

## ADVISORY OPINION NO. 93-3

The director of a state agency asked the Ethics Commission (Commission) for an advisory opinion on whether her agency had properly solicited donations from private businesses. The role of the director's agency was to promote a certain industry in the State. The director said that her agency was sponsoring a conference that would soon take place. The conference would focus on the industry and would assist in promoting the industry. The director said that she had solicited a number of organizations for contributions to help sponsor this conference. She asked for advice as to whether these solicitations were appropriate.

The conference that the agency was sponsoring was an annual event. In past years, the agency had been a co-sponsor of this conference. However, for the past several years, the agency had been the only sponsor of this event. The director explained that the agency allocated money from within its own budget to sponsor the conference. The director said however, that, although the agency was spending quite a bit of its own money, it still needed outside support in order to fund the conference.

The director provided a list of all the organizations that the agency had approached for sponsorship money. The agency approached approximately 20 organizations, all of which were part of the industry. The industry contained many more organizations that were not approached for sponsorship money.

The director explained that a sponsor could either donate any amount of money that it wished, or it could donate a specific amount of money in order to sponsor a particular conference event. For example, the conference contained two breakfasts. A sponsor could opt to pay a certain sum of money and sponsor one of these breakfasts. The director said that the agency had received nearly \$10,000 in sponsorship money. The money was donated from five different organizations.

The solicitation and the acceptance of these contributions raised two major questions under the ethics code. The first question was whether these contributions were properly solicited. If these gifts were properly solicited, then the second question was whether the offered gifts were acceptable.

### 1. Were the contributions properly solicited?

The Ethics Commission has long recognized that the act of requesting a contribution may in itself be improper. HRS section 84-13, the fair treatment section of the ethics code, forbids employees from using their state positions to grant anyone an unwarranted advantage. In relevant part, this section 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 some situations, an employee's request for contributions may amount to a misuse of position in order to gain an unwarranted benefit for the employee or his agency.

As an initial matter, the Commission stated its belief that a state agency's solicitation of a private company for a state employee's personal benefit would be a violation of the fair treatment law. This type of solicitation would amount to the use of one's state position for an unwarranted personal benefit. Similarly, the Commission believed that a solicitation of a donation for an employee social event would also be a violation of this section.

In this instance, the purpose of the solicitations was to fund a state conference. The Commission, however, has traditionally discouraged solicitations for any purpose. In Advisory Opinion No. 45, issued in 1969, the Commission first discussed its opinion of solicitations. The Commission said:

State government pervades all parts of our business and economical life and controls it in many areas. Because of this power, the solicitation of a gift from a business concern which must operate within the system places that concern in an awkward position. If the business solicited does contribute, there is always the suspicion of favored treatment to the detriment of other members of the industry who do not give equally. And a non-contributing concern will never be sure whether its failure to contribute will be remembered at some later time when it is dealing with the State.

Thus, it appears appropriate that the State should take care not to obligate or create the appearance of obligating itself or others in the conduct of its business. Only if the State in its official actions conducts itself on the very highest ethical level can it inspire confidence in state government and high ethical standards of conduct in its employees.

The Commission restated its basic opposition to solicitations in Advisory Opinion No. 316. In that opinion, the Commission said:

In addition, however, we suggested to the [agency] as we had to others in the past, that it fully consider the position in which the solicited business would be placed by such solicitations. While the [agency] might not take action directly affecting a specific business, it did act as a representative of an all-pervasive state government. Some programs were designed to require public as well as private financial assistance, but that fact would be known at the outset. In the case of this program, businesses were not expecting to be asked to contribute and if asked might be placed in a rather awkward position.... The savings to the taxpayers had to weighed against the loss of credibility and trust by the public that might be occasioned by solicitations of persons and business to support government projects.

These opinions clearly illustrate the Commission's basic position that solicitations of any sort are not favored.

Despite this basic position, however, the Commission has held that solicitations of private companies for state purposes are not per se violations of the ethics code. The fair treatment law is violated only if the solicitation amounts to a misuse of position resulting in an unwarranted benefit to the agency or the soliciting employee. Any solicitation that reasonably appears to be coercive would amount to a misuse of position in violation of section 84-13.

In Advisory Opinion No. 504 the Commission discussed the appropriateness of a solicitation. The Commission listed a number of factors that should be considered in determining whether a solicitation was in violation of the ethics code. Among these factors were whether the gift benefitted the State or whether it benefitted a particular employee, the size of the gift, whether the employee's department had before it an application or a request affecting the donor of the gift, and the custom and practice of the community.

In determining whether or not the director's requests for contributions were coercive in violation of section 84-13, the Commission examined several factors similar to those expounded in Advisory Opinion No. 504. First, the Commission examined whether or not the agency did business with the organizations that it had solicited, and, if so, whether the agency

had recently done business with the organizations, or would soon do business with the organizations. The Commission believed that the closer the business relationship between a soliciting agency and a solicited organization, the more likely it would be that an element of coercion would be present. The Commission was concerned that it could appear that if the company did not contribute, then the agency would cease doing business with the company.

The director solicited some organizations with which her agency had a business relationship. The agency had some business ties to four of the five donating organizations. The director explained that one of the organization's developed and maintained a piece of equipment used by the agency. However, this organization's contract to maintain the equipment was with another state agency rather than with the director's agency. The agency also subscribed to a service provided by a second donating organization. In addition, the agency had bought some equipment from this second organization. These pieces of equipment were on the state price list. The director said that the agency had bought equipment that was manufactured by a third donating agency. This equipment was purchased approximately two and one half years ago. The director did not foresee the need to purchase anything manufactured by this third organization in the near future.

The director said that the company with which her agency had the most direct relationship was the fourth company. In the last fiscal year, this company bid on several contracts issued from the agency. The director said that the company had worked on less than five contracts for the agency in the past year. These contracts were for amounts in the 18-25 thousand dollar range. They were all bid contracts. The Commission thought that the bidding process somewhat reduced the contracting agency's discretion in choosing the company to perform work under a contract.

The second factor that was considered in determining whether the solicitation was coercive was the nature of the relationship between the agency and the organization being solicited. State agencies have wide ranging duties. Some agencies are required to inspect or regulate private businesses. An employee of an agency that inspects or regulates the companies that the employee solicits is much more likely to run afoul of section 84-13 than an employee of an agency that does not regulate or inspect these companies.

The director's agency was not a regulatory agency. The mission of the agency was to promote a particular industry. The legislation that established the agency indicated that it was to work closely and cooperatively with members of the industry. In many cases, the interests of the agency were parallel to those of the businesses in the industry. The agency appeared to be viewed by the industry as a resource rather than as a regulator.

The third factor the Commission examined was whether all members of the particular industry were solicited or just a few. When seeking donations to an event, it would be reasonable for an agency to approach members of the industry that would likely be interested in the event. However, if an agency approached only select members of the industry, then the Commission believed that it would be possible to infer that the agency was targeting certain members and seeking to influence those over which it had some power or control.

In this situation, the agency had solicited certain members of the industry. Members of this industry were solicited because they would naturally be interested in this conference. The industry was a large one and not all members of the industry were solicited. The director explained that only certain members were solicited not because the agency had any special power over these companies, but because the agency was short of time and so sought sponsorship money only from companies that were likely to contribute. The director explained that the agency had approached companies that had sponsored the conference in past years, or that had participated in similar conferences.

The fourth factor that the Commission examined in determining whether or not any coercion was present was the form that the solicitation took. The Commission believed that it was possible that the language of a solicitation could create the impression that an agency was requiring a donation, or that the agency would retaliate against a company that refused to donate. Language of this sort would appear coercive.

The director solicited sponsorship money by letter. Two different types of solicitation letters were used. The first type was sent to the organization that had no business ties to the agency. The director sent a letter to this organization to determine whether an officer of that organization would be interested in speaking at the conference. Towards the end of this letter, the director noted that the agency was seeking sponsors for the conference and stated that perhaps the organization would like to support the event. There was no other mention of sponsorship in this letter. Representatives from this organization then called the agency and told the director that they were interested and asked for further information on sponsorships. The sponsorship options were described over the phone. It was explained that a sponsor could sponsor a particular conference event, such as a breakfast, and pay the cost of that event. Otherwise, a sponsor could donate any amount to the conference. A second follow-up letter was then sent to the organization. The second letter again described the conference and also provided a list of conference events and their estimated costs.

The second type of solicitation letter was sent to other potential sponsors. The Commission found that this version was much more direct. The letter explained the conference and then invited the organization to participate in the conference as a presenter, as an exhibitor, and as a sponsor. If the company had contributed to the conference the previous year, then the letter went on to say that the company's previous donation was appreciated and that the company's continued support was needed this year. The letter then described the sponsorship options and provided a list of events along with estimated costs for sponsoring the events. It was explained that the organization could opt to donate any amount of money rather than sponsor an event.

The four sponsors that did business with the agency were among the organizations that received this second type of solicitation letter. These companies, along with others that ultimately did not choose to donate any money, were then called by the agency's staff and the sponsorship options were explained again. The director informed the Commission that no one was asked to sponsor a particular event and no one was asked to give a particular amount of money.

The Commission believed that the language of the director's request to the organization with which the agency had no business ties was clearly not coercive. The language in the initial solicitation letter was quite mild. It was left up to the company whether or not to respond to the request. Once the company did respond, it was given a number of choices for contributing to the conference. The company was told that it could sponsor a specific event for a certain price, or that it could contribute any amount that it wished. It appeared that the decision to become a sponsor was left to the company's initiative and that the amount of the donation was left to the company's discretion. For these reasons, the Commission did not believe that the form of this solicitation was coercive.

The solicitation of the other companies was a bit more troubling to the Commission. The letter said that support was needed and went on to list events and their estimated costs. The Commission has generally frowned upon requests for donations that mention specific dollar amounts. On the other hand, it appeared that the agency did not pressure any company into donating a specific amount or into sponsoring a specific event. The agency essentially laid out all of the sponsorship options and then allowed the company to choose one.

The final factor the Commission considered in determining whether the solicitation was coercive was whether the solicited company would receive a legitimate benefit in return for

its donation. If the company received a substantial benefit from the donation, then it was less likely that the donation was forced from the company. For example, a conference may greatly benefit a company in that it serves as a forum for an exchange of information or as a platform for new ideas or technology. In addition, sponsors may improve their public relations or gain advertisement for their companies. In some cases, the benefit to the company may be so great that the company and the State may treat the conference as something akin to a joint venture.

The conference in question was one of the biggest conferences in the State for this particular industry. It was attended by many members of the private sector as well as by state employees. Presenters this year included members of the private sector as well as state employees and officials. The information presented at the conference was valuable to the sponsors. The conference also featured vendors who exhibited their products. The director explained, however, that none of the sponsors had exhibits this year. The director explained that the sponsors were periodically acknowledged during the conference. The director said that they were thanked during the actual sessions, and also during the events such as breakfasts and receptions. One page of the conference program was an acknowledgement of the sponsors. The names of the sponsors and their logos appeared in large type on this page.

The sponsors of the conference did receive some benefit in exchange for their donations. They received information that was important to them. They also improved their public relations and got some advertising. The Commission thought that a benefit to a solicited company did not remove a solicitation from scrutiny, but it did diminish the likelihood of coercion.

It was clear to the Commission that the solicitation of the organization that did not do business with the agency was not coercive in violation of section 84-13. The agency had no business relationship with the organization. The organization was solicited because of its extensive interest in the industry. The form of the solicitation was mild. Finally, the organization received some benefit in the form of shared information and public relations.

It was a closer question whether the other solicitations were in violation of the fair treatment law. The agency had some sort of business relationship with all of the other sponsors. This relationship, however, was not that of a regulator and a regulated company. The agency was expected to work in a cooperative manner with the private sector. In addition, not all members of the industry were solicited. However, those solicited were chosen because they had sponsored these kinds of conferences in the past. Further, although the form of the solicitation was very direct, the companies were not specifically asked to donate a certain amount of money. Finally, it appeared that the companies did receive some benefit from the conference. They were able to share information and improve their public relations.

The most troubling aspect of these solicitations was the fact that the agency had engaged in a forthright request for contributions from companies with which it did business. The ultimate question, however, was whether the solicitations were coercive. The Commission believed that they were not. These companies were solicited because of their past interest in participating in these types of conferences. They had a history of a willingness to participate. The agency's goal was to promote the industry so that this conference did benefit the sponsors. The director assured the Commission that in making the actual request no one was pressured into donating. Instead, the sponsors were simply presented with all of the sponsorship options. It was also noteworthy that none of the companies complained to the Commission about the solicitations. In light of these facts, the Commission believed that these contributions were not improperly solicited.

2. Were the offered gifts acceptable?

The second question that the Commission answered was whether the offered contributions were acceptable gifts. Section 84-11, the gifts section, 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.

The gifts law forbids a state employee from accepting a gift if, under the circumstances, it is reasonable to infer that the gift is intended to influence or reward the employee.

In determining whether or not a gift was given for an improper purpose, the Commission has traditionally examined at least three factors. The first of these is the value of the gift. Gifts of large value tend to raise more of an inference of an improper purpose. In this case, the gifts were of substantial value. The gifts ranged in value from \$500 to \$5000 from five different sources.

The second factor that the Commission examines is whether the recipient of the gift takes action affecting the donor of the gift. The director explained that the agency took no action affecting one of the sponsors and had no relationship to that company. The agency did have a relationship to the other companies. The first of these other companies maintained some equipment that the agency used. However, the company's contract was with another agency and not with the director's agency. This same company was also in the midst of publishing a brochure that would advertise its equipment and would refer heavily to the agency. The brochure would provide desired publicity for the agency. The agency also subscribed to a service offered by the second sponsoring company. The agency had bought some equipment from this same company. About two and one half years ago, the agency purchased equipment from the third sponsoring company. The director did not foresee that the agency would purchase anything else directly from this third company. The fourth company performed work on several substantial contracts with the agency in the past year. All of these contracts had gone out to bid. The director anticipated that the agency would have contracts with this company in the future.

The third factor that is significant in determining whether a gift is appropriate is whether a state employee receives the benefit of the gift, or whether the gift benefits the State. In this case, the sponsorship money was used to help fund in which a state conference. The conference featured state and national speakers. The director estimated that between 200 to 300 people attended this conference. The conference aided in promoting the industry. Thus, it appeared that the donations benefitted the State rather than a particular employee.

The Commission noted that the legislature had provided a mechanism for the agency to accept gifts. A section in the HRS allowed this agency to set up a fund in which to deposit money received from public or private contracts, public or private grants, awards, or gifts. This provision indicated that the legislature clearly intended that the agency be allowed to accept gifts of money intended to be used for a state purpose.

The gifts offered to the agency were of substantial value. In addition, except for one organization, the agency took action affecting the donors of these gifts. However, these gifts were specifically intended to help fund a conference that served a state purpose. The conference promoted the industry in Hawaii. Thus, these gifts were not intended to benefit

a particular state employee, but were instead intended to benefit the State of Hawaii. The legislation that established the agency specifically allowed it to accept gifts of money for a state purpose. For these reasons, the Commission believed that these gifts were not prohibited by section 84-11.

The Commission believed that the director did not act improperly in soliciting these contributions and allowing her agency to accept them. In requesting the contributions, there was no misuse of position in violation of section 84-13. Because the donations were used for a state purpose, there was no violation of section 84-11.

The Commission appreciated the candor and cooperation that the director exhibited during the Commission's review of this matter. The Commission also appreciated the sensitivity that the director exhibited by seeking advice on this matter.

Dated: Honolulu, Hawaii, July 21, 1993.

STATE ETHICS COMMISSION

K. Koki Akamine, Vice Chairperson  
Cynthia T. Alm, Commissioner  
Laurie A. Loomis, Commissioner

Note: Commissioner David K. Kaupu participated in the Commission's decision but was unable to be present at the signing of this opinion. There was also a vacancy on the Commission when this opinion was signed.