

## INFORMAL ADVISORY OPINION NO. 18

The State Ethics Commission charged a state employee with violations of HRS §84-11 (Supp. 1975) for allegedly accepting the gift of an automobile.

He was notified of this charge by certified letter. He was also informed that, pursuant to HRS §84-31(b), he could meet with the Commission to explain the conduct alleged to be in violation of the law. An informal hearing was held in connection with this matter.

We issued this informal advisory opinion pursuant to HRS §84-31(b) (Supp. 1975).

He was a property manager at a state facility. According to his position description his duties included the recommendation of rental and lease rates for space at the facility; of plans for the best use of space, buildings, facilities and land; and of specifications to be contained in the terms and conditions governing leases and rentals of properties. He had been employed at this facility for more than ten years.

The subject matter of this proceeding primarily revolved around a company that had a concession to do business at this state facility. The company had gained the concession contract through a competitive bidding process. The contract contained a provision for a five-year reopener which had not as yet been renegotiated. As property manager he had been involved in the procedures utilized to award the contract.

First, he had prepared a proposed lease for the bidders. After this document was reviewed he then prepared the bid specifications upon which competitive companies would submit their proposals to the department. He had also put the specifications in final form, had issued the specification sheets to the bidders who had expressed interest, had received the intentions to bid, had opened the bids submitted, had prepared memos for appropriate signatures and had issued recommendations as to whether the lease should be awarded to the high bidders. He maintained that while these duties appeared to be significant they were exhaustively reviewed by people above him and that in reality his responsibilities were more limited than they appeared.

The Commission learned that he had allegedly received an automobile from this company. We had also received a request for an advisory opinion from the director of the department, who had provided additional information concerning the matter. As this information indicated a possible violation of the gifts section of the statute, HRS §84-11, a charge was filed against him and he was given an opportunity to respond.

The statute provides 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.

As property manager, he had been involved in the award of a contract to this company. He had had and continued to have an official relationship with it. His receipt of a gift from the company raised a significant question under this section of the statute.

In the past, the Commission had indicated certain criteria which determined the legitimacy of a gift. They were as follows:

1. Whether the gift is related to the public job of the recipient.
2. Whether the gift redounds to the benefit of the individual or the State.
3. Whether the employee's department presently has before it, or has had before it, an application affecting the donor.
4. What benefit the donor stands to gain from the gift.
5. Whether the receipt of the gift impugns the integrity of the employee's department.

In his testimony before the Commission, he indicated that a friend who had a business relationship to the company had given him an automobile several years ago. He stated that he never knew who the actual owner of the vehicle was. Then, in 1974, the same friend gave him another car, the vehicle that was the subject of this matter. He stated that his friend had given him the car as a gift, that he had not paid for it, and that at the time he received it he did not know who held the title to the car. The title was ultimately transferred to him, and he conceded that at that time he did realize that the owner of the car was a company he had been dealing with in his state capacity. Upon questioning, however, he also stated that prior to that time the automobile had been repaired by the company and that incident indicated to him that the car was probably its property. He denied having any knowledge that the company was the titleholder prior to that date. At no time had he advised his superiors or the Commission that he had received an automobile owned by a company that had an official relationship with him as a state employee.

At his meeting with the Commissioners, he stated that at no time had he given preferential treatment to the company or disadvantageous treatment to its competitors. He also stated that he had never given the company information that was not available to all of its competitors.

Our factual findings were as follows:

1. The gift of this automobile was related to his public position as it had been closely involved in the proceedings that had led to the award of a concession contract to this company.
2. The benefit of this gift redounded to him; no benefit redounded to the State.
3. During the period of time he had received and made use of this car the department had an official relationship with the company.
4. Because of his position in the department, it was reasonable to infer that the company had something to gain from the gift of this automobile to him.

5. His acceptance of this automobile and the public exposure of this fact had cast doubt upon the integrity of the department and its decision-making processes.

We stated to him that the intent of the gifts section was to maintain a neutrality, to the extent possible, between government employees and the private businesses that they dealt with in their state capacities. It was a well-recognized fact that the receipt of significant gifts from those an employee deals with in a state capacity are generally intended to influence the employee in his or her official behavior. It was elemental that an individual should not accept gifts from those persons he or she regulated in an official capacity. Further, we could not credit his assertion that he did not know who held the title to these cars at the time he received them. That a person in his position and with his experience should not have known this information was simply not credible testimony. Even if we had credited his testimony on this point, he himself had conceded his awareness of the company's interest in the car more than two years prior to the public exposure of this matter. Yet at no time had he attempted to return the car or to advise his superiors of the fact that he was using it.

He stated that his position in the department seemed to be of higher rank than it actually was and that any action he took was so thoroughly reviewed by the authorities above him that he actually took no more than ministerial action on the matters before him. We believe that he underestimated the influence of his position. It was true that he occupied what was basically a middle-management position and that his actions were indeed reviewed by those above him. However, we pointed out that people in middle management are often subjected to attempts to gain their favor. This was because people in higher authority were so publicly exposed that the awarding of influential gifts to them was not likely to go unnoticed. Gifts intended to influence official action were much more safely given to people in the kind of middle-management position he held.

We pointed out further that employees in his position have influence upon decisions and, in addition, have access to information which is of use to persons doing business with the State. He had been involved in nearly every step of the contract process. In addition, he was to have some involvement in the five-year reopening negotiations that would be beginning soon.

We noted that official action is not only final decision-making but is also the power to make recommendations. Regardless of how exhaustively an employee's recommendations may be reviewed they are still the basis upon which future and further decisions are made. We could not say that the recommendations he made would not be included in final decisions. In addition, he had access to all the information that was included in the files of this company and its competitors. He indicated that in recent months all of these companies had solicited him for information about the gross receipts of their various competitors. This confidential information would be very valuable to any of these companies.

His acceptance of this gift raised the appearance and created the inference that information available to him and recommendations that he made would be made available or slanted in favor of this company. It was our opinion that any citizen hearing a recitation of the facts in this case would be justified in drawing the conclusion that the company had gained an advantage in the state decision-making process because of a significant gift to him. Whether this in fact had been the case could not be known. It might well have been that he was correct in his assertion that no such advantage had been granted. He was powerless, however, under the circumstances, to convince

anyone of this fact. He had cast a doubt upon the integrity of the department that would not easily be erased from the public's memory.

As we had stated, it was our conclusion that he had been in violation of the gifts section in his initial acceptance of this automobile, in his continuing to operate it, and in his decision to accept ownership of it. It was our recommendation that the automobile be returned to the immediately-preceding titleholder within fourteen days of the receipt of this opinion and that he immediately refrain from making any further use of it. Because of the importance of this matter, he was advised that copies of this opinion would be forwarded to the director of the department, pursuant to his request for an opinion, and to his supervisors at the state facility.

Pursuant to HRS §84-31(b), he was advised that he might either (1) agree to comply with the findings, conclusions, and recommendations of this informal advisory opinion or (2) request a formal hearing and opinion. We asked that he inform us of his decision within ten days of the receipt of this informal advisory opinion.<sup>++++</sup>

Dated: Honolulu, Hawaii, January 4, 1978.

STATE ETHICS COMMISSION  
Paul C.T. Loo, Chairman  
I.B. Peterson, Vice Chairman  
Audrey P. Bliss, Commissioner  
Dorothy K. Ching, Commissioner

Note: Commissioner Gary B.K.T. Lee was excused from the meeting at which this opinion was considered.

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<sup>++++</sup>The state employee advised us that he accepted the findings and conclusions of this informal advisory opinion and would comply with its recommendations.