

ADVISORY OPINION NO. 91-2

A director of a department requested an advisory opinion from the State Ethics Commission (Commission) regarding the propriety of an incentive and awards program for Aloha United Way (AUW) coordinators within the department. This program would allow the coordinators to receive awards donated by private companies.

The state government encourages and supports the activities of the AUW. This department encouraged its employees to make donations to the AUW. Towards this end, the department was organized so that there were AUW coordinators for each division or office within the department. These coordinators helped organize the campaign and also received contributions from employees within their division or office.

In order to encourage full participation by the employees, the department wished to offer incentive awards to coordinators who obtained a high rate of participation within their units. These incentives would have taken the form of prizes which had been received from private companies. These prizes included such items as tote bags, restaurant gift certificates, round trip inter-island flights, and a weekend at a resort hotel on a neighbor island.

The prizes were all donated under slightly different circumstances. The administrative aide to a deputy director of the department appeared before the Commission on behalf of the department. The aide informed the Commission about the circumstances surrounding these donations. According to the aide, another deputy director of the department had friends in the restaurant business. These friends informed the deputy director that if she ever needed gift certificates, she should ask for them. This she did, and received gift certificates in amounts from ten to twenty-five dollars.

The airline tickets were solicited in a similar way. These tickets were for travel on a local airline. The department used this airline for its travel and made arrangements through a travel agent. This travel agent apparently told the department that he would be willing to donate tickets to the department. The department asked for the tickets for the incentive program.

The hotel stay was offered by a hotel on a neighbor island. According to the aide, the hotel's owner was a friend of one of the department's deputy directors. The owner offered the stay in order to help the deputy director establish the incentive program.

The Commission had several concerns about this situation. Initially, the Commission was concerned about a possible violation of section 84-13(2) of the State Ethics Code. That section reads 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 has held in a prior advisory opinion that it is not a violation of the State Ethics Code for the State to be involved in the AUW campaign. Thus, state employees who participate in raising funds for AUW while they are at work are carrying out state duties by participating in the AUW campaign. The state employees are, therefore, being compensated through their state salaries for doing this work. It seemed that an incentive program of this type was contrary to the intent of section 84-13(2).

The administrative aide noted that Hawaii Revised Statutes chapter 82, entitled "Incentive and Service Awards" allows for incentive awards to be presented to state employees. The Commission, however, was not convinced that chapter 82 was enacted to allow or authorize this type of incentive program. The Commission felt that there may be significant differences between the type of incentive program envisioned by chapter 82 and the type established by the department. The Commission, therefore, was reluctant to believe that chapter 82 was the law that authorized additional compensation in the form of these incentive awards.

Despite its concern about a possible violation of section 84-13(2), the Commission did not base its decision on a reading of that statute. Rather, the Commission believed that this incentive program would be violative of sections 84-11 and 84-13 of the ethics code.

Section 84-11 reads 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.

According to this section, a gift cannot be accepted or solicited if it is given under circumstances in which it can reasonably be inferred that its purpose is to influence or reward an employee or legislator. In determining whether this inference can be drawn, the Commission generally examines three factors. The first factor is the value of the gift. The second is the relationship between the recipient and the donor. The third factor is whether the gift confers a personal benefit to an employee or legislator.

In this case, the value of the gifts received varied somewhat. The hotel stay and the airline tickets were of very notable value. The restaurant certificates and the tote bags were of lesser value, but still seemed to have had significant value.

An analysis of the second factor revealed a definite relationship between the recipient and the donors. The recipient department has wide-ranging regulatory duties. These duties would require the department to inspect and regulate the donors of the prizes. The department also purchases the services of the airline that was donating tickets.

Finally, it was noted that these gifts were intended to confer a personal benefit to particular employees. These were not gifts to the State, but, rather, were indirect gifts to select employees. A single employee would have received the full impact and value of the gift. This, of course, would have tended to magnify the influence of the gift.

In light of these three factors, the Commission believed that this incentive program would be violative of section 84-11. These were personal gifts of significant value. In addition, the department receiving these gifts would be required to take very meaningful official action affecting the donors of these gifts. These factors combined to convince the Commission that acceptance or solicitation of these gifts for the incentive program would be violative of section 84-11.

The Commission also believed that the solicitation of these gifts would be violative of section 84-13. In relevant part, section 84-13 reads:

§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

In the past, the Commission has applied this section to prohibit the solicitation of donations for a personal benefit. In this case, this section forbids employees of the department from soliciting companies for donations of items that will personally benefit department employees.

The Commission was cognizant of the fact that these donations may not have been directly solicited by the department. It appeared that there was some willingness on the part of the companies to offer these items to the department. Nevertheless, the Commission believed that the companies would not have offered these items without an indication from the department that the donations would be desirable and would be accepted. In addition, it appeared that, at some point, department employees approached these companies and asked for a specific donation. The Commission believed that this amounted to a solicitation.

Although the Commission believed that the department employees who accepted or solicited gifts were acting in good faith to promote a worthy cause, the Commission believed that the gifts had to be returned. The return of the gifts would serve to obviate any issue of impropriety with respect to compliance with the ethics code.

The Commission noted that if the department still believed that an incentive program was desirable, then the department should consider a program authorized by chapter 82. Chapter 82 provides for a separate mechanism for establishing an incentive and awards program. The Commission noted, however, that if the department opted to institute an

incentive program in line with chapter 82, then it had to take care that its program did not encourage its employees to coerce others into making donations to AUW. The Commission was concerned about any kind of incentive program that rewarded AUW coordinators who achieved high rates of participation. The Commission believed that such a program ran the risk of encouraging coordinators to unduly pressure employees into making donations. Any coercion would violate the fair treatment section of the ethics code.

The Commission commended the director for his concern for adhering to the ethical principles set forth in the code of conduct. The Commission appreciated his bringing this matter to the Commission before he embarked on the incentive program. The Commission also appreciated the administrative aide's willingness to appear before the Commission and appreciated his candor in answering questions.

Dated: Honolulu, Hawaii, October 9, 1991.

STATE ETHICS COMMISSION
Reverend David K. Kaupu, Chairperson
K. Koki Akamine, Vice Chairperson
Cynthia T. Alm, Commissioner
Barbara J. Tanabe, Commissioner

Note: Commissioner Laurie A. Loomis was not present during the discussion and consideration of this opinion.