

ADVISORY OPINION NO. 88-11

A state board member requested an advisory opinion from the State Ethics Commission (the "Commission") regarding a trip to a private institution on the mainland that the board member had accepted from the institution, together with two other board members and a state employee. The board member requested an advisory opinion because allegations had been raised that the board member had a conflict of interest in recommending that her board budget funds for employee training at the institution because the board member had previously accepted a trip from the institution to visit its facilities on the mainland.

The Commission, through its staff, interviewed numerous persons connected to this matter, including the board members that had accepted the mainland trip, other members of the board, and representatives of the private institution. The Commission's staff also reviewed correspondence and memoranda provided by the board and by the institution, and also reviewed transcripts of certain board meetings. Based upon all of this information, the Commission ascertained the following facts.

The board member's board prescribed policies for a particular state department. A committee consisting of several board members had been reviewing the department's training programs. The board member that requested the Commission's opinion was also a member of this committee. There apparently had been some concern within the board that a particular training program was not keeping abreast with current technology.

The private institution offered advanced technological training, educational materials, and research services. The institution had facilities in a number of states on the mainland. Representatives from the institution periodically recruited students in Hawaii's high schools for post-secondary technological training and also conducted training sessions for local businesses and teachers.

The Commission learned that the committee that was reviewing state training programs had held an informational meeting at which representatives of the institution provided information to the committee and to other department officials present about the institution's curriculum and training program. At the end of that meeting, the institution invited the committee to visit the institution's research and development center on the mainland to observe first hand the institution's programs and facilities.

Following this meeting, a representative of the institution contacted the chairperson of the committee and again invited the committee to participate in the institution's visitation program. Through this program, which has existed for over ten years, the institution paid for transportation and lodging expenses for professionals across the country to visit the institution's facilities.

Before accepting the institution's invitation, the committee requested from the institution, as a condition of the trip, a letter confirming that there would be no obligation on the board's part if the committee accepted the trip offer. The institution responded by providing to the committee a letter reiterating the invitation to the committee to visit the institution's mainland facilities and stating that the only stipulation on the visit was that the committee and the institution share thoughts and ideas on improving the quality of education.

Of all the members of the committee, only the chairperson of the committee and the board member that had requested the Commission's opinion in connection with this matter accepted the

invitation to visit the institution. One of the other committee members apparently had reservations about the propriety of the trip. The remaining members of the committee were unable to adjust their schedules to accommodate the trip. The chairperson of the board was also invited to attend the trip, and did so, in his capacity as chairperson.

Originally, the committee also planned to send four state employees on the trip because of their technological expertise. However, due to an increase in the price of airline tickets, the institution asked the committee to reduce its group size by three persons. Therefore, only one state employee accompanied the board members on the trip to the mainland.

The three board members and the state employee flew together to the mainland to visit the institution's facilities. The group spent approximately eleven hours the following day touring these facilities. During that time, the group observed training and classroom sessions and attended meetings to discuss the institution's curriculum and programs. All four members of the group returned directly to Hawaii on the following day. No one extended the trip for vacation purposes.

The Commission was informed that the institution paid for the airfare and hotel accommodations for all four members of the group. The institution also paid for the cost of a luncheon meeting at a nearby restaurant. The institution did not pay for any other meals for the group members.

The Commission learned that the institution also paid for air transportation and hotel expenses for a subsequent visit to the institution's facilities by two employees in the department that was advised by the board member's board. Following their return, these state employees submitted a report to their supervisor about their trip to the institution and about the information that they had gathered. The supervisor then worked with his staff to develop recommendations and a proposed budget to send department employees to the institution in 1989 and 1990 for training. Pursuant to a request from the committee, the supervisor also attempted to determine whether other institutions could provide similar services to the department. According to the supervisor, all research indicated that no other institution offered a comparable training program.

The proposed budget request was presented to the committee at a meeting in 1988. Following a discussion during the meeting regarding the proposed budget, the board member that had requested the Commission's opinion moved to have the committee forward the budget through the appropriate channels to the department director to be included in the biennium budget that the board would later review. The committee majority voted in favor of this motion.

One of the committee members who opposed the motion questioned the propriety of submitting the proposed budget to the department director directly without first presenting the proposal to the entire board for consideration. The committee chairperson informed the Commission's staff that this issue later became moot because it was discovered that one of the committee members who voted in favor of the motion had not been properly appointed to the committee. Therefore, the committee's vote on the matter was invalidated.

The board member that requested an opinion from the Commission had done so in response to allegations regarding a possible conflict of interest between her trip to the school and her subsequent actions in recommending approval of the proposed budget.

The Commission noted that section 84-14(a), Hawaii Revised Statutes ("HRS"), is the conflict-of-interest section of the ethics code, chapter 84, HRS, that mandates a board member's disqualification from official action directly affecting a business in which the member has a

substantial financial interest. The Commission stated, however, that it did not believe that section 84-14(a) was applicable to this situation because the board member did not have any financial interest in the private institution.

The Commission held that the section of the ethics code that was relevant to this situation was section 84-11, HRS, the gifts section, which provides as follows:

§84-11 Gifts. No legislator or employee shall solicit, accept, or receive, directly or indirectly, any gift, whether in the form of money, service, loan, travel, entertainment, hospitality, thing, or promise, or in any other form, under circumstances in which it can reasonably be inferred that the gift is intended to influence the legislator or employee in the performance of the legislator's or employee's official duties or is intended as a reward for any official action on the legislator's or employee's part.

Section 84-11 prohibits a state employee from soliciting or accepting any gift under circumstances in which it can reasonably be inferred that the gift is intended to influence or reward the employee for official action. The Commission noted that a state board or commission member is considered an "employee" for purposes of the ethics code.

The Commission stated that it had long recognized that air transportation and hotel accommodations from a private source to a state employee constitute gifts of travel and lodging. Therefore the Commission held that the board member's trip to the mainland constituted a gift of travel and lodging from the private institution which, pursuant to section 84-11, should not have been accepted if it was reasonable to infer that the gift was intended to influence the board member in the performance of her official duties or reward her for official action.

The Commission explained that in applying section 84-11, HRS, in previous cases involving gifts of travel and lodging to state employees, the Commission had considered the following: 1) The business relationship between the donor and the recipient of the gift; 2) the relationship of the gift to the official function of the recipient; and 3) the benefits to the donor and the recipient of the gift.

Business relationship between donor and recipient. The Commission was informed that the board had not had any prior business dealings with the private institution. However, the Commission noted that at the time of the board member's trip to the mainland, the institution was subject to pending official action by the board member and by the other committee members in that the committee was considering whether or not to recommend state enrollment in the institution's training curriculum.

Relationship of the gift to the official function of the recipient. It appeared to the Commission that the gift of travel and lodging to the board member to visit the institution was related to the board member's official function as a member of the board committee. The purpose of the board member's trip was to obtain information about the institution's training program and facilities to determine whether the board's department should subscribe to the institution's program and curriculum. The Commission noted that the board was empowered by the state constitution and by statute with the authority to establish policies for certain programs throughout the State. The board member's trip appeared to the Commission to fall within the scope of her authority as a board member. The Commission noted that other members of the board, including its chairman, had confirmed that fact-finding trips, such as the board member's trip to the mainland, constituted a legitimate exercise of the board's duties.

Benefits to the donor and to the recipient of the gift. The Commission believed that as the donor of travel and lodging, the institution benefitted from the board member's visit to the mainland, because the member's trip enabled the institution to demonstrate its curriculum and facilities to the board member and to the other members of her group, thereby promoting the institution's training program. However, the Commission stated that it had no evidence that the institution received any unwarranted benefit from the board member or from the board as a result of the board member's trip.

The Commission believed that the board member and the other members of her group that visited the institution also benefitted in their official capacities from the trip. The board member and the members of her group had made it very clear to the Commission that their trip to the institution provided them with valuable information. The Commission stated that to the extent that the board member and her companions would use this information in the performance of their official duties, the Commission believed that the benefits of the trip ultimately redounded to the State. It did not appear to the Commission that the personal benefit of the trip to the board member outweighed the benefits to the State.

The Commission noted that it had previously held, with respect to a gift of air transportation and lodging to a state employee, that the most significant question for consideration is whether the gift obligates the State to the donor in such a manner that it can be inferred that the gift is intended to influence the State in the conduct of its future business or reward the State for past action. The Commission held that the totality of circumstances surrounding the board member's trip to the private institution did not indicate to the Commission that the gift of travel and lodging to the board member and to the other members of her group to visit the institution obligated the State to the institution in such a manner that it could be inferred the gift was intended to improperly influence or reward the State. Accordingly, the Commission concluded that the board member's acceptance of airfare and lodging from the institution was not in violation of section 84-11 of the ethics code.

Although the Commission did not believe that the board member's trip to the institution was in violation of the State Ethics Code, the Commission was concerned about practices that appeared to have occurred within the board and within the board's department with respect to the acceptance of gifts of travel and lodging from the private institution.

First, the Commission stated that it seemed that some board and department officials were unaware that air transportation, hotel accommodations, and meals that are offered to a state employee during the course of the employee's official duties constitute gifts of travel, lodging, and hospitality to the employee and, as such, are subject to the restrictions of section 84-11, HRS.

Second, the Commission stated that it would like to caution all state employees that offers of travel, lodging, and hospitality that are accepted in a non-discriminatory fashion may be in violation of the ethics code. In reviewing the board member's request for an advisory opinion, the Commission was informed that a total of six board members and department employees accepted trips to visit the private institution's facilities in a particular mainland state. The Commission stated that it was not its intent to substitute its opinion for the board's opinion as to whether or not the board needed to send six persons, as opposed to a lesser number of persons, to visit the institution. However, the Commission stated that it believed that a gift of travel that is offered to several state employees does not mean that as large a number of employees that can be accommodated should accept the offer. The Commission believed that some consideration should be given as to whether it is in the State's interest to allow more than one employee to accept such a gift of travel. The Commission also noted that the larger the contingent of employees accepting a gift of travel on behalf of the State for the same purpose, the more likely are questions to arise

regarding the legitimacy of the travel and whether the gift was intended to influence or reward the recipient employees.

Finally, the Commission stated that it had learned that during the previous year, fourteen department employees accepted air transportation and hotel lodgings from the private institution to visit the institution's facilities in another state on the mainland. It appeared that the general purpose of these trips was to acquire information about the institution to be used in counseling services. According to the board chairman, the board's department did not authorize official visitations to the institution by these employees, although the chairman and the board member who requested the Commission's opinion had indicated that they were aware that department employees were visiting or were planning to visit the institution. The Commission expressed concern about the apparent lack of reporting procedures and guidelines in the department with respect to the acceptance of gifts of travel and lodging from the institution in particular, and gifts of travel and lodging in general. The Commission stated that it believed that in the absence of departmental reporting procedures and guidelines, employees risk receiving or accepting gifts in violation of the ethics code. Although the Commission recognized that this problem was not confined to that particular department, the Commission nevertheless strongly recommended that the board and the department adopt reporting procedures and guidelines regarding the acceptance of trips that are offered to board members and to employees. The Commission stated that it and its staff would be very willing to assist the board and the department as necessary in connection with this matter.

The Commission stated that it appreciated the board member's seeking its advice and further appreciated the board member's cooperation.

Dated: Honolulu, Hawaii, October 28, 1988.

STATE ETHICS COMMISSION
Laurie A. Loomis, Chairperson
Rabbi Arnold J. Magid, Vice Chairperson
K. Koki Akamine, Commissioner
Cynthia T. Alm, Commissioner

Note: Commissioner David K. Kaupu was not present during the discussion and consideration of this opinion.