

INFORMAL ADVISORY OPINION NO. 27

A citizen filed a charge with the Commission against a state employee and a state agency alleging various violations of the ethics code stemming from a consultant contract the state agency had awarded the employee in her capacity as a private consultant. In response to the charge, the agency's head submitted written statements on behalf of his agency to the Commission and appeared before the Commission to refute the allegations.

After the charge was filed, the Commission began its own investigation of the case. 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 the agency head might have violated the ethics code by paying per diem to the employee for an off-island trip she took even though she had already received a per diem payment for the same trip from her regular state employer. The Commission therefore issued a Charge and Further Statement of Alleged Violation against the agency head. In response to the Commission's Charge and Further Statement of Alleged Violation, the agency head filed an answer with the Commission denying the charge allegations.

After considering the agency head's response, as well as other information before the Commission, the Commission concluded that the evidence in the case was insufficient to warrant proceeding to a formal hearing to determine whether violations of the ethics code in fact occurred. However, because the Commission determined that the payment of the per diem raised legitimate questions under the ethics code, the Commission decided that it would issue an informal advisory opinion to address those aspects of the payment of the per diem that gave rise to an appearance of unethical activity.

I. Requirements of the Fair Treatment Section of the State Ethics Code.

The fair treatment section of the State Ethics Code, HRS §84-13, reads in pertinent part 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

The Commission believes that a violation of this section of the ethics code would occur if a state official awarded a per diem payment to an employee when there was reason to believe that the per diem payment would or might be unauthorized. Under such circumstances, the state official would be granting an unwarranted privilege to the recipient of the per diem payment.

The Commission noted that the employee took an off-island trip on behalf of her regular state employer. On the same trip, in accordance with her contract, the employee also performed work for the state agency. After returning from the trip, the employee requested and received from the agency a second per diem payment.

The agency head maintained that he was unaware that the employee had also received a per diem payment from her regular state employer. The Commission believed that the fact that the

employee had applied to the agency only for reimbursement of per diem suggested, however, that her airfare had been paid for by another source. It seemed to the Commission that the agency head might have questioned why the source paying the airfare was not also paying the per diem.

In the agency head's answer to the Commission's Charge and Further Statement of Alleged Violation, he stated that he believed that the employee was entitled to the agency's additional per diem payment because the consultant contract allowed reimbursement of "out-of-pocket" expenses. Although the agency head had asserted that he was not aware that the employee had in fact received another per diem payment from her regular state employer, it appeared that even had the agency head known, he would have made the additional per diem payment anyway, on the basis that the consultant contract authorized reimbursement of "out-of-pocket" expenses. Indeed, although the agency head eventually learned of the duplicate per diem payment, it appeared that he took no action to ascertain whether his agency's per diem payment had been warranted.

The Commission noted that the agency's contract did in fact entitle the employee to reimbursement of "out-of-pocket" expenses. However, with respect to lodging and meal expenses, it was apparent that the agency's policy was to reimburse those expenses with a per diem payment rather than pay the actual costs of lodging or meals. 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 expenses for lodging and meals were to be paid at a per diem rate rather than by reimbursement of the actual expenses incurred. The fact that the agency's policy regarding these expenses was to reimburse them with a per diem payment rather than with a payment to cover the actual expenses was also evidenced by the employee's lack of receipts indicating her expenses. It seemed to the Commission that had the agency intended to reimburse the employee's expenses, the agency certainly would have required receipts of 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 was established by law to cover 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 state employees for actual lodging and meal expenses, which might vary considerably, the State had chosen to adhere to a fixed per diem rate.

The Commission believed that HRS §78-15 and the travel rules promulgated by DAGS, which were used by the agency to pay per diem, established the rules by which the appropriateness of the agency per diem payment to the employee 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, this appeared to the Commission to be 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 a state 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 duplicate per diems.

The Commission believed that the agency head's assertion that the contractor was entitled to two per diem payments from the State was inconsistent with state law and the DAGS travel rules. The Commission believed that the authoritative source in the State on per diem policies was DAGS. The Commission believed that the award of duplicate per diem was certainly unusual and questionable and thus the question of the appropriateness of the award should have been presented to DAGS for either a formal or informal opinion. The Commission believed that the deputy attorney general assigned to the agency should also have been asked whether the contract provided for the payment of per diem when per diem had in fact been received from another state source.

II. Conclusion.

The Commission believed that it was the agency head's responsibility to be circumspect when evaluating the employee's request for per diem reimbursement both at the time the request was made and when the agency head learned that his agency had paid the employee a second per diem. The Commission believed that in this case the agency head could have done more to assure that his agency's funds were being properly expended. Unfortunately, the lack of circumspection on the agency head's part raised a legitimate question of possible unethical activity.

Dated: Honolulu, Hawaii, November 20, 1985.

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