



HAWAII STATE ETHICS COMMISSION

State of Hawaii · Bishop Square, 1001 Bishop Street, ASB Tower 970 · Honolulu, Hawaii 96813

ADVISORY OPINION NO. 2019-2

February 28, 2019

A state employee requested an Advisory Opinion from the State Ethics Commission (“Commission”) as to whether his state agency (“Agency A”) may create a position to research and secure federal and private sector funding to address an issue of concern to Agency A. The position would be funded by donations from the private sector to a second state agency (“Agency B”). The new employee would be an employee of Agency B but would work under the direction of Agency A.

Based on the information provided, the Commission’s opinion is that the State Ethics Code, Chapter 84, Hawaii Revised Statutes (“HRS”), does not prohibit the establishment of this position. The individual who fills the position, however, is subject to the State Ethics Code and must abide by certain restrictions when soliciting any donations from the private sector. Furthermore, the solicitation of private donations for the position requires Agency A personnel to ensure that (1) solicitations are not coercive; (2) those who support the fundraising efforts are not provided with any unwarranted benefits (and, correlative, those who decline to contribute are not retaliated against); and (3) private funders do not control the actions of the new employee.

The Commission was provided with the following information:

I. FACTS

- Agency A would like to create a three-year Director position within Agency A.
- The Director position would be funded by donations from the private sector.
- Funding for the Director position would go directly to Agency B.
- The Director would research and secure federal and private-sector grants to address the issue in innovative ways. This would include soliciting donations from the private sector.

This proposal, therefore, involves two different solicitations of the private sector: the first solicitation – ostensibly performed by Agency A employees – would be to raise funds to create the position itself; the second solicitation – performed by the new Director – would seek funding to address the issue of concern to Agency A.

The Ethics Code does not prohibit Agency A from pursuing this project. However, the Commission cautions Agency A personnel, including the new Director, regarding potential ethics issues that may arise when soliciting the private sector for donations.

II. APPLICATION OF THE ETHICS CODE

As the Commission has stated, “[t]he Commission . . . has traditionally discouraged solicitations for any purpose” and has “restated its basic opposition to solicitations” in multiple Advisory Opinions.¹ “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.”² Instead, the Commission analyzes each situation to determine whether “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.”³ The Commission considers Agency A’s proposal with these principles in mind.

A. Phase I: Seeking Private Sector Funding for the Position

As previously stated, the solicitation of private donations for the position requires Agency A personnel to ensure that (1) solicitations are not coercive; (2) those who support the fundraising efforts are not provided with any unwarranted benefits (and, correlative, those who decline to contribute are not retaliated against); and (3) private funders do not control the actions of the new Director. Each of these issues is addressed in turn.

- (1) Agency A personnel who solicit donations must not pressure or coerce potential donors.

The Commission has long held that government solicitations of the private sector are subject to the restrictions of the Fair Treatment law, HRS § 84-13. Solicitations that serve a state purpose may be permissible under the Ethics Code; however, the Fair

¹ Advisory Opinion No. 93-3 at 2.

² Id.

³ Id.

Treatment law (HRS § 84-13)⁴ prohibits solicitations that reasonably appear to be coercive.

In determining whether a solicitation of the private sector is coercive, the Commission examines factors such as (a) the relationship between the soliciting state agency or employee and the solicited private sector individual or organization and (b) the language or form of the solicitation. A solicitation from a state agency that regulates, inspects, or has similar authority over a private sector entity is more likely to be perceived as coercive than one that originates from an agency that does not have that sort of power or control over the private sector organization. Similarly, a solicitation that uses language that creates the impression that a donation is required or expected, or that there would be negative consequences if a donation is not made, is likely to be seen as coercive.⁵

⁴ The Fair Treatment law provides:

§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:

- (1) Seeking other employment or contract for services for oneself by the use or attempted use of the legislator's or employee's office or position.
- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of the legislator's or employee's official duties or responsibilities except as provided by law.
- (3) Using state time, equipment or other 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.

Nothing herein shall be construed to prohibit a legislator from introducing bills and resolutions, or to prevent a person from serving on a task force or from serving on a task force committee, or from making statements or taking official action as a legislator, or a task force member or a task force member's designee or representative. Every legislator, or task force member or designee or representative of a task force member shall file a full and complete public disclosure of the nature and extent of the interest or transaction which the legislator or task force member or task force member's designee or representative believes may be affected by the legislator's or task force member's official action.

⁵ See Advisory Opinion Nos. 45, 316, 504, 93-3.

Solicitations that come directly from high-level state officials (such as the head of an agency) and are targeted at specific private entities could be problematic. The Commission has previously opined that solicitations that target certain private entities and not others may be perceived as unfairly selecting the targeted entity for a special burden. The state agency, therefore, should take great care if soliciting from private sector entities with which the State does business. Such solicitations could raise concerns if it appears that the State is pressuring the private entity to contribute as the cost of doing business with the State. On the other hand, if a charitable foundation has an established process for accepting grant proposals from the community, and Agency A were to apply to that foundation for funding in the same manner as any other would-be grantee, there would likely be less of an appearance of coercion or pressure. Similarly, the Ethics Code does not prohibit Agency A from applying for federal grants, and Agency A may generally apply for funding from mainland foundations without raising substantial ethics concerns. When soliciting Hawaii-based private entities (or other private entities that have a significant presence in Hawaii), however, Agency A should take extra care to avoid any appearance of coercion or pressure.

Alternatively, there may be entities that would like to contribute (as a marketing opportunity and to create good will within the community) and – if not given the opportunity to donate – may believe that they were unfairly omitted from consideration. Accordingly, the Commission has generally recommended that the soliciting agency adopt reasonable, objective criteria to determine which private sector entities will be solicited. Ordinarily, similarly situated organizations within the private sector should be given an equal opportunity to participate.

- (2) Agency A must avoid showing favoritism towards those who contribute funds (and must avoid any unwarranted negative treatment of those who decline to contribute).

Again, the Fair Treatment law (HRS § 84-13) prohibits state officials from using their official positions to grant themselves (or anyone else) an unwarranted benefit – or, conversely, to use their official positions to retaliate against another person. Agency A personnel must, therefore, take care to avoid showing any favoritism towards those who contribute to the fundraising effort; similarly, Agency A must avoid any negative treatment of any would-be funder who declines to contribute.

- (3) Agency A – and not the private donors – must control the hiring, firing, and other terms and conditions of employment for the new Director.

Agency B (and the State generally) may accept private sector funds to support State activities. However, the private funders may not control the new Director's activities: the new Director will be an Agency B employee (subject to the State Ethics Code, among other laws), housed within Agency A, such that Agency A will control the Director's actions. Private sector entities cannot be permitted to control the activities of

state officials; allowing a private entity to control a state employee could bestow an unwarranted benefit on that private entity in violation of the Fair Treatment law.

The Commission previously considered an analogous situation in which a state official received supplemental compensation from private sector donations.⁶ At issue was whether the acceptance of the supplemental compensation violated the Fair Treatment law. In determining that acceptance of the supplemental funds did not create an unwarranted benefit in violation of this section, the Commission essentially concluded that funds given to the State became State money and could be used at the State's discretion to aid in funding a position, but cautioned against earmarks that could grant an unwarranted benefit to a particular individual:

Thus, donations given to the organization for the Fund could not be earmarked for a particular official, and were used at the discretion of the division, once monies were deposited into its Fund. . . .

Under these circumstances, the Commission concluded that the official's salary was paid for by the agency in total, with the use of state funds and monetary gifts that became state funds.^[7]

Similarly, in this case, the Commission believes that accepting private sector donations to fund the Director position does not violate the Fair Treatment law, provided the donation is made to the State (in this case, Agency B) rather than an individual, and provided further that Agency A maintains the authority to hire, fire, and otherwise control the work activities of the new Director.

B. Phase II: Application of the Ethics Code to the Duties of the New Position

The Director position does not yet exist, and the Director's job duties are not yet established, but it appears that the Director's duties will include soliciting donations from the private sector. Subject to the Fair Treatment law, the new Director may solicit donations to address the issue of concern but she or he may not solicit donations to fund the Director position. When seeking funding for the issue, the new Director must follow the guidance in (A)(1) and (2), above, and must avoid (a) pressuring any donor to contribute and (b) providing any unwarranted benefit to those who contribute or retaliating against anyone who declines to contribute.

⁶ Informal Advisory Opinion No. 2006-1.

⁷ Id. at 3.

If the new Director is in a position to take “official action”⁸ affecting the individual(s) or organization(s) funding the Director’s position, the Director should contact the Commission immediately. At that point, the Commission can evaluate whether the Conflicts of Interests law, HRS § 84-14(a),⁹ requires the Director to recuse her- or himself from the matter.

III. CONCLUSION

The Ethics Code does not prohibit Agency A from establishing the new Director position or from soliciting or accepting donations from the private sector to fund the position through Agency B, subject to the constraints set forth above. If the position is created, and if the duties of the position include solicitation of the private sector, then additional concerns under the Fair Treatment and Conflicts of Interests laws may arise. The Commission strongly recommends that, once the Director position is established and a more detailed description of the position’s duties and responsibilities has been created, the Director seek further guidance from the Commission.

Dated: Honolulu, Hawaii, February 28, 2019.

HAWAII STATE ETHICS COMMISSION

Reynard D. Graulty, Chair
Ruth D. Tschumy, Vice Chair
Susan N. DeGuzman, Commissioner
Melinda S. Wood, Commissioner
Wesley F. Fong, Commissioner

⁸ “Official action” is broadly defined, and includes “a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.” HRS § 84-3.

⁹ HRS § 84-14, entitled “Conflicts of interests,” provides in relevant part:

- (a) No employee shall take any official action directly affecting:
 - (1) A business or other undertaking in which the employee has a substantial financial interest; or
 - (2) A private undertaking in which the employee is engaged as legal counsel, advisor, consultant, representative, or other agency capacity.