

ADVISORY OPINION NO. 93-5

The State Ethics Commission (Commission) received a request for an advisory opinion concerning the trading of collectable milk caps. The request was received from a teacher in the public school system. The teacher had traded milk caps with both teachers and students at her school.

The Commission initially received notice of this situation through an anonymous telephone call. The caller said that a teacher was trading milk caps with students at her school. In response to this telephone call, the Commission's staff spoke to the principal of the school. The principal was apparently unaware that the teacher was trading milk caps with students. He instructed the teacher to stop trading milk caps with students.

The Commission's staff then spoke to the teacher about this matter. She explained that the milk cap craze had invaded her school at the beginning of the school year. She said that some teachers brought some milk caps for the students to play with. Some of the teachers then divided up a roll of milk caps. She took a portion of the roll and put it in her classroom for the students to play with. This set of milk caps was considered a classroom set. She said that sometimes students would donate their own milk caps to the classroom set.

The teacher then began collecting her own milk caps. She kept her good collection in three ring binders. The binders held her more valuable or unusual milk caps. She also had a personal set of milk caps that were less valuable, or that were duplicates of the milk caps in the binders. The less valuable milk caps were kept in a tray.

She initially began trading milk caps with some of the students in her own class. As word got out that she would trade milk caps, she began trading with some of the other students at the school. She generally traded with students at the grade level at which she taught. She said that occasionally she would also trade with students in other grades who were interested.

The teacher said that the trading probably arose from the students donating milk caps to the classroom set. She said that students would bring in milk caps that they no longer wanted. The students were aware that the teacher collected milk caps. The students would ask the teacher if she had a particular milk cap and then offer it to her for her own collection. The teacher explained that if she did not have the milk cap, and if it was in good shape, then she would take it for her collection. The teacher did not think that she should take a milk cap from a child without giving something in return. She decided to give the child a milk cap from her tray in exchange for the milk cap that the child offered. The teacher said that she allowed the students to choose any milk cap from her tray in exchange for the child's milk cap. The teacher estimated the average value of these milk caps at around twenty-five cents. The teacher said that she always made sure that the trade was a fair one. She also said that she would not take a milk cap from a child unless the milk cap was a duplicate of one that the child already had.

The teacher also mentioned that a family member owned a sport cards store. The store sold milk caps and other items. The teacher said that in her off time she worked as a volunteer at the store. Because she was not paid, she was able to take milk caps from the store. She said that some of these milk caps she added to her collection. Some she traded to students.

The teacher also said that she traded and sold milk caps with other teachers at her school. The milk caps that she traded and sold came from the store. She said that she kept the money from her transactions with the teachers. If the other teachers traded milk caps

with her, then she either kept the traded milk caps for herself, or took them back to the store. These transactions occurred at the school after school hours.

The teacher stressed that she never sold milk caps to the students. She only traded milk caps of relatively low value. The teacher's interest in the milk caps was apparently speculative. She told the Commission's staff that she intended to keep her collection and hope that it appreciated in value. The teacher said that her most valuable milk cap was worth between seven and ten dollars. She had seen some milk caps priced at twenty-five dollars.

The Commission believed that the teacher's actions raised issues under several provisions of Hawaii Revised Statutes (HRS), chapter 84, the state ethics code. In particular, the Commission was concerned about issues raised under HRS section 84-13, the fair treatment section. 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; including but not limited to the following:

....

- (3) Using state time, equipment, or facilities for private business purposes.
- (4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom the legislator or employee inspects or supervises in the legislator's or employee's official capacity.

In general, the fair treatment section forbids a state employee from using his state position to grant himself, or anyone else, an unwarranted advantage. Section 84-13(3) and 13(4) refer to specific activities that violate the fair treatment section.

The first issue faced by the Commission was whether trading collectable items such as milk caps with one's students bestowed an unwarranted benefit upon a teacher. The Commission believed that it did. A teacher who traded collectibles with her students was using her position to gain access to trading partners in a way that was not available to other collectors. The teacher had placed herself in a preferential position. She had created a closed market within the school. While she had the opportunity to trade with students within this market, others did not. Thus, the Commission believed that by trading with the students who assembled at the school, the teacher used her position to grant herself an unwarranted benefit.

Subsection 84-13(3) was also applicable. This section prohibits a state employee from using any state time, equipment, or facilities for a private business purpose. The ethics code defines the term "business" as:

a corporation, a partnership, a sole proprietorship, a trust or foundation, or any other individual or organization carrying on a business, whether or not operated for profit.

The Commission believed that an individual who sold items for a private benefit was conducting a business. In addition, the acquisition of items for later sale in a retail store was also a private business activity. Section 84-13(3), therefore, prohibited a state employee from using any state time, equipment, or facilities in order to sell items or to acquire items for later sale. The Commission believed that this section prohibited a teacher from selling milk caps

and other collectable items to fellow teachers while on school property. It also prohibited a teacher from acquiring milk caps for later sale in a retail store.

The final section that was applicable was section 84-13(4). This section forbids substantial financial transactions between supervisors and subordinates. In the past, the Commission had applied this section to forbid substantial financial transactions between teachers and their students. For example, in Advisory Opinion 450, the Commission applied section 84-13(4) to forbid a teacher from doing private work for one of the classes at his school. In that opinion, the Commission noted that there is a dependent relationship between students and teachers. The Commission said that, because of this relationship, a student is unable to effectively negotiate with a teacher at his school. The two are in unequal bargaining positions.

While it was not clear that trading milk caps with a student amounted to a substantial financial transaction, such trading nonetheless raised concerns about the unequal bargaining power between a student and a teacher. The Commission believed that financial transactions of even low value may be affected by this inequality in positions. In addition, the Commission believed that a teacher who engaged in a private transaction with a student ran the risk of jeopardizing the relationship between the student and the teacher. Thus, while the Commission did not hold that trading milk caps with a student necessarily violated section 84-13(4), the Commission nonetheless strongly advised against such transactions.

It was the Commission's opinion that HRS section 84-13 prohibited a teacher from trading milk caps with the students at her school. It was the Commission's further opinion that section 84-13(3) prohibited a teacher from privately selling milk caps to other teachers while on school grounds and from acquiring milk caps from other teachers for later sale. The Commission also believed that trading milk caps with students raised serious concerns under section 84-13(4) and so strongly advised against such trading.

The Commission appreciated the fact that the teacher in this instance stopped her activities as soon as her principal spoke to her. It appeared that the teacher was unaware of the restrictions contained in the ethics code. Throughout the Commission's review of this matter, the teacher had been genuinely remorseful and cooperative. The Commission was less concerned with the teacher's individual situation than it was with the fact that teacher trading of milk caps seemed to be an institutional problem within the teacher's department. It appeared that trading and selling milk caps was quite prevalent at the time that this particular situation was brought to the Commission's attention. The Commission believed that the best solution to this problem was to communicate with the department administration in order to bring about greater awareness of the provisions of the ethics code. The Commission believed that violations of this sort should not be occurring. The Commission felt that if they persisted beyond the education efforts, stronger action would be necessary.

DATED: Honolulu, Hawaii, November 3, 1993.

STATE ETHICS COMMISSION

Rev. David K. Kaupu, Chairperson
K. Koki Akamine, Vice Chairperson
Cynthia T. Alm, Commissioner

Note: Commissioner Don J. Daley 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 considered.