HAWAII
STATE
ETHICS
COMMISSION
State of Hawaii • Bishop Square, 1001 Bishop Street, ASB Tower 970 • Honolulu, Hawaii 96813

ADVISORY OPINION NO. 2015-1

The Hawaii State Ethics Commission ("Commission") has learned that it is a longstanding practice for Department of Education ("DOE") teachers and other DOE employees (collectively, "teachers") who serve as chaperones on student educational trips to be offered free travel and other benefits from tour companies through which the teachers plan and organize these trips.

The State Ethics Code, Chapter 84, Hawaii Revised Statutes ("HRS"), prohibits teachers from accepting free travel and other benefits from tour companies for serving as chaperones on student educational trips, where the teachers are directly involved in planning a trip and selecting a tour company to help organize the trip, promoting the trip to students and their parents, deciding who will chaperone the students, and/or requesting DOE approval of the trip.

I. Facts

Based on the Commission's understanding of the facts, a teacher or group of teachers plans and organizes an educational trip for students. The trips that are the subject of this Advisory Opinion (also referred to as "student educational trips") are organized and arranged as follows:

- The teachers decide to offer students the opportunity to participate in an educational trip and decide on a particular destination.

- The trip usually relates to a particular subject such as history or foreign language. The trip is not mandatory or a required part of the curriculum but, rather, an "enrichment" activity offered to interested students and their parents.

- The trip usually is scheduled to occur around the time of a school break, such as Spring Break or summer.

- Teachers who are interested in and/or willing to accompany the students and serve as chaperones plan and organize the trip.

- The teachers select a particular tour company to help organize the trip. When selecting the tour company, the teachers do not appear to follow formal state procurement procedures. The choice of tour company appears to be based on the teachers' own subjective criteria.

- The teachers select a particular tour package offered by the tour company or work with the tour company to develop a trip itinerary.

- The teachers generate interest in and promote the trip to students and their parents. Typically, this involves meeting with the parents and disseminating and presenting informational and promotional material about the trip prepared by the tour company.

- The tour company may prepare a letter to the students' parents from a particular teacher, on the tour company's letterhead, to generate interest in the trip. The teacher's name may appear as the signatory of the letter. In addition to providing information about the trip, the letter may include an endorsement of the tour company by stating that the teacher chose that particular tour company due to the quality and affordability of that company's services.

- The tour company may also prepare a PowerPoint slide show promoting the trip, which the teachers present at an informational meeting with parents. The slide show may bear the tour company's logo and identify a particular teacher as the person who will be leading the student travel group. The tour company customarily offers one free travel package to a teacher per a certain number of paying travelers. For example, for a trip to the East Coast, the ratio may be one free travel package per 10 paying travelers; whereas for a trip to Europe, the ratio may be one free travel package per six paying travelers.

- The travel package typically covers airfare, hotel accommodations, meals, overnight hotel security, illness and accident insurance coverage, entrance fees to the sites visited, and gratuities. Some tour companies provide emergency and/or other types of assistance during the trip as part of the travel package.

- The fair market value of a teacher's travel package is several thousand dollars, e.g., $3,500 or more for a tour of East Coast cities, and $5,500 or more for a tour of European countries.

- Travelers who must pay for the trip include the students, parents who want to accompany their children on the trip, and other members of the students' families, if they are invited to join the travel group. Paying travelers also may include a teacher's spouse and/or family members.

- The tour company may also offer a teacher additional benefits. For example, the tour company may offer a teacher who will be leading a student travel group for the first time a free weekend "orientation" trip to the mainland, to experience a tour firsthand and obtain additional information from the tour

company. The tour company may also offer a teacher a stipend for the trip, "points" that can be earned and applied toward obtaining other benefits from the tour company, or a personal gift, such as an iPad.

- The students may conduct fundraising activities to help pay for their travel expenses.

- Teachers must obtain approval for the trip from their school principal and complex area superintendent. In requesting the approval, the teachers must articulate an educational purpose for the trip.

II. Application of the State Ethics Code

Based on the Commission's understanding of how student educational trips are currently organized and arranged, it is the Commission's opinion that the State Ethics Code prohibits teachers from accepting free travel and other benefits from the tour companies. Several sections of the State Ethics Code apply.

A. Gifts Law, HRS section 84-11

The gifts law, HRS section 84-11, prohibits an employee from soliciting, accepting, or receiving any gift, including travel, under circumstances where it can reasonably be inferred that the gift is intended to influence the employee in performing the employee's official duties or is intended to reward the employee for official action.[1] Because the gifts law is based on an appearance of impropriety, it is immaterial whether the employee is actually influenced by the gift or whether the donor of the gift actually intended to influence the employee. If it appears to a reasonable person that the gift is given to influence or reward the employee for official action, the employee is prohibited from accepting the gift.

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[1] HRS section 84-11 states:

> 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.

"Official action" is "a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority."[2] Official action includes providing input to decisions even if one is not the final decision maker, exercising judgment, expressing opinions, giving advice, and taking other action that is non-ministerial in nature.

Teachers who participate in planning and organizing a student educational trip engage in official action that includes: selecting a tour company with which to plan and organize the trip, planning the trip itinerary, promoting and recommending the trip to students/parents, deciding who will chaperone the students, and requesting DOE approval for the trip by justifying the purpose of the trip to the principal and complex area superintendent.

The Commission believes it is reasonable to infer that the free travel and other benefits offered to teachers by a tour company are intended as both an incentive for the teachers to promote the trip to as many students/parents as possible and a reward for the teachers' efforts in generating revenue for the tour company. Therefore, the free travel and other benefits are prohibited gifts.

In the Commission's view, the "educational purpose" of the trip that may be proffered by the teachers does not outweigh or negate the inference that free travel and other benefits are intended to influence or reward the teachers for official action.

Many teachers have emphasized that the trip is a "working trip" for them, and they do not construe the free travel and other benefits provided to them by a tour company as "gifts." The Commission does not doubt that a teacher who serves as a chaperone takes on additional work responsibilities. At the same time, however, the free travel package has substantial monetary value that provides a personal benefit to the teacher by allowing the teacher to travel for free. Additional personal benefits the teacher may receive from a tour company also have significant monetary value. The Commission emphasizes that the free travel and other benefits constitute prohibited gifts because of the way the trips are currently organized and arranged.

B. <u>Gifts Reporting Law, HRS section 84-11.5</u>

The gifts reporting law, HRS section 84-11.5, requires an employee to report a gift to the State Ethics Commission on a gifts disclosure statement filed by June 30 of each year, if: (1) the value of the gift or gifts received from a single source, singly or in the aggregate, exceeds $200; (2) the source of the gift has interests that may be affected by official action by the employee; and (3) the law does not exempt the gift

[2] HRS section 84-3.

from the reporting requirement.[3] A teacher who accepts a free trip and other benefits from a tour company for serving as a chaperone on a student educational trip must report these items on a gifts disclosure statement.

The Commission emphasizes that reporting the free travel and other benefits on a gifts disclosure statement does not mean that the teacher was allowed to accept them

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[3] HRS section 84-11.5 states:

(a) Every legislator and employee shall file a gifts disclosure statement with the state ethics commission on June 30 of each year if all the following conditions are met:
  (1) The legislator or employee, or spouse or dependent child of a legislator or employee, received directly or indirectly from one source any gift or gifts valued singly or in the aggregate in excess of $200, whether the gift is in the form of money, service, goods, or in any other form;
  (2) The source of the gift or gifts have interests that may be affected by official action or lack of action by the legislator or employee; and
  (3) The gift is not exempted by subsection (d) from reporting requirements under this subsection.

(b) The report shall cover the period from June 1 of the preceding calendar year through June 1 of the year of the report.

(c) The gifts disclosure statement shall contain the following information:
  (1) A description of the gift;
  (2) A good faith estimate of the value of the gift;
  (3) The date the gift was received; and
  (4) The name of the person, business entity, or organization from whom, or on behalf of whom, the gift was received.

(d) Excluded from the reporting requirements of this section are the following:
  (1) Gifts received by will or intestate succession;
  (2) Gifts received by way of distribution of any inter vivos or testamentary trust established by a spouse or ancestor;
  (3) Gifts from a spouse, fiancé, fiancee, any relative within four degrees of consanguinity or the spouse, fiancé, or fiancee of such a relative. A gift from any such person is a reportable gift if the person is acting as an agent or intermediary for any person not covered by this paragraph;
  (4) Political campaign contributions that comply with state law;
  (5) Anything available to or distributed to the public generally without regard to the official status of the recipient;
  (6) Gifts that, within thirty days after receipt, are returned to the giver or delivered to a public body or to a bona fide educational or charitable organization without the donation being claimed as a charitable contribution for tax purposes; and
  (7) Exchanges of approximately equal value on holidays, birthday, or special occasions.

(e) Failure of a legislator or employee to file a gifts disclosure statement as required by this section shall be a violation of this chapter.

(f) This section shall not affect the applicability of section 84-11.

from the tour company. In other words, if the free travel and other benefits were prohibited gifts in the first place, reporting them on a gifts disclosure statement does not "cure" a violation of the gifts law.[4]

C. Fair Treatment Law, HRS section 84-13

The fair treatment law, HRS section 84-13, prohibits an employee from using or attempting to use the employee's official position to secure unwarranted advantages or benefits for himself or herself or anyone else. A teacher's personal and direct involvement in selecting a particular tour company to help organize a trip, promoting the trip, deciding that he or she will serve as a chaperone, and securing DOE approval for the trip raises concerns that the teacher may be misusing the teacher's official position to secure free travel and other personal benefits for himself or herself. Under these circumstances, the free travel and other benefits appear to be unwarranted benefits the teacher obtains in violation of HRS section 84-13.

D. Conflicts of Interests Law, HRS section 84-14

When an employee takes official action that personally benefits the employee, concerns arise that the employee's state work is influenced by personal interests. This undermines public confidence in government. The State Ethics Code is intended to prevent an employee from being involved in official action that places the employee in a conflict of interest with his or her state position.

1. HRS section 84-14(a)(2)

HRS section 84-14(a)(2), part of the conflicts of interests law, prohibits an employee from taking official action directly affecting a private undertaking in which the employee is engaged as a representative or in some other agency capacity.[5]

A trip that a teacher organizes and arranges through a particular tour company using the tour company's letterhead, PowerPoint presentation, and/or other promotional material prepared by the tour company appears to be a private undertaking in which the teacher in essence is a representative of the tour company. By taking official action directly affecting this undertaking in his or her capacity as a teacher, i.e., selecting the

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[4] See HRS section 84-11.5(f).

[5] HRS section 84-14(a)(2) states:

> No employee shall take any official action directly affecting . . . [a] private undertaking in which the employee is engaged as legal counsel, advisor, consultant, representative, or other agency capacity.

tour company, planning the trip itinerary, promoting the trip, deciding who will serve as chaperones, and/or requesting DOE approval of the trip, the teacher has a conflict of interest under HRS section 84-14(a)(2). Under these circumstances, the teacher's acceptance of free travel and other benefits from the tour company is prohibited under the State Ethics Code.

HRS section 84-14(d)

HRS section 84-14(d), another part of the conflicts of interests law, prohibits an employee from assisting or representing a business for compensation on a matter in which the employee participates or will participate in the employee's state capacity, or on a matter before the employee's own state agency.[6]

In the Commission's view, the free travel and other benefits a teacher receives from a tour company is "compensation"[7] for assisting or representing the tour company on a matter in which the teacher participates in his or her DOE (state) capacity. By promoting the trip to the students and their parents, the teacher assists or represents the tour company in generating revenue for the tour company and is "compensated" by the tour company for these efforts. The teacher also is "compensated" for securing approval for the tour company's trip from the DOE, i.e., assisting or representing the tour company on a matter before the DOE.[8] The teacher's acceptance of free travel and other benefits from the tour company under these circumstances is a conflict of interest and, therefore, prohibited under HRS section 84-14(d).

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[6] HRS section 84-14(d) states:

> No legislator or employee shall assist any person or business or act in a representative capacity for a fee or other compensation to secure passage of a bill or to obtain a contract, claim, or other transaction or proposal in which the legislator or employee has participated or will participate as a legislator or employee, nor shall the legislator or employee assist any person or business or act in a representative capacity for a fee or other compensation on such bill, contract, claim, or other transaction or proposal before the legislature or agency of which the legislator or employee is an employee or legislator.

[7] HRS section 84-3 defines "compensation" as "any money, thing of value, or economic benefit conferred on or received by any person in return for services rendered or to be rendered by oneself or another."

[8] It is possible that the free travel and other benefits (i.e., "compensation") a teacher receives from a tour company may be considered as "income" the teacher earns for services rendered. The Commission notes that the Internal Revenue Service ("IRS") may recognize the fair market value of the free travel and other benefits as "income" the teacher must report to the IRS for tax purposes. See *Taxable and Nontaxable Income*, Publication 525 (2014), Department of the Treasury, IRS.

III. Upcoming Trips

The Commission is aware that teachers have been offered free travel and other benefits by tour companies for a number of upcoming trips that are scheduled or are being planned, including trips for which students have already paid. For the reasons discussed above, the teachers are prohibited from accepting the free travel and other benefits from the tour companies.

The State Ethics Code does not prohibit the trips from occurring, nor does the State Ethics Code prohibit the teachers from serving as chaperones on the trips. However, if the teachers are directly involved in planning and organizing the trips with the tour companies and engage in the official action described above, the State Ethics Code prohibits the teachers from accepting free travel and other benefits from the tour companies.

IV. Trips That Already Occurred

The Commission is aware that teachers have received free travel and other benefits from tour companies for trips that already occurred. The Commission has decided to take no administrative action[9] against teachers for accepting free travel and other benefits from tour companies for student educational trips that already occurred. However, in accordance with the gifts reporting law, teachers who accepted free travel and other benefits from the tour companies must report the travel and other benefits that they received on a gifts disclosure statement filed with the Commission.[10]

V. Summary

The Commission emphasizes that the State Ethics Code does not prohibit student educational trips from occurring, nor does the State Ethics Code prohibit teachers from serving as chaperones on these trips. However, the State Ethics Code prohibits the teachers from accepting free travel and other benefits from the tour

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[9] The Commission may take administrative action by issuing a charge against an employee for alleged violations of the State Ethics Code. A charge commences formal proceedings against an employee that may lead to an administrative hearing and penalties that may include a fine. See HRS section 84-31.

[10] The Commission issued a memorandum to all teachers, dated August 4, 2015, which addresses trips that already occurred. The memorandum states that the Commission will take no administrative action against teachers for accepting free travel and other benefits from tour companies for student educational trips that were completed before July 31, 2015. The memorandum also explains that teachers who accepted free travel and other benefits from tour companies after June 1, 2014, must file a gifts disclosure statement with the Commission to report those gifts.

companies if the teachers engage in official action vis-a-vis the tour companies as described above. In short, because of the way the trips are currently organized and arranged, the State Ethics Code prohibits teachers from accepting free travel and other benefits from the tour companies.

The Commission has offered to assist the DOE in reviewing policies and procedures to address the State Ethics Code concerns associated with the teachers' acceptance of free travel and other benefits, including possible ways to fund the teachers' travel for upcoming student educational trips.

Dated: Honolulu, Hawaii, August 19, 2015.

HAWAII STATE ETHICS COMMISSION

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