OPINION NO. 504

The Commission received a request for an advisory opinion from a department official who asked for advice on the propriety of his department soliciting private companies for contributions for a conference his department intended to host. The official informed the Commission that about seventy officials from various states were making plans to attend the conference. The official stated that unless his department could solicit private companies for donations, his department would not be able to host the conference.

The ethics code provision relevant to the question the official asked was HRS §84-11, the gifts section of the code, which states that

> [n]o 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 him in the performance of his official duties or is intended as a reward for any official action on his part.

Official action is defined in HRS §84-3(7) as "a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority."

The Commission explained to the official that the solicitation of private companies divides itself into two distinct areas: (1) the solicitation of companies that have a business relationship with the soliciting state agency and (2) the solicitation of companies that do not have a business relationship with the soliciting agency. The Commission pointed out to the official that it does not favor any form of solicitation by a state agency. The Commission stated that, obviously, the solicitation of a private company that had a business relationship with the soliciting state agency would always raise a question of ethics: Was the gift given to influence or reward official action? The Commission informed the official that in Advisory Opinion No. 45 the Commission had stated:

> State government pervades all parts of our business and economical life and controls it in many areas. Because of this power, the solicitation of a gift from a business concern which must operate within the system places that concern in an awkward position. If the business solicited does not contribute, there is always the suspicion of favored treatment to the detriment of other members of the industry who do not give equally. And a non-contributing concern will never be sure whether its failure to contribute will be remembered at some later time when it is dealing with the State.
>
> Thus, it appears appropriate that the State should take care not to obligate or create the appearance of obligating itself or others in the conduct of its business. Only if the State in its official actions conducts itself on the very

> highest ethical level can it inspire confidence in state government and high ethical standards of conduct in its employees.

Even though the solicitation of a private company with no business relationship to the soliciting state agency would most likely not create an ethical issue under HRS §84-11, the Commission informed the official that it had stated, in Advisory Opinion No. 316, that such solicitations were still disfavored:

> In addition, however, we suggested to the [agency] as we had to others in the past, that it fully consider the position in which the solicited business would be placed by such solicitations. While the [agency] *might* not take action directly affecting a specific business, it did act as a representative of an all-pervasive state government. Some programs were designed to require public as well as private financial assistance, but that fact would be known at the outset. In the case of this program, businesses were not expecting to be asked to contribute and if asked might be placed in a rather awkward position.... The savings to the taxpayers had to be weighed against the loss of credibility and trust by the public that might be occasioned by solicitations of persons and businesses to support government projects. (Emphasis added.)

The Commission stated to the official that although, for the reasons mentioned above, it disfavors the solicitation even of companies that have no business relationship with the soliciting agency, the safest course for the official's department to take if it decided to engage in soliciting was to avoid soliciting those companies that had a business relationship with his department.

The Commission pointed out that if the official's department decided to solicit companies that it did do business with, whether a violation of HRS §84-11 would occur depended upon the circumstances surrounding each solicited gift. The Commission explained that, first of all, the solicitation of a donation even from a company that had a business relationship with the official's department would not be per se a violation of the code, since a violation of HRS §84-11 arises only when "it can reasonably be inferred that the gift is intended to influence ... or ... reward ... official action." However, the Commission told the official that, as stated above, the solicitation of a company that an agency did business with would always raise an ethical question. The Commission informed the official that in determining whether there has been a violation of HRS §84-11, the Commission considers the following factors:

(1) Does the state employee who solicits the gift stand to gain a personal benefit from the gift?

(2) Was only one member of an industry solicited--as opposed to all members--by the employee?

(3) Does the employee's department presently have before it, or has the department recently had before it, an application or request affecting the potential donor?

(4) Does the donor stand to gain a benefit from giving the gift?

(5) Does the gift redound to the benefit of the State?

(6) Does the gift help the employee in the performance of his state responsibilities?

(7) The size of the gift.

(8) The custom and practice in the community with regard to the giving of gifts.

In considering these factors, the Commission noted that the official had stated that there was a substantial benefit to the State if his department was able to host the conference. Secondly, the official had stated that solicited gifts would not redound substantially to the personal benefit of an official or employee of his department. The Commission informed the official that these two factors diminished the inference of a gift given to influence or reward. However, the Commission advised that if the official intended to solicit companies that did business with his department, he should solicit those companies that were not soon to be subject to, or that had not recently been subject to, official action on the part of his department. The Commission also informed the official that, of course, he could contact this Commission again with regard to specific situations that he believed might raise serious questions. Finally, the Commission told the official that for further information on the subject of gifts he might wish to consult the Commission's brochure on gifts, a copy of which was enclosed with the opinion.

The Commission told the official that it appreciated his sensitivity to the ethical considerations raised in this situation and also appreciated his bringing this matter to the Commission's attention at an early time.

Dated: Honolulu, Hawaii, August 15, 1983.

STATE ETHICS COMMISSION
Edith K. Kleinjans, Chairperson
Allen K. Hoe, Vice Chairperson
Gary B.K.T. Lee, Commissioner
Rabbi Arnold J. Magid, Commissioner

Note: Commissioner Mildred D. Kosaki was excused from the meeting at which this opinion was considered.