

ADVISORY OPINION NO. 93-6

Dear Mr. Blair:

In a letter dated October 7, 1993, you requested an advisory opinion concerning items purchased using the legislative allowance. The legislative allowance is a \$5000 allotment given to each member of the legislature. In your letter, you stated that over the years you have used this allowance to acquire certain non-perishable items. Among these items are such things as computer hardware, computer software, and books. You wrote that you assumed that these items were state property. You asked what should be done with these items when you left the Senate. You resigned from the Senate on November 19.

Payment of a legislative allowance is authorized by the State Constitution. In relevant part, article III of the State Constitution reads:

The members of the legislature shall receive allowances reasonably related to expenses as provided by law....¹

The phrase "reasonably related to expenses as provided by law" was added to this provision during the 1968 Constitutional Convention. Standing Committee Report No. 46 discussed the inclusion of this phrase:

An amendment has also been made to this section to relate the allowances to reasonable expenses. While your Committee has no reason to believe that there is any abuse under the present provision, the amendment would clearly restrict allowances from taking any forms of subsidy. With the term "allowances" restricted to relate to reasonable expenses, it was believed that the legislature should have some flexibility to, and could fairly, effect changes in allowances to apply immediately to reflect current needs and expenses.²

Standing Committee Report No. 46 indicates that the allowance is intended to be used for reasonable expenses of the legislator. The report states that the allowance is not to be used as a subsidy. A legislator is not to treat the allowance as a grant of money to be used in any manner the legislator wishes. Instead, the allowance must be used to cover reasonable expenses.

In response to this constitutional amendment, the legislature appointed a committee to develop a recommendation on the form that the allowance should take. The Citizen's Committee on the Allowance for Personal Expenses of Members of the Legislature was instructed to adjust expense allowances so that they were "reasonably related to actual expenses, taking no form of income or subsidy."³ The Citizen's Committee's report initially described the expenses requiring an allowance as:

¹ Haw. Const. art. III, § 9.

² Standing Committee Report No. 46, Vol. I Proceedings of the Constitutional Convention of Hawaii, 211, 214 (1968).

³ Report of the Citizen's Committee on the Allowance for Personal Expenses of Members of the Legislature, Memorandum of Comment and Dissent by Mrs. Robert V. Vik, member (1969).

expenses such as meals required by meetings held early or late in the day, auto mileage (beyond travel to and from work) and depreciation, increased home telephone bills, expenditures connected with social, political, and charitable functions which a legislator is expected to attend, postage for newsletters, and other mailings to constituents, all of which apply to every member of the legislature.⁴

The Citizen's Committee "adopted the concept of an annual expense allowance consistent with the view that legislators perform legislatively related tasks throughout the year."⁵ The Committee's report then stated:

It is the Committee's intent that this allowance be applied against expenses such as those entailed in a legislator's presentation before community gatherings of his constituents as well as the more traditional expenses occasioned by legislative sessions or interim and pre-session committee meetings held on the home island.⁶

The Committee recommended that the allowance be set at \$750. The Committee's report further stated:

The Committee is of the opinion that this allowance need not be itemized by legislative rule since sufficient safeguards are provided by the Federal Internal Revenue Service requirement for itemization of expense allowances over \$25....Finally, the Committee is concerned that certain members of the public may surmise that the annual expense allowance constitutes a "salary increase" for legislators. To forestall such an interpretation, the Committee proposes that this allowance be referred to as the "Per Annum Expense Allowance to Take Care of the Necessary Personal Expenses Connected with Legislative Duties."⁷

The Committee's Report reflected the constitutional intent that the allowance not be used as an income or subsidy to the legislator. The Committee listed examples of expenses that could be covered by the allowance and offered its opinion that the expenses covered by the allowance should be itemized pursuant to Internal Revenue Service requirements. The Committee also indicated that the allowance should not even appear to be a salary increase. This report was forwarded to the legislature.

Senate Bill 3 of 1969 proposed a legislative allowance consistent with Standing Committee Report No. 46 of the Constitutional Convention and the Report of the Citizen's Committee on the Allowance for Personal Expenses of Members of the Legislature. Standing Committee Report No. 4 on Senate Bill 3 echoed the language of the Citizen's Committee's report. The Standing Committee Report explained the purpose of the expense allowance:

In proposing an annual salary, it was the intent of the Constitutional Convention that legislators are to be available for legislative work throughout the year and that they are expected to keep their communities and constituents informed on the legislative process and issues. Your Committee has provided each legislator

⁴ Report of the Citizen's Committee on the Allowance for Personal Expenses of Members of the Legislature, 2 (1969).

⁵ Id., at 2.

⁶ Id., 2-3.

⁷ Id., 3.

with an annual allowance of \$750 to cover the expenses connected with legislative work, such as meals required by meetings held early or late in the day, auto mileage (beyond travel to and from work) and depreciation, increased home telephone bills, expenditures connected with social, political and charitable functions which a legislator is expected to attend, postage for newsletters and other mailings to constituents.⁸

Conference Committee Report 2 on this same bill essentially repeated the language of the Standing Committee Report.⁹ Again, it is clear that the allowance was to be tied to expenses connected with legislative duties.

Senate Bill 3 resulted in the enactment of Hawaii Revised Statutes (HRS) section 24-1, which originally read:

§24-1 Allowance for incidental expenses. Each member of the legislature shall receive an annual allowance of \$750, which amount is to cover incidental expenses connected with legislative duties and the amount shall be payable in a manner prescribed by the respective rules of each house.

Over the years, the amount of the allowance has increased. In 1975, the amount of the allowance was raised to \$1500. Standing Committee Report No. 36 on House Bill No. 171 of 1975, which proposed the increase, reported that the increase was due to inflation and "the anticipated increase in legislative activities during interim periods."¹⁰ In 1981, the allowance was raised to \$2,500. Finally, in 1987, the allowance was raised to its current level of \$5,000.

Both houses of the legislature have adopted rules prescribing the manner in which the allowance is to be paid. The Senate rules read:

Each legislator is allowed such amount as provided by statute to be used for any purpose he considers in his discretion to be appropriate in his duties as a legislator.

The use of the allowance is not subject to reporting or accounting, and the amount of the allowance is not subject to reduction or adjustment by reason of the receipt of any other allowance provided by the statute or under any other section of this manual or by reason of the legislator serving for less than a full year. The allowance is paid in a lump sum no later than 10 calendar days after the effective date of legislation appropriating funds for the operation of the Senate. In the case of a legislator who fills a vacancy after the specified 10-day period, the allowance is payable no later than 10 days after he is appointed by the Governor.¹¹

The rules of the House of Representatives contain a similar provision.¹²

⁸ Senate Committee on Ways and Means, SC Rep. No. 4, 5th Leg. (1969).

⁹ Conf. Com. Rep. No. 2, 5th Leg. (1969).

¹⁰ Senate Committee on Ways and Means, SC Rep. No. 36, 8th Leg. (1975).

¹¹ Administrative and Financial Manual of Guides of the Senate State of Hawaii, title 1, § 1.3.

¹² House Administrative and Financial Manual, title 1, § 1.3 (1993-1994).

Pursuant to the rules of the Senate, each senator is given the allowance in a lump sum. The Senate does not require its members to keep any accounting of the money. According to United States Treasury Regulations, business expenses reimbursed by an employer under a non-accountable plan are included in the employee's gross income and must be reported as wages or other compensation on the employee's Internal Revenue Service Form W-2.¹³ The Senate's payment scheme appears to amount to a non-accountable plan. Accordingly, at the time that he is given the allowance, the senator also receives a W-2 Form. The senator reports the allowance to the Internal Revenue Service as part of his gross income.¹⁴ This, however, appears to be inconsistent with the State Constitution and HRS section 24-1, both of which clearly indicate that the allowance is not to be used in the same manner that income is used. Use of the allowance is restricted. It is only to be used for expenses related to legislative duties. It may not be used as a subsidy for the legislator.

In your situation, you have used the allowance to purchase non-perishable items connected with your legislative duties. You asked what should become of these items now that you have left office. Your question raises issues under section 84-13 of the ethics code, chapter 84, HRS. 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....

Section 84-13 forbids a state legislator from using his position as a legislator in order to bestow an unwarranted privilege or advantage upon himself or anyone else. The ethics code does not define the term "unwarranted." However, in Informal Advisory Opinion No. 23, the Ethics Commission stated that the term "means that a state employee or official has attempted to secure an advantage...that would not come about through the proper exercise of state powers." In this instance, a proper exercise of state powers would entail using the legislative allowance exclusively for purposes reasonably relating to legislative duties. If a legislator were to use the allowance for another purpose, then the legislator would likely be in violation of section 84-13.¹⁵ For example, a legislator clearly could not use the allowance to subsidize his personal income. This would amount to a misuse of position in violation of HRS section 84-13.

In the situation that you described, a legislator purchases a non-perishable item with the allowance. The Ethics Commission believes that if the legislator were to convert this item to his own personal property, then he would be in violation of HRS section 84-13. In your letter, you stated that you assumed that items purchased with the allowance were state property. The Ethics Commission believes that this is a correct assumption. The items were purchased with state funds specifically designated to cover expenses connected with legislative duties. They must be used for legislative purposes. HRS section 84-13 would prohibit a legislator from converting the items into his own personal property.

The Ethics Commission believes that non-perishable items purchased with the legislative allowance should be considered state property. They should be treated no

¹³ Treas. Reg. § 1.62-2(c) (5) (1992).

¹⁴ See Office of Information Practices Op. Ltr. No. 93-17, issued to Senator Russell Blair, 10-11 (Oct. 8, 1993) for a discussion of the applicable Treasury Regulations.

¹⁵ While the Ethics Commission believes that it is not within its jurisdiction to determine whether use of the allowance is in compliance with HRS 24-1, the Commission does believe that if a legislator were to use the allowance for a purpose clearly unrelated to his legislative duties, then the legislator would likely be in violation of HRS section 84-13.

differently than other pieces of state property at the legislature. State property located at the Senate is inventoried. If a senator leaves the Senate, the state property in his office stays with the State. Accordingly, non-perishable items purchased with the legislative allowance should be placed on inventory and remain with the Senate when a senator leaves office. The Ethics Commission believes that the non-perishable items that you purchased with your legislative allowance should remain with the State. It is for the State to decide how to allocate or dispose of these items.

The Ethics Commission would like to thank you for your request for advice. Your sensitivity to the ethical concerns arising out of this situation is greatly appreciated. We wish you well in your future endeavors.

Dated: Honolulu, Hawaii, December 10, 1993.

STATE ETHICS COMMISSION

Reverend David K. Kaupu, Chairperson
K. Koki Akamine, Vice Chairperson
Cynthia T. Alm, Commissioner
Don J. Daley, Commissioner

Note: There was a vacancy on the Commission when this opinion was considered.