

## ADVISORY OPINION NO. 88-9

A state employee requested an opinion from the State Ethics Commission ("the Commission") as to whether there would be a violation of the ethics code if state employees used nontransferable air mileage credits acquired from travel on state business towards the purchase of airline tickets for personal travel.

The Commission's staff was informed that the employee's department had promulgated the following instructions, which applied to all state departments and agencies, regarding the use of travel benefits:

1. Benefits that accrue as a result of official travel by state officers and employees belong to the State; benefits do not belong to the officers or to the employees personally. Departments and state agencies were reminded not to make travel arrangements to benefit individual employees.
2. Whenever possible, departments and agencies should not allow coupons or other benefits to lapse; rather, the benefits should be used at the earliest possible date to reduce state costs. Any benefits that cannot be so used before the time of lapse should be offered to other state departments and agencies.

The Commission further understood that the employee's department had not established any instructions specifically pertaining to nontransferable travel benefits.

The employee's request for an opinion related to the frequent flyer promotional programs that are offered by various airlines. The Commission was informed that these programs vary among the many different airlines, but that the basic concept underlying these programs is that travelers accrue points or credits based upon the number of miles flown on a particular airline. After accruing a specified number of points or credits, travelers are then awarded benefits by the airline. The Commission had learned that benefits include upgrades on airline seating classes, hotel accommodations and car rentals; discounted airfare and hotel room rates; and free airline tickets, hotel accommodations, and car rentals. The Commission also learned that the frequent flyer awards for some airlines are freely transferable, but that other airlines limit the transferability of these awards.

The Commission found that the section of the State Ethics Code, chapter 84, Hawaii Revised Statutes ("HRS"), that was applicable to the question raised regarding the personal use of travel benefits accrued from state travel was section 84-13(2), HRS, which provides as follows:

**§84-13 Fair treatment.** No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others; including but not limited to the following:

....

- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of the legislator's or employee's official duties or responsibilities except as provided by law.

The Commission explained that this section of the ethics code prohibits a state employee from receiving compensation or other consideration for performance of the employee's duties except as provided by law. The Commission further explained that section 84-13(2) is a subsection

to section 84-13, HRS, which generally prohibits a state employee from using or attempting to use the employee's official position to secure an unwarranted privilege or advantage.

The Commission stated that it strongly believed that frequent flyer travel benefits accrued on state travel must be used for state purposes. At the same time, however, the Commission realized that this may not always be possible. The Commission was aware that many, if not most, frequent flyer benefits cannot be transferred from one state employee to another. Further complicating the situation, the Commission noted, was the fact that most airlines apparently do not permit state employees to maintain separate frequent flyer accounts for personal travel and state travel.

The Commission concluded that transferable travel benefits accrued on state travel must either be used for subsequent state travel by the employee that accrued the benefits or must be transferred to another state employee for state business.

The Commission further concluded that nontransferable travel benefits accrued on state travel must also, where at all possible, be used for state business. The Commission held that if it appears that frequent flyer benefits will not or cannot be used for future state purposes, state employees may use the benefits for personal travel without contravening the ethics code *provided* the State has adopted a policy to this effect. The Commission made no determination as to whether such a policy should be promulgated by the employee's department or by some other department, agency, or governmental branch. However, the Commission held that absent such a policy, travel benefits accrued on state travel cannot be used for personal travel.

In considering this matter, the Commission realized that the use of travel benefits accrued on state business may be subject to abuse. The Commission held that state employees who misuse travel privileges at state expense in order to accumulate benefits or awards for their personal use may be in violation of section 84-13, HRS, for using their official positions to obtain an unwarranted privilege or advantage for themselves. However, the Commission believed that the personal use of travel benefits that cannot be used for state purposes will not necessarily be violative of HRS section 84-13 or section 84-13(2) if the State specifically provides for this through an established state policy and if the State also is able to adopt a mechanism for administering and enforcing that policy.

The Commission noted that it was sensitive to the fact that the public might perceive the personal use by state employees of travel benefits acquired from state travel as unfair or unjust compensation. However, the Commission did not believe that the ethics code prohibits, on a *per se* basis, the receipt by employees of all benefits and privileges that may accompany public employment. The Commission noted that the State, as an employer, certainly has the discretion to accord its employees various benefits or privileges. If the State itself provides for its employees to receive nontransferable travel benefits that cannot be used for a state purpose and that would otherwise lapse and be wasted, the Commission did not feel that unwarranted advantages or compensation would accrue to employees as far as the ethics code was concerned. The Commission explained that an ethics problem arises only when employees receive unauthorized benefits or preferential treatment.

The Commission informed the employee who had requested this opinion that if the employee's department did in fact promulgate a policy to allow state employees to make personal use of nontransferable travel benefits accrued on state travel, the Commission would be more than willing to review that policy to insure that it did not conflict with any of the provisions of the ethics code.

The Commission expressed its appreciation to the employee for requesting an opinion in connection with this matter.

Dated: Honolulu, Hawaii, July 20, 1988.

STATE ETHICS COMMISSION  
Laurie A. Loomis, Chairperson  
K. Koki Akamine, Commissioner  
Cynthia T. Alm, Commissioner  
Rev. David K. Kaupu, Commissioner

Note: Vice Chairperson Arnold J. Magid was not present during the discussion and consideration of this opinion.