 on January 24, 2013 or HB1020 on January 22, 2013 that are in direct opposition to a provision in the Human and Civil Rights plank in the Party Platform which reads:

"We support the rights of the Lesbian, Gay, Bisexual, Transgender and Intersex community to equality before the law, including the right to equal relationship recognition including but not limited to equal marriage rights both at the State and Federal level."

C. Respondents were notified of the complaint by letter of February 28, 2013 from the OCC Secretary. A response was received from Casey Hines, Director, Senate Majority Research Office on March 25, 2013 on behalf of Senators Kim and Gabbard. A response also was received from Rep. Mizuno on March 28, 2013, and from Rep. Takai on March 29, 2013. A combined response, including exhibits, was received late on April 4, 2013 from Representatives Har, Aquino, Cullen, Ito, Tsuji, Awana and Say which was accepted by the Committee.

D. Article I, Section 8 of the Bylaws of the Democratic Party of Hawai'i requires the Investigative Committee to offer the complainant and the accused the opportunity to be interviewed by the Committee. Michael Golojuch was offered a list of dates for interview by letter of April 4, 2013, and was interviewed by the Committee on April 12, 2013. By letter of April 4, 2013 the respondents were offered a list of dates for interview. Representative K. Mark Takai agreed to an interview, and was interviewed by the Committee on May 1, 2013. The others did not respond to this opportunity to meet with the Committee.

E. Discussion of Responses.

Items I. through VI. in bold or italics below are from the combined response. Comments are by the Committee.

"I. The Hawaii State constitution confers on legislators absolute immunity or actions taken in the course of the members legislative functions."

Comment: See comments under B. below.

"A. Bill introduction is clearly within the scope of legislators duties."

Comment: Agreed. But note that it does not prohibit them from not introducing something that conflicts with the Party platform. Members are required to support the Platform.

"B. The Hawaii supreme court has reaffirmed that legislators are protected under absolute immunity from exercises performed during the course of legislators duties."

Comment: Agreed. However, the DPH is a Domestic Nonprofit Corporation under the Hawai'i Nonprofit Corporation Act, and an IRS 527 nonprofit corporation. HRS Chapter 414D requires these corporations to adopt bylaws such as those of the DPH. 414D also sets requirements for members of such corporations. The Bylaws of the DPH were established in accordance with 414D, and require members to attest to adherence to the Constitution and Bylaws. Any member, including a legislator, who does not support the Party Platform, may be the subject of a complaint.

Membership in this type of organization is voluntary. Any person is free to either join or not join, or resign if a member. The latter occurred in the case of Gary Okino who resigned from the Party following the initiation of a complaint, with the result that he was no longer subject to the complaint process or the possible sanctions.

"In the instant case, respondents exercise their legislative duty by introducing or co-introducing a bill which would have called for a constitutional amendment allowing for the people of the State of Hawaii to vote on the issue of same sex marriage."

Comment: The Bills specifically addressed marriage between one man and one woman, not the general subject of same-sex marriage. It is inconsistent with a plank in the Party Platform, thereby creating a motivation for the subject complaint. The introduction of such Bills may be

within the duties of a legislator, but the subject of the Bills is clearly inconsistent with the Constitution and Bylaws of the DPH.

"C. The only tribunal for which a legislator may answer for purported misconduct in the scope of his or her duties is the house in which that legislator sits."

Comment: No complaint has been filed concerning misconduct on the part of any legislator in the scope of his or her legislative duties. A complaint has been filed with the DPH that alleges that certain legislators, by the introduction of certain Bills, have violated the membership requirements of the DPH. All members volunteer to support the Party Platform; the O'ahu County Committee (OCC) must decide if sanctions should be applied for violations of Bylaw's requirements to which the members have attested.

All members volunteer to support the Party Platform, and must continue to do so to remain members of the organization. As a volunteer membership organization, the DPH does not require any limit on a person's right as an individual or a legislator to be a member of any other political party they wish, and introduce whatever they wish as legislators, but the Constitution and Bylaws of the DPH reserves membership rights to those who support Party Platform and resolutions. At work here is the DPH's First Amendment right to free association. A recent Supreme Court decision (California Democratic Party v. Jones) addressed this right and held that the prospect of having a party's candidate chosen by members of an opposing party violated that party's First Amendment constitutional right of association because the association was not given the freedom to exclude non-members from affecting the outcome of their own primary. (www.casebriefs.com.)

If the Legislature feels that nothing wrong has transpired with respect to the Legislature's rules and immunities, that's their right. That right however, does not abridge the right of the corporation to have and enforce membership requirements.

"II. Even if legislators may be brought before a tribunal outside of the legislative body which respondents do not concede, the Constitution of the Democratic Party of Hawaii does not require legislators per se to unequivocally support the party platform."

Comment: Agreed. However, this is not a basis for the complaint to be improper. See discussion in III. below. While only the voters can choose legislators, the Party can choose its members and candidates according to adopted Bylaws. Party candidates must be party members, and members must meet membership requirements. The provisions of the Constitution and Bylaws of the DPH include requirements for persons who wish to use the label "Democrat" in an election. Actions can be taken to prohibit the use of that designation in a future election by a member who has been determined not to be in good standing. None of the sanctions that could be applied in this case would affect the current public position of a sitting elected official. Expulsion would affect a member's right to run as a candidate of the Democratic Party in a future election.

"III. Even assuming arguendo, that a legislator is required to support the Party Platform in the legislator's capacity as a candidate of the DPH, the bylaws of the democratic party of Hawaii do not require a legislator to support each and every platform and resolution."

Comment: Agreed. As is stated in the response, *"The Bylaws explicitly provide to candidates an opportunity to disagree or to express reservations with the Party Platform and resolutions."* However, for any member to be supported as a candidate, they must complete and submit a candidate statement form which lists all Platform planks and Party resolutions and indicate whether they support, do not support or have reservations on each item. While it is true that all items do not have to be supported, note how absurd it would be if a candidate indicated disagreement with all Platform planks and resolutions. As has been stated in decisions on previous complaints, the O'ahu County Committee has explained that the intent of this procedure establishes an egregiousness test. When the procedure is read in conjunction with the procedures in the Bylaws to process complaints, it is seen that it is left up to the entire O'ahu County Committee to conclude whether or not the basis for a complaint is sufficiently egregious to warrant a sanction of the member. Sanctions can include expulsion, reprimand or censure.

Respondents maintain that HB1020, if passed, would allow for a vote on same-sex marriage, and if defeated would affirm the objectives of the Platform. (Note that SB1292, introduced by Senators Gabbard and Kim has the same language.) The State Constitution now says: "The Legislature shall have the power to reserve marriage to opposite sex couples." An affirmative vote would change that to: "To be valid and recognized in this State, a marriage may exist only between one man and one woman." A negative vote would only retain the existing language. While in some respects affirming the Platform plank, the Bill would in no way achieve it. If the Bill were defeated by the voters, it would mean only that the voters support the Platform. More meaningful legislative support for the Platform would be to pass a Bill like HB1005 which would require a vote to amend the Constitution "to allow marriage between same sex couples." Only one of the respondents, Rep. Mizuno, introduced HB1005.

"IV. An uneven standard is clearly being applied to respondents which renders the complaint suspect." *"It is well-known and was highly publicized that during the re-organization of the House of Representatives for the 2013 legislative session, certain house members organized with the Republican caucus in order to take over leadership in the State House."... "Another clear violation of the Bylaws occurred several weeks ago when a certain house member allegedly made racial epithets towards an employee of the State Foundation of Culture and the Arts."*

Comment: We equally process all complaints filed in accordance with the DPH Bylaws. No complaints have been filed concerning the re-organization, or the racial slur mentioned in the response. The 180-day time limit for a member to file a complaint in these matters has not yet expired. Note also that the fact that other complaints could have been filed does not invalidate the subject complaint.

"V. Michael Golojuch, Jr. and his family, have shown a pattern of abuse, harassment, and history of filing baseless complaints."

Comment: The committee concludes that, even if a pattern were to be substantiated, it would not affect the complainant's right to file the subject complaint.

"VI. Procedural aspects of the complaint were not complied with rendering the complaint void." *"Complainants have failed to provide any evidence supporting their claims."*

Comment: All required procedures have been complied with. The complainant submitted information in the complaint document concerning his basis for the complaint. This was provided to the respondents. He chose not to offer any witnesses. The complaint was signed by the complainant and at least four other Party members as is required. In terms of further evidence, interviews are part of the process as well as the provision that "the Investigative Committee shall gather other facts necessary for its findings...." Note that only the complainant can withdraw a complaint.

Responses From Takai and Mizuno

Evidence presented in the responses from Representatives K. Mark Takai and John M. Mizuno is essentially addressed in the Committee's comments above on the response from the six other Representatives including the immunity matter. It should be noted that Representative Mizuno introduced not only the subject Bill, but two others. HB1004 proposed a constitutional amendment to define marriage between one man and one woman, and HB 1005 proposed a constitutional amendment to allow marriage between same-sex couples. He indicated that he considered this to be a fair approach. Also, the Committee appreciated Representative Takai agreeing to an interview with the Committee.

Responses From Kim and Gabbard

Senators Donna Mercado Kim and Mike Gabbard asked the Director of the Senate Majority Research Office, Casey Hines, to respond on their behalf. The complaint against the senators was based upon their introduction of SB 1292 which is essentially a duplicate of HB 1020. It should be noted that the response for Senator Kim and Senator Gabbard, prepared by Casey Hines, and approved by Richard Wada, Senate Majority Attorney, refers to possible judicial action against the Party. The letter says, "In summary, it is clear that a reviewing court will find that the complaint, which is based solely on the Senators' introduction of SB 1292, is improper under the Hawaii State Constitution because the Senators have legislative immunity for acts such as the introduction of legislation."

Like the combined response from the Representatives, the response on behalf of the Senators argues extensively for legislative immunity, and that the legislators have a right to introduce Bills. In addition to comments we have made above, we note that the complaint concerns the introduction of HB1020 and SB1292. However, the complaint does not maintain that the legislators cannot introduce the Bills. It also does not say that they cannot introduce Bills on that subject. The response that the legislators have a right to introduce Bills, and even Bills with the content of HB1020 and SB1292 is beside the point. The complaint is essentially that the subject of the Bills is contrary to the DPH Platform. There is no Hawai'i Constitutional provision nor statute which says that the DPH cannot sanction a member who does not support the Party Platform.

The response also discussed a case in another state where a legislator, because of immunity, could not be expelled from his party even though he changed parties. Under the DPH Bylaws, changing parties from Democrat to another results in automatic expulsion. Experience in Hawaii has been that the members are automatically expelled if they change parties. The most celebrated case being when Honolulu City Council members Toraki Matsumoto, George Akahane, and Rudy Paccaro switched mid-term from Democrat to Republican. They automatically lost their membership in the DPH. Also, Rep. Lei Ahu Isa who, on the floor of the House of Representatives in 2002, changed parties from Democratic to Republican was automatically expelled for five years.

The response also says *"...we wish to point out consistencies with our State Constitution respecting the acts of legislators in the performance of their legislative functions and the diversity of legislative and voting in the legislature that are not to be controlled or limited by any specific party platform."*

Comment: The Bylaws which require support of the Platform do not limit legislators in the performance of their functions since legislators are not required to be DPH members. The Bylaws only provide limitations on persons to be members of the DPH.

Conclusion and Recommendation

The complaint by member Michael Golojuch, Jr. was received in a timely manner, and in the proper format required by the DPH Bylaws. All parties were duly notified by the OCC Secretary. A written combined response, including exhibits, was received on April 4, 2013 from Representatives Har, Aquino, Cullen, Ito, Tsuji, Awana and Say. A written response for Senator Kim and Senator Gabbard was received prepared by Casey Hines, and approved by Richard Wada. Individual responses were received from Representatives Mizuno and Takai. Complainant, member Michael Golojuch agreed to a voluntary interview with the Investigative Committee, and met with the Committee on April 12, 2013. With the exception of Rep. K. Mark Takai, respondents did not respond to letters of April 4, 2013 which offered interview dates.

The complaint requested that action be taken against the respondents in accordance with DPH Bylaws Article I, Section 8A. (2), "A member of the Democratic Party of Hawai'i may be expelled, reprimanded or censured for ... Failure to abide by the Constitution of the Democratic Party of Hawai'i and /or platform of the Party." In accordance with the DPH Bylaws, the Committee may recommend dismissal of the complaint, or recommend expulsion from the Party, reprimand or a letter of censure.

The issue in this complaint is not about the right of a legislator to introduce Bills, or the immunity they have from certain legal judgments. The complaint here is only that they have violated the membership requirements of the DPH to the extent that sanctions may be applied to them that affect their membership in the organization. The Bylaws of the DPH nonprofit corporation, adopted in accordance with the appropriate Hawaii Revised Statutes, explicitly

include the requirements that members must follow, as well as the sanctions that may be applied to those who do not. All members volunteer to be subject to the Bylaws when they join the organization, and the organization is not required to continue membership for members who violate its membership requirements.

Membership in the Democratic Party of Hawai'i is not a required qualification to be an elected official in Hawai'i. All elected officials and candidates are free to choose whatever party they wish, or no party at all. However, if they wish to say that they are a candidate of the DPH, they must adhere to the membership requirements in the Party Constitution and Bylaws.

The standard practice of the DPH is not to require 100% support of the Party Platform by members or candidates of the Party. The "failure to abide" requirement in Section 8A. (2), therefore, engenders a judgment on a case by case basis wherein there must necessarily be a direct, blatant, serious or egregious failure to abide by the Platform. This procedure is necessary to promote the "big tent" concept that is so desired by the members of the Party while retaining a meaningful Party Platform. This complaint was investigated on that basis. As an Investigative Committee, the committee reviewed and discussed all information submitted by the parties, and also conducted its own investigation into matters relative to the issue.

The Committee finds that the language in the subject Bills is contrary to a major plank in the Party Platform that has widespread current interest and support among Party members.

The Committee also finds that, although signing on as a co-introducer of a Bill is a strong indication that the member supports the Bill, being the initial or prime introducer is a much stronger indication that the member desires the passage of the Bill, and will work for its passage. It is a more egregious action than to be a co-introducer. In the instant case, Senator Gabbard and Representative Har were the prime introducers of the subject Bills. Also, Senator Gabbard had a previous complaint on the same general subject upheld against him by the OCC, and upheld on appeal to the State Central Committee. A second offense adds to the blatant or egregious nature of introduction of the Bill.

The Committee concludes that the most egregious action was primary introduction of the subject Bills, and recommends that the sanctions below be given to Senator Mike Gabbard and Representative Sharon Har.

For what essentially amounts to a second offense, Senator Mike Gabbard be reprimanded in accordance with DPH Bylaws Section 8C (3) "The Party shall take all reasonable actions to prevent such member from holding an office in the Party for up to three (3) years." The recommendation is for a reprimand for the period of three years.

Representative Sharon Har be censured in accordance with DPH Bylaws Section 8C (4) "...an official letter of censure shall be written by the County Chair." In accordance with DPH Bylaws

Section 2B (1) (a) she will not be able to file as a Democratic Party candidate for public office for six months after receiving a letter of censure.

The Committee also recommends that the complaint against co-introducers Senator Donna Mercado Kim, and Representatives Henry J.C. Aquino, Karen Awana, Ty J.K. Cullen, Ken Ito, John M. Mizuno, Calvin K.Y. Say, and K. Mark Takai be dismissed.

The Committee also recommends that the complaint by the GLBT caucus, and the complaint against Representative Clift Tsuji be dismissed.



Charles A. Prentiss, Chair



Lynne Matusow, member



Alan Burdick, member

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