INFORMAL ADVISORY OPINION NO. 2001-11

On February 28, 2001, a member of the public ("complainant") filed a formal charge against a former state employee with the Hawaii State Ethics Commission ("Commission"). Pursuant to the Commission's procedures, a copy of the charge was sent to the former state employee for a response. The former state employee filed an "answer" to the charge with the Commission. The Commission reviewed this matter and issued this Informal Advisory Opinion, in accordance with its procedures.

The Charge

The former state employee worked for a state agency with jurisdiction over certain resources until he retired from his state position in late 1999. The charge alleged that, in 1999, the former state employee, while an employee of the State, violated the State Ethics Code by abusing his state authority and position to solicit and accept free air transportation services for himself and his son from a vendor who did business with his state agency. The charge also alleged that the free air transportation services received from the vendor were inappropriate gifts and were not reported to the Commission as required by the State Ethics Code. The charge also alleged that the air transportation services provided by the vendor constituted additional "compensation" to the former state employee in violation of the State Ethics Code. The State Ethics Code is state law and is set forth in chapter 84 of the Hawaii Revised Statutes ("HRS").

The charge arose as a result of an incident involving the former state employee and his son. According to information provided by the complainant and other sources, the former state employee and his son, while on vacation, flew into a restricted area. The charge alleged that while there, the former state employee and his son used an illegal hunting method to hunt wildlife. Hunters in the area claimed that they observed the former state employee and his son using what appeared to be an illegal hunting method. The hunters took their concerns to the complainant who filed the charge in this case and to the former state employee's state agency. The Department of the Attorney General investigated the matter, which resulted in criminal charges being filed against the former state employee and his son for (1) utilizing an illegal hunting method, and (2) flying into a restricted area without a required permit.

According to information provided by the complainant and other sources, the former state employee's son pleaded guilty to the illegal flight charge, in exchange for the State dropping the illegal hunting method charge against him. The former state employee did not reach a plea agreement and his case proceeded to trial.

The case proceeded to trial in 2001. According to information provided to the Commission, the air transportation company's owner, who flew the former state employee and his son into the restricted area, testified at the trial that he flew the former state employee and his son to their destination as a "favor." He also testified that he knew the former state employee and his son from "working" with them. He also testified that the former state employee's son contacted him by telephone to make arrangements for the flight.

Following the trial, a jury found the former state employee guilty of the illegal flight charge, a misdemeanor, but acquitted him of the illegal hunting method charge. The former state employee was sentenced to pay a fine and to perform a certain number of hours of community service.

Answer to the Charge

At the time the charge was filed against the former state employee, he had already retired from his state position. Pursuant to HRS section 84-31(b) of the State Ethics Code, a copy of the charge was sent to the former state employee for his response, via the private attorney who represented him in the criminal case. The former state employee filed a written answer to the charge with the Commission.

In his answer, the former state employee stated that flight services needed by his former state agency were acquired on a contract basis. All interested vendors were required to submit yearly bids. He explained that another state agency, rather than his former state agency, administered these contracts. He stated that he did not have a role in the administration of these contracts. He also stated that all arrangements for flight services were done by persons in another position at his former state agency, rather than by persons in the position he held. He did not dispute that he received flight services from the company to travel in and out of the restricted area on the date in question. He stated, however, that he was invited to go on the trip by his son. The former state employee stated that this trip was entirely arranged by his son, and not by himself. The former state employee maintained that he had not been in contact with, nor had spoken with, the vendor for at least one year prior to the trip.

<u>The State Ethics Code</u>

For reasons set forth below, the Commission decided not to pursue the charges raised in this case. However, the Commission commented in general on the relevant provisions of the State Ethics Code and certain facts that pertained to this case.

The charge filed against the former state employee concerned actions taken by him while he was a state employee in 1999. The State Ethics Code provides a six-year statute of limitations for alleged ethics violations.[1] Therefore, the Commission had jurisdiction to receive and consider the charge against the former state employee and to take appropriate action in the case.

Several sections of the State Ethics Code were applicable to the allegations raised in the charge. The charge essentially made four allegations against the former state employee: (1) The former state employee misused his state position by participating in the flight trip; (2) the free air transportation he received amounted to "additional compensation" to the former state employee; (3) the free air transportation was an improper gift; and, (4) the gift was not disclosed to the Commission as required by the State Ethics Code. The first two allegations raised concerns under HRS section 84-13, the Fair Treatment section of the State Ethics Code. The third allegation pertained to HRS section 84-11, the Gifts section of the State Ethics Code. The final allegation raised concerns under HRS section 84-11.5, the Gifts Reporting section of the State Ethics Code. The following paragraphs discuss these provisions of the State Ethics Code and the relevant facts.

With regard to the first two allegations of the charge, HRS section 84-13, the Fair Treatment section of the State Ethics Code, states, in relevant part, as follows:

---

[1] HRS section 84-31(a)(6) reads:

> **§ 84-31 Duties of commission; complaint, hearing, determination.**
> (a) The ethics commission shall have the following powers and duties:
> . . . .
> (6) It shall have jurisdiction for the purposes of investigation and taking appropriate action on alleged violations of this chapter in all proceedings commenced within six years of an alleged violation of this chapter by a legislator or employee or former legislator or employee. A proceeding shall be deemed commenced by the filing of a charge with the commission or by the signing of a charge by three or more members of the commission. Nothing herein shall bar proceedings against a person who by fraud or other device, prevents discovery of a violation of this chapter.

> **§ 84-13 Fair treatment.** No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others; including but not limited to the following:
>
> . . . .
>
> (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of the legislator's or employee's official duties or responsibilities except as provided by law.

HRS section 84-13 in general prohibits a state employee from using or attempting to use the employee's official position to secure unwarranted privileges, treatment, or advantages for himself or herself or for others. HRS section 84-13 contains several subsections. HRS subsection 84-13(2) prohibits state employees from accepting or soliciting any "compensation or other consideration" for the performance of official duties except as provided by law. HRS section 84-3 defines "compensation" as "any money, thing of value, or economic benefit conferred on or received by any person in return for services rendered or to be rendered by oneself or another."

It was apparent from the trial testimony of the flight company's owner, who also piloted the aircraft, that his relationship with the former state employee resulted from the latter's state employment. The flight company's owner testified that he knew the former state employee and his son from working with them. The flight company's owner also testified that he flew the former state employee and his son to the restricted area as a favor to them.

The third allegation of the charge stated that the acceptance of the free flight amounted to the acceptance of an improper gift. HRS section 84-11, the Gifts section of the State Ethics Code, reads as follows:

> **§ 84-11 Gifts.** No legislator or employee shall solicit, accept, or receive, directly or indirectly, any gift, whether in the form of money, service, loan, <u>travel</u>, 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 the legislator or employee in the performance of the legislator's or employee's official duties or is intended as a reward for any official action on the legislator's or employee's part. [Emphasis added.]

Section 84-11 prohibits a state employee from soliciting or accepting any gift, directly or indirectly, if it is <u>reasonable</u> for a person <u>to infer</u> that the gift is either (1) intended to influence the employee in the performance of his or her official duties, or (2) is intended to reward the employee for official action on his or her part.

The free flight that the former state employee accepted was a gift for purposes of the State Ethics Code. The flight trip had a substantial value. The information provided to the Commission indicated that the value of the flight amounted to approximately $400-$500 per hour. In addition, the flight was provided to the former state employee as a favor by an individual whose relationship with the former state employee appeared to have been based upon the former state employee's official state position. These circumstances raised questions as to whether the flight trip was acceptable under HRS section 84-11.

Finally, HRS section 84-11.5, the Gifts Reporting section of the State Ethics Code, was applicable to the final allegation of the charge. In relevant part, this section reads:

§ 84-11.5 Reporting of gifts. (a) Every legislator and employee shall file a gifts disclosure statement with the state ethics commission on June 30 of each year if all of the following conditions are met:

(1) The legislator or employee, or spouse or dependent child of a legislator or employee, received directly or indirectly from one source any gift or gifts valued singly or in the aggregate in excess of $200, whether the gift is in the form of money, service, goods, or in any other form;

(2) The source of the gift or gifts have interests that may be affected by official action or lack of action by the legislator or employee;

(3) The gift is not exempted by subsection (d) from reporting requirements under this subsection.[2]

HRS section 84-11.5 requires state employees to file "gifts disclosure statements" with the State Ethics Commission on June 30 of each year to report gifts that meet the conditions cited above. These statements are records available for public inspection. In 1999, the former state employee received a gift of significant value from a vendor who transacted business with his former state agency. If the vendor had interests that were subject to the former state employee's official action as a state employee, a gifts disclosure statement would have been required by HRS section 84-11.5. The Commission had no record of the former state employee filing a gifts disclosure statement with the Commission either in 1999, or in any subsequent year.

The allegations stated in the charge raised a number of ethics issues worthy of consideration by the Commission. The Commission thus considered whether to pursue this matter through further proceedings. If the Commission were to continue further with the charge, the Commission would ultimately be required to hold a formal, contested case hearing to determine whether violations of the State Ethics Code in fact occurred.

After careful consideration, the Commission decided not to proceed with further proceedings in this case. The Commission noted that the State had already prosecuted the former state employee for violations of state criminal law as a result of his actions in connection with the flight trip that was accepted in 1999. The former state employee was found guilty of a misdemeanor, fined, and sentenced to perform community service. The Commission believed that it would be duplicative and would not be a wise use of its resources to hold an administrative hearing in this case given the fact that criminal proceedings had

---

[2] HRS section 84-11.5 (d) reads:

4) Excluded from the reporting requirements of this section are the following:

(1) Gifts received by will or intestate succession;

(2) Gifts received by way of distribution of any inter vivos or testamentary trust established by a spouse or ancestor;

(3) Gifts from a spouse, fiancé, fiancee, any relative within four degrees of consanguinity or the spouse, fiancé, or fiancee of such a relative. A gift from any such person is a reportable gift if the person is acting as an agent or intermediary for any person not covered by this paragraph;

(4) Political campaign contributions that comply with state law;

(5) Anything available to or distributed to the public generally without regard to the official status of the recipient;

(6) Gifts that, within thirty days after receipt, are returned to the giver or delivered to a public body or to a bona fide educational or charitable organization without the donation being claimed as a charitable contribution for tax purposes; and

(7) Exchanges of approximately equal value on holidays, birthday, or special occasions.

None of these exceptions appear to be applicable in this case.

already been held in regard to virtually the same set of facts, and criminal sanctions had been imposed upon the former state employee. The Commission believed that because the criminal case against the former state employee had been tried and resulted in a conviction in state court, justice had been done, and further proceedings by the Commission were unwarranted.

The Commission decided, in accordance with its procedures, to issue an Informal Advisory Opinion to the former state employee. The purpose of this opinion was to explain the relevant ethics laws, as well as the basis for the Commission's decision not to continue with further charge proceedings.

Dated: Honolulu, Hawaii, November 14, 2001

HAWAII STATE ETHICS COMMISSION

Ronald R. Yoshida, Vice Chairperson
Eloise Lee, Commissioner
Carl Morton, M.D., Commissioner
Dawn Suyenaga, Commissioner

Note: Chairperson Cassandra J.L. Abdul disqualified herself from consideration of this matter.