

## **INFORMAL ADVISORY OPINION NO. 25**

A citizen filed a charge with the Commission against a state employee who worked part-time for one state agency (agency "A") and had, in her private capacity, been awarded a consultant contract from another state agency (agency "B"). The citizen alleged that the employee had violated the ethics laws by failing to perform the consultant contract. In response to this charge, the employee filed a written statement with the Commission and appeared before the Commission to refute the charge against her.

After the citizen filed his charge, the Commission began its own investigation of the matter. During the course of the investigation, it was determined that the citizen complainant was not interested in further action. The Commission thus dismissed the citizen from the case.

The Commission determined after its investigation that it had reason to believe that violations of the ethics code might have occurred. The Commission adopted a resolution and issued a Charge and Further Statement of Alleged Violation against the employee. The Charge and Further Statement of Alleged Violation alleged that the employee had violated the ethics code by (1) submitting her resume for the award of the contract to state agency B together with a cover letter that indicated her employment position in state agency A and (2) requesting and accepting per diem from both state agencies for an off-island trip.

In response to the Commission's Charge and Further Statement of Alleged Violation, the employee filed a Motion to Dismiss Charge and Further Statement of Alleged Violation. After receiving the motion, the Commission granted the employee an extension for filing her answer to the Commission's Charge and Further Statement of Alleged Violation, informing her that her answer would be due should her motion not be granted in its entirety.

A short time after the employee filed her motion, the Commission learned that the employee had also received airfare and per diem from both agencies for interisland trips. The Commission forwarded this information to the employee for comment, and subsequently the employee submitted a written response to the Commission. After receiving the employee's response, the Commission issued an Amended Further Statement of Alleged Violation, additionally alleging that the employee might have violated the ethics code by applying for and accepting airfare and per diem from both state agencies. Because the Commission believed it needed further clarification regarding the employee's response, the employee appeared before the Commission and further explained the circumstances of the apparent double payments of airfare and per diem.

After the employee's appearance, the Commission concluded that the circumstances of the case did not warrant proceeding to a formal hearing at that time. In accordance with Section 21-5-4(b), State Ethics Commission Rules, the Commission determined that it would issue an informal advisory opinion to the employee and ask for her compliance with the opinion. In the remainder of this informal advisory opinion, the Commission discusses the requirements of the ethics code with respect to the three allegations the Commission considered in the case brought against the employee.

### **I. Use of State Title When Seeking Private Employment for a Private Contract for Services.**

HRS §84-13 reads in pertinent part as follows:

**Fair treatment.** 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:

- (1) Seeking other employment or contract for services for himself by the use or attempted use of his office or position.
- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of his 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 he inspects or supervises in his official capacity.

HRS §84-13(1) specifically prohibits legislators or state employees from using their official positions to obtain unwarranted advantages when seeking other employment or contracts for services. The Commission has long maintained that HRS §84-13 is violated when state legislators or employees refer to their official positions in conjunction with purely private commercial or financial matters. See, for example, Informal Advisory Opinion No. 22 and Advisory Opinion Nos. 315, 363, 472, and 476. HRS §84-13(1) is violated when state legislators or employees mention their official positions in conjunction with an attempt to secure other employment or a contract for services. In Advisory Opinion No. 472, the Commission specifically stated:

The Commission has held that the use of an employee's official title in private business publications violates HRS §84-13(1), which states that employees shall not seek other employment or contract for services for themselves by the use or attempted use of their office or position. In Advisory Opinion No. 315, the Commission observed that if employees "used their state position in the business literature, it could easily be inferred that they were using their official position to seek other employment or contract for services for themselves."

The Commission believes that the official title of a legislator or state employee carries with it the dignity, authority, and prestige of the legislator's or state employee's office. The Commission therefore believes that the use of one's official title when applying for purely private employment or a contract for services gives rise to a misuse of position since the legislator's or state employee's application may be unfairly enhanced by the prestige of his or her office. Furthermore, the mentioning of a legislator's or state employee's position in a purely private employment matter gives rise to speculation about possible favored treatment or possible repercussions, depending on the legislator's or state employee's success in winning the employment or contract.

The state ethics code does not prohibit legislators or state employees, in their private capacities, from applying for contracts with state agencies. However, the ethics code does require legislators and state employees to make every reasonable attempt to separate their official positions from their private employment affairs. The Legislature, in enacting the ethics code,

intended that no legislators or state employees should have an advantage over others in their attempts to secure employment by making unwarranted use of their state positions.

The Commission noted that the employee applied for the contract by forwarding her resume with a cover letter to state agency B. The cover letter was typed on stationery that clearly indicated the employee's position with state agency A.

The Commission concluded that the employee's use of her official title when applying for the contract constituted a clear violation of HRS §84-13(1). The Commission advised the employee to take care in the future to clearly separate, to the extent reasonably possible, her official position from her private business affairs.

## **II. Receipt of Double Per Diem for an Off-island Trip.**

Before leaving on an off-island trip on behalf of state agency A, the employee received authorization from the head of state agency A for payment of airfare and per diem for lodging and meal expenses. After returning from the trip, the employee filed a "Statement of Completed Travel" with state agency B, asking for reimbursement of per diem for lodging and meal expenses. The head of state agency B stated to the Commission that he was unaware that the employee had received a per diem payment from state agency A. Since the employee did not apply for the per diem payment from state agency B until returning, it seemed that the head of state agency A was not informed of the employee's application for or acceptance of a per diem payment from state agency B for the same trip.

The employee did not dispute that she received duplicate per diem payments for the same trip. In fact, the employee maintained that she was entitled to per diem payments from both agencies because she performed work for both agencies on the trip.

The Commission noted that the consultant contract entitled the employee to reimbursement of "out-of-pocket" expenses. With respect to lodging and meal expenses, it seemed that state agency B's policy was to reimburse those expenses with a per diem payment, rather than to reimburse the actual lodging or meal expenses incurred. This was evidenced by the agency's use of the "Completed Statement of Travel" form, which explicitly stated that travel expenses paid by the agency were to be paid in accordance with HRS §78-15 and the "Rules and Regulations" governing travel expenses promulgated by the Department of Accounting and General Services (DAGS). HRS §78-15 and the travel rules promulgated by DAGS provided that lodging and meal expenses were to be paid by the use of a per diem rate, rather than by reimbursement of the actual lodging and meal expenses incurred. The fact that the agency's policy regarding lodging and meal expenses was to reimburse those expenses with a per diem payment rather than with a payment to cover the actual expenses incurred was also evidenced by the employee's lack of receipts indicating her expenses. It seemed that, had the agency intended to reimburse the employee's actual expenses, the agency certainly would have instructed the employee to obtain and turn in receipts for her expenses.

The Commission further noted that the agency's policy to provide a per diem payment for lodging and meal expenses was consonant with the practice of the entire State. The per diem rate was established by law to cover the lodging and meal expenses that the State believed were reasonable and appropriate for those staying overnight to conduct state business while away from home. Rather than reimburse an employee for actual lodging and meal expenses, which might vary

considerably, the State had chosen to adhere to a fixed per diem rate. Employees who exceed this rate do so at their own expense.

The Commission believed that HRS §78-15 and the travel rules promulgated by DAGS, which were used by state agency B to pay per diem, established the rules by which the appropriateness of the per diem payment the employee received from state agency B should be evaluated. The Commission noted that although the agency did not fall within DAGS's jurisdiction, the agency had apparently voluntarily chosen to follow HRS §78-15 and the DAGS travel rules in determining payments for travel expenses. Again, the Commission noted that this was in keeping with the universal state policy.

Having reviewed the travel rules, the Commission noted that duplicate payments for meals were not allowed in certain instances (§3-1-10(5)) and that reimbursement for lodging was discretionary with an agency head when lodging was provided at no cost to an employee (§3-10-10(b)). The Commission also noted that the travel rules repeatedly stressed economy when determining the appropriate amount for reimbursement. In light of these policies, the Commission believed that the State would certainly disfavor the award of two per diems for the same time.

Furthermore, Section 3-10-12 of the travel rules required those receiving per diem to report on their statements of completed travel "any expenditure details" that might be required for "full disclosure." The Commission noted that the reimbursement of travel expenses was permitted only when there was authorization from an agency head, who acted on behalf of the State. The Commission believed that agency heads could not make informed decisions or authorizations on behalf of the State unless all the relevant information had been disclosed to them.

Because the employee did not disclose her receipt of per diem from state agency A to the head of state agency B, the Commission believed that the receipt of the per diem payment from state agency B was contrary to law. The Commission believed that as an employee of state agency A, the employee had a duty to inform her employer, the State, through state agency B, that she had already received one per diem payment. The Commission believed that the employee's failure to do so constituted a violation of HRS §84-13 since she had been given an unwarranted advantage by virtue of her failure to disclose the relevant information.

The Commission believed that as an employee of state agency A, the employee had a duty to inform the head of state agency A of the receipt of an additional per diem payment from state agency B. The Commission believed that the employee's failure to do so also constituted a violation of HRS §84-13.

The Commission again pointed out that authorization for a per diem payment was only valid when all the relevant information had been presented and considered. Because the agency heads were not aware of a second per diem payment, the Commission believed that the employee in fact never had authorization from the State to accept two per diem payments. The question was never put before the State.

In light of these circumstances, the Commission directed that the employee reimburse the State for the additional per diem payment.

### **III. Receipt of Double Airfare and Double Per Diem for Interisland Travel.**

As stated above, the Commission believed that HRS §84-13 would prohibit legislators or state employees from accepting or retaining unauthorized payments of airfare or per diem.

After examining records from both state agencies during its investigation, the Commission found additional duplicate payments of airfare and per diem for travel while the employee was under contract to state agency B. The Commission forwarded this information to the employee for her response.

In response to the information, the employee stated that because of her hectic schedule and frequent scheduling changes, she may have inadvertently acquired additional airplane tickets or per diem for the same travel. The employee also stated that the additional airplane tickets may have been used by others who assisted with the contract duties, although she did not remember who used the tickets and had no records pertaining to such use. The employee further stated that two of the tickets were in fact never used because they had been lost. These tickets were no longer valid. The employee stated that she was willing to reimburse the State for the apparent duplication in airfare and per diem payments. The Commission believed that reimbursement was appropriate under the circumstances and believed that the matter could properly be terminated with the appropriate payments to either of the two state agencies.

The Commission told the employee that it was dismayed to learn that airplane tickets provided by the State could have been lost so easily. That it would take the filing of a charge and subsequent investigation by the Commission to uncover lost airplane tickets was extremely disappointing to the Commission. The Commission stated that it believes that employees have a responsibility to see that state property entrusted to them is used for state purposes or returned promptly to the State. The Commission stated that it also believes that clear records should be kept as to who uses airplane tickets paid for by the State. The Commission stated that it was concerned not only with actual ethical violations but also with any appearance of impropriety, which can be just as damaging to the public's confidence.

### **IV. Conclusion.**

Section 21-5-4(b), State Ethics Commission Rules, provides that a legislator or state employee who receives an informal advisory opinion from the Commission may either request a formal opinion or comply with the informal advisory opinion. Section 21-5-4(c) provides that in the case of non-compliance with an informal advisory opinion, the Commission may proceed to a formal hearing. The Commission asked the employee to inform the Commission within thirty days of the date of this opinion of her decision to comply or not to comply with this opinion. Finally, the Commission specified what it thought the exact amount of the reimbursement should be.

Dated: Honolulu, Hawaii, November 7, 1985.

STATE ETHICS COMMISSION  
Allen K. Hoe, Chairperson  
Tim S. Farr, Vice Chairperson  
Edith K. Kleinjans, Commissioner

Note: Commissioner Laurie A. Loomis was excused from the meeting at which this opinion was considered.

## **DISSENT**

I respectfully dissent.

HRS §84-31(b) provides that the Commission may issue a "further statement of alleged violation" if a majority of the members of the Commission determines that there is probable cause for belief that violations of the State Ethics Code might have occurred.

After careful and serious consideration of all the material submitted to the Commission, I find that such probable cause exists with respect to (1) the misuse of official title, (2) the receipt of duplicate per diem for the off-island trip, and (3) the receipt of duplicate per diem and airfare for interisland travel.

Under these circumstances, I believe that the issuance of an informal advisory opinion is inappropriate. In accordance with HRS §84-31(b) and (d), the Respondent, I believe, should have been directed to answer the Amended Further Statement of Alleged Violation issued against her so that the Commission could then have determined whether there was justification to proceed to a formal hearing.

Dated: Honolulu, Hawaii, November 7, 1985.

Rabbi Arnold J. Magid, Commissioner