



HAWAII STATE ETHICS COMMISSION

State of Hawaii · Bishop Square, 1001 Bishop Street, ASB Tower 970 · Honolulu, Hawaii 96813
50th ANNIVERSARY 1968-2018

ADVISORY OPINION NO. 2018-2

June 21, 2018

A member of a state Board (“Board Member”) requested an advisory opinion from the State Ethics Commission (“Commission”) regarding: (1) whether he may accept *pro bono* (free) legal services provided to him in his individual capacity, in connection with a matter concerning his state agency (“Agency”); and (2) whether he was required to report these *pro bono* legal services to the Commission on a gifts disclosure statement.

Under the State Ethics Code, Chapter 84, Hawaii Revised Statutes (“HRS”) the *pro bono* legal services are considered “gifts.” Based on the particular facts and circumstances of the Board Member’s situation, it is the Commission’s opinion that: (1) although it is a close question, the State Ethics Code does not prohibit the Board Member from accepting the *pro bono* legal services; and (2) the Board Member must report these gifts to the Commission on a gifts disclosure statement.

The Board Member presented the Commission with the following facts and circumstances regarding his situation.

I. Facts

- The Board Member is a member of the Agency’s board (“Board”).
- The Board Member learned that the Agency had become involved in a certain matter (“Matter”). An attorney to the Board recommended that all members of the Board retain private legal counsel regarding the Matter.
- Acting on the Board attorney’s recommendation, the Board Member asked Attorney A to represent him in his individual capacity with respect to the Matter, on a *pro bono* basis, and Attorney A agreed. The Board Member met Attorney A several years ago, through the Board Member’s employment with a private organization (“Organization”), and became friends with Attorney A thereafter. The Board Member’s employment with the Organization pre-dates

his becoming a member of the Board. The Board member is still privately employed with the Organization.

- The Board Member also asked Attorney B to represent him in his individual capacity with respect to the Matter. The Board Member has been friends with Attorney B for several years, through the Board Member's private employment with the Organization. The Board Member informed Attorney B that he did not have the resources to pay for his legal fees. Attorney B agreed to co-represent the Board Member with Attorney A, on a *pro bono* basis, with respect to the Matter.
- At the time the Board Member requested this Advisory Opinion from the Commission, the monetary value of legal services that the Board Member had received from Attorney A and Attorney B regarding the Matter was several thousand dollars each.
- Prior to the time the Board Member became a member of the Board, Attorney A represented him and other plaintiffs in a lawsuit filed against members of the Board and other defendants ("Lawsuit"). Shortly after becoming a member of the Board, the Board Member removed himself as a plaintiff in the Lawsuit.
- Attorney A continues to represent plaintiffs in the Lawsuit.
- Attorney A is not involved in any matters pertaining to the Agency other than the Lawsuit and providing *pro bono* legal services to the Board Member, as discussed above. Attorney B is not involved in any matters pertaining to the Agency other than providing *pro bono* legal services to the Board Member, as discussed above.
- Upon becoming a member of the Board, the Board Member informed Attorney A that, as a member of the Agency's board, he would be recusing himself from Board discussions pertaining to the Lawsuit, and, in fact, has recused himself from such discussions.

II. Application of the State Ethics Code

As a member of the Board, the Board Member is considered an "employee" under the State Ethics Code,¹ and is subject to the provisions of the State Ethics Code. Three sections of the State Ethics Code are relevant to his situation: the Gifts law, the Gifts Reporting law, and the Fair Treatment law.

¹ HRS § 84-3.

A. The Gifts Law

The Gifts law, HRS § 84-11, states in relevant part:

No . . . 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 . . . employee in the performance of the . . . employee's official duties or is intended as a reward for any official action on the . . . employee's part.

(Emphasis added.)

The *pro bono* legal services provided by Attorney A and Attorney B are services that have a monetary value. Under the State Ethics Code, the *pro bono* legal services are considered "gifts."

The Gifts law prohibits the Board Member from soliciting or accepting any gift where it is reasonable to infer that the gift is given to influence or reward the Board Member in performing his official duties. The Gifts law is based on the appearance of improper influence or reward. The actual intent of the donor in giving a gift is irrelevant to determining whether the Gifts law is violated. Likewise, it does not matter whether the recipient of the gift is actually influenced by the gift. The Gifts law is violated where the facts and circumstances of the situation raise a reasonable inference of improper influence or reward.

The Commission considers several factors in determining whether a gift is prohibited under the State Ethics Code: (1) the value of the gift; (2) the relationship between the recipient and the donor of the gift, including whether the recipient takes official action with respect to the donor; and (3) whether the gift benefits the recipient personally or serves legitimate state interests. See, e.g., Advisory Op. No. 2011-1, 2011 WL 13192591, at *1.

The first factor, the monetary value of the *pro bono* legal services provided by Attorney A and Attorney B, weighs against acceptance: each gift is substantial, being valued at several thousand dollars.

The second factor – the relationship between the Board Member and the donors – is perhaps the most important of the three. In this case, this factor leans towards the gifts being acceptable. The Board Member knows (and became friends with) Attorney A and Attorney B through his private employment with the Organization, which pre-dates his becoming a member of the Board by several years. It does not appear that either

Attorney A or Attorney B (or their respective law firms) is currently involved in official action the Board Member is taking in his Board (state) capacity.² There is no indication that Attorney B has matters before the Agency. Although Attorney A is involved in the pending Lawsuit, the Board Member, in his state capacity, has taken prompt and unequivocal steps to avoid taking official action affecting the Lawsuit, and hence, affecting Attorney A. Based on the facts and circumstances, it appears unlikely that the gifts of *pro bono* legal services from Attorney A and Attorney B would influence or reward the Board Member for any official action he might take in his Board capacity.

The third factor, the extent to which the gifts benefit the Board Member personally or benefit the State, is complex in this case. The legal services are being provided to the Board Member in his individual capacity – and he is therefore receiving them in his individual capacity – but the services are required only because he serves as a member of the Board. On the one hand, the State may benefit if state officials are able to accept *pro bono* legal services if sued in their individual capacities, insofar as more community members may be willing to enter public service if they are able to use such a “safety net.” On the other hand, by definition, individual-capacity lawsuits are based upon alleged activities undertaken outside the scope of one’s official state duties – suggesting that there is, in fact, no benefit to the State. In the specific circumstances of this case, however, it appears that a recommendation was made to all members of the Agency’s board to obtain legal representation in their individual capacities, and that the Board Member’s solicitation and acceptance of *pro bono* legal services was in response to this.

Looking at the three factors together, the Commission believes that this is a close case. Yet, based on the specific facts and circumstances presented by the Board Member, particularly with respect to the second factor, the Commission does not believe it is reasonable to infer that the gifts of *pro bono* legal services from Attorney A or Attorney B are intended to influence or reward the Board Member in performing his official duties for the Agency. Therefore, it is the Commission’s opinion that HRS section 84-11 does not prohibit the Board Member from accepting these gifts.

B. The Gifts Reporting Law

The Gifts Reporting law, HRS § 84-11.5, requires an employee to file a gifts disclosure statement with the Commission on June 30 of each year, if all of the following conditions are met:

² In fact, when the Board Member became a member of the Board, he informed Attorney A that he did not intend to participate in discussions of the Lawsuit in his capacity as a Board Member. Moreover, the Board Member withdrew as a plaintiff in the Lawsuit shortly after becoming a member of the Board. As a member of the Board, he has not taken any official action involving the Lawsuit. Although it appears that the Board has taken (and will continue to take) action affecting Attorney A with respect to the Lawsuit, the Board Member has not.

- (1) The employee, or spouse or dependent child of the 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 has interests that may be affected by official action or lack of action by the employee; and
- (3) The Gifts Reporting law does not exempt the gift from the reporting requirements.³

The gifts disclosure statement covers the period from June 1 of the preceding calendar year through June 1 of the year of the report.⁴

The monetary value of Attorney A's *pro bono* legal services exceeds \$200, as does the monetary value of Attorney B's *pro bono* legal services. These services do not fall in the category of gifts that are exempt from the reporting requirements.⁵

It appears likely that the Matter would be discussed by the Board. The Board Member's participation in Board discussions, decisions, or other action regarding the Matter as it pertains to the Agency could possibly affect the legal representation the Board Member receives from Attorney A and Attorney B in his individual capacity with

³ HRS § 84-11.5(a).

⁴ HRS § 84-11.5(b).

⁵ Pursuant to HRS § 84-11.5(d), the following items are excluded from the reporting requirements of the Gifts Reporting law:

- (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, fiancée, any relative within four degrees of consanguinity or the spouse, fiancé, or fiancée of such a relative. . . .;
- (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[s], or special occasions.

respect to the Matter. Under a liberal interpretation of the Gifts Reporting law,⁶ it appears that Attorney A and Attorney B have interests, through their legal representation of the Board Member, that may be affected by official action or lack of action on the part of the Board Member.

In the Commission's view, the three conditions of the Gifts Reporting law are met that require the Board Member to report the gifts of *pro bono* legal services from Attorney A and Attorney B.

C. The Fair Treatment Law

The Fair Treatment law, HRS § 84-13, prohibits a state employee from using or attempting to use the employee's official position to secure or grant unwarranted privileges, advantages, benefits, or treatment for the employee or others. This provision of the State Ethics Code has been applied to prohibit an employee from accepting expensive gifts of a personal nature that appear to be offered to the employee purely because of the employee's status in state government.

As previously discussed, the Board Member knows and became friends with Attorney A and Attorney B through his private employment with the Organization, which pre-dates his becoming a member of the Board by several years. It appears that Attorney A and Attorney B are providing the *pro bono* legal services due to their pre-existing professional relationships and friendships with the Board Member in his private capacity, and not because of his status as a Board Member. Under these circumstances, the Commission does not consider the *pro bono* legal services to be unwarranted benefits. Stated differently, the Commission does not believe that the Board Member's acceptance of the gifts constitutes a misuse of his official position under the Fair Treatment law; therefore, he is not prohibited from accepting the gifts.

However, the Commission cautions the Board Member from using or attempting to use his position as a Board Member to grant any unwarranted privileges or benefits to Attorney A or Attorney B (or their respective law firms) in return for their *pro bono* legal services to him.

⁶ HRS § 84-1 provides that the State Ethics Code "shall be liberally construed to promote high standards of ethical conduct in state government."

III. Conclusion

The *pro bono* legal services the Board Member receives from Attorney A and Attorney B are considered gifts under the State Ethics Code. Based on the particular facts and circumstances of the Board Member's situation, it is the Commission's opinion that: (1) the State Ethics Code does not prohibit him from accepting these gifts; and (2) he is required to report these gifts to the Commission on a gifts disclosure statement.

Dated: Honolulu, Hawaii, June 21, 2018.

HAWAII STATE ETHICS COMMISSION

Reynard D. Graulty, Chairperson
Ruth D. Tschumy, Vice Chairperson
Susan N. DeGuzman, Commissioner
David O'Neal, Commissioner
Melinda S. Wood, Commissioner