

ADVISORY OPINION NO. 553

The chairman of a state board asked the Commission's advice on whether action taken by the board regarding a possible compensation package for an incoming employee was permissible under the State Ethics Code.

The Commission was informed that a subcommittee of the board had agreed to ask a private foundation, whose sole purpose was to support a state institution overseen by the board, for assistance in providing additional benefits for the employee to be paid from funds raised and administered by the foundation. Thereafter, two members of the board met with representatives of private corporations and other foundations to solicit their support in the board's effort. The board had hoped that these organizations would pledge contributions to the foundation in amounts sufficient to meet the cost of the additional benefits the board anticipated would be provided by the foundation. Although the chairman stated that contributions to the foundation would not be earmarked as a special fund, the Commission noted that the only reason underlying the request for support had been to provide funds for the proposed benefits. The board believed that the additional pledged funds would demonstrate to the foundation that it would not be required to expend funds from its existing programs because the foundation would be able to use the additional pledged donations to meet the cost of the proposed benefits. The board of directors of the foundation was informed that pledges of support had been secured. Subsequently, the board of directors of the foundation voted to approve the concept of providing the proposed benefits by approving an unsecured, interest-free advance for the term of five years to be used by the foundation directly for the purchase of the benefits. Accordingly, the Commission understood that when the employee began his state service, he would receive an annual salary from the State with additional benefits provided directly to him by the foundation.

A number of ethical questions had been raised as a result of the foregoing circumstances; however, the Commission concluded that it would serve the interests of the State and the community to reserve most of the questions and to address in this opinion only one of the questions presented: whether the incoming employee could accept additional benefits from the foundation as a part of his state compensation package.

The Commission noted that a statute authorized the board to receive gifts for the purposes of the institution. The Commission recognized that the board could accept gifts from private sources, including the foundation, and it could, within the confines of the law and its own policies, determine the appropriate uses of the gifts. The Commission noted, however, that the question of whether it was appropriate and legal for the board to use this power to establish the compensation package was still unsettled. The Commission was cognizant that this question had been discussed in an attorney general's opinion, which stated that the Office of the Attorney General had not been able to establish clearly and convincingly the legality or the illegality of the board's action based on its review of the statute allowing the board to receive gifts in conjunction with other state statutes.

The Commission did not believe that supplementing the annual state salary of the employee with benefits provided directly by the foundation would be appropriate under the ethics law. HRS §84-11 states as follows:

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

The Commission determined that the additional benefits would be a gift from the foundation to the employee under this section, and the employee would be precluded from accepting this gift if the circumstances indicated that the gift would be given to influence or reward him in the performance of his duties. In the Commission's view, such an inference was likely to arise when an employee took official action affecting the donor. The Commission noted that the employee not only would serve as a member of the board of directors of the foundation but also would be the chief liaison between the institution and the foundation. The Commission observed that all requests for funding from the institution to the foundation were channeled through the employee. The chairman had explained to the Commission that it was his understanding that it was expected that the employee would notify the board in instances where large amounts of funding would be sought from the foundation, and the employee might occasionally seek the board's approval before presenting those proposals to the foundation. In addition, the Commission also noted that as the institution's chief executive officer, it would be the employee's responsibility to exercise discretion with respect to any matters concerning the foundation. The Commission recognized that individuals who had previously served in that position may not have taken any official action in the recent past that had directly affected the foundation; nevertheless, the Commission noted that decisions regarding the use of office space, assigned parking stalls, and state staff assistance would be matters requiring review and approval by the employee. Accordingly, the Commission believed that it would be impermissible under HRS §84-11 for the employee to accept the gift of the benefits supplement to his state salary directly from the foundation.

A second applicable section of the ethics law was HRS §84-13(2), which states as follows:

No legislator or employee shall use or attempt to use his official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for himself or others; including but not limited to the following:

....

(2) Accepting, receiving, or soliciting compensation or other consideration for the performance of his official duties or responsibilities except as provided by law.

It was clear to the Commission that this section limited an employee to accepting compensation from state sources for the performance of his duties. Because the benefits portion of the compensation package would be a gift, the Commission concluded that the additional benefits provided directly to the employee from the foundation, a private source, would not be allowable under this section. The Commission stated, however, that a compensation package exclusively from state sources would be permissible under the ethics

code. Accordingly, in the Commission's view, it would be permissible under the ethics code for the board to accept gifts from private sources on behalf of the institution and, in its discretion, to designate a portion of those assets as part of a compensation package for the employee so long as the action was provided by law.

The Commission appreciated the chairman's candor in his discussions on this matter.

Dated: Honolulu, Hawaii, April 10, 1985.

STATE ETHICS COMMISSION
Allen K. Hoe, Chairperson
Tim S. Farr, Vice Chairperson
Rabbi Arnold J. Magid, Commissioner

Note: Commissioner Edith K. Kleinjans disqualified herself from consideration of this opinion. There was a vacancy on the Commission.