

INFORMAL ADVISORY OPINION NO. 2006-1

Our office received a formal, sworn Charge from a member of the public (“complainant”) against both a state agency (“agency”) and one of its officials (“official”). The Charge, in essence, alleged that the agency and official had violated the State Ethics Code because of the acceptance by the official of “supplemental” pay to the official’s state salary from outside, private sources. The State Ethics Code is state law, and is set forth in chapter 84 of the Hawaii Revised Statutes (“HRS”). The complainant specifically alleged violations of the State Ethics Code as follows: (1) a violation by the official in conjunction with his accepting the “supplemental” pay; and, (2) a violation on the part of the agency for facilitating the “supplemental” pay. The complainant also alleged that, having accepted the “supplemental” pay, the official was in a position to potentially violate other provisions of the State Ethics Code, such as the Code’s conflict-of-interests law, set forth in HRS section 84-14.

In accordance with HRS section 84-31 of the State Ethics Code, copies of the Charge were sent to the agency and to the official for response. A Response to the Charge was filed on behalf of the agency and the official by the agency’s attorney.

In his Response, the agency’s attorney contended that there had been no violation of the State Ethics Code by the official since all compensation paid to the official came from the agency, and thus the official received no special treatment. The agency’s attorney also asserted that the agency had done nothing inappropriate in compensating the official, and further argued that the Charge should have named specific officials of the agency, rather than the agency itself in its role as an entity, since, as the attorney noted, the relevant provisions of the State Ethics Code relate to individual state employee misconduct rather than “conduct” by an employee’s agency.

The central issue in this case was whether the “supplemental” compensation paid to the official was violative of the “Fair treatment” section of the State Ethics Code. The “Fair treatment” section of the State Ethics Code, HRS section 84-13, reads, in its entirety, as follows:

§ 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:

- (1) Seeking other employment or contract for services for oneself by the use or attempted use of the legislator's or employee's office or position.
- (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.
- (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 the legislator or employee inspects or supervises in the legislator's or employee's official capacity.

Nothing herein shall be construed to prohibit a legislator from introducing bills and resolutions, serving on committees or from making statements or taking action in the exercise of the legislator's legislative functions. Every legislator shall file a full and complete public disclosure of the nature and extent of the interest or transaction which the legislator believes may be affected by legislative action.

HRS section 84-13 prohibits state employees from according to themselves or others any "unwarranted" treatment or special advantages or privileges.

The complainant's main argument was that the official's supplemental compensation was "unfair" because other state employees do not receive "supplemental" compensation from private, outside sources. Further, the complainant believed that the anonymity of donors was inappropriate.

The complainant did state, however, the complainant's belief that private monies that fund "endowed" positions at the agency were, in fact, proper. The Commission understands that there are many endowed positions at the agency that are funded from private sources. There are endowed positions funded by corporations, private foundations, and at least two endowed positions funded by anonymous donors.

The complainant believed that the private funding of an endowed position was appropriate, apparently because the money was for the "position," so to speak, rather than for a "named" person. For the record, the complainant had not raised with the Commission any concerns about endowed positions, or the anonymity of the donors of any endowed positions.

After reviewing the complainant's allegations against the agency and the official, the Commission determined, at its adjudicatory meeting held on August 16, 2006, that neither the agency, its officials, nor the official in this case had violated the State Ethics Code with respect to the official's compensation.

The Commission believed that the official's position at the agency was and should be considered sui generis, i.e., "unique," or "one of a kind." Further, although the position was not an "endowed" position, the Commission believed that the same logic used for establishing and maintaining endowed positions appeared to apply in this case as well.

It was evident that the money raised from private donors was for the purpose of attracting and keeping a highly competent individual to serve in the official's position. The position was an extremely competitive one in terms of recruitment and retention. The Commission saw no evidence in this case of favoritism for a specific individual, but a desire to adequately fund a position for the benefit of the agency and for the people the agency served.

In this case, it was the Commission's understanding that a governmental division ("division") within the agency had created a "fund" ("Fund") for the use of the division. This Fund accepted donations from a non-profit organization ("organization") that were given to the organization for the benefit of the Fund. What the division did with the Fund money was at its own discretion. It was the Commission's understanding that donations were not "earmarked" by the division for the benefit of any particular official. In fact, under certain rules, which applied in this case, private, outside supplemental pay could not be "earmarked" for a particular official.

Thus, donations given to the organization for the Fund could not be earmarked for a particular official, and were used at the discretion of the division, once monies were deposited into its Fund. Further, with respect to the official's contract with the agency, the agency in its Response to the Charge stated that it had to meet the requirements of the official's contract regardless of whether it received organization donations from the organization to its Fund or not.

Under these circumstances, the Commission concluded that the official's salary was paid for by the agency in total, with the use of state funds and monetary gifts that became state funds. The manner of compensation for the official was akin to the manner of compensation used for endowed positions. Thus, the Commission did not find any violation of the State Ethics Code.

The Commission believed that endowed positions at the agency, and the position of the official in this case (as well as similar positions at the agency), constituted unique situations that were particular to the type of agency in question. The agency in question competed with other similar agencies nationwide. Funds were continually sought by the agency to employ individuals of exceptional ability in various areas relating to the agency's mission. The overall purpose was to benefit the agency in general, and the people the agency served.

The Commission believed, however, that there appeared to be no apparent basis for extending "supplemental" pay in this fashion to other state positions outside the agency in question. Other state salaries are appropriately set within budgetary appropriations established by the Legislature.

With respect to the issue of the undisclosed names of donors, the Commission believed that this was an issue that more appropriately fell within the jurisdiction of the Office of Information Practices.

The Commission noted that the issuance of this decision had taken much time from the time of the filing of the Charge. Part of the time needed to resolve this case stemmed from the unique issues raised in this case, and the time required to research these issues to the Commission's satisfaction.

The Commission also noted that, in resolving this case, the Commission sought an opinion from the Office of Information Practices about the confidentiality of the names of donors, since much of the focus of the Charge seemed to deal with the fact that the names of some of the donors were unknown. Because of the workload of the Office of Information Practices, however, the Commission did not receive an opinion from the Office of

Information Practices within the time frame it had expected for resolving this case. The Commission was recently informed by the Office of Information Practices that substantially more time would be needed by the Office of Information Practices in order to render an opinion. The Commission re-evaluated this case on that basis, and determined that the Commission was in a position to resolve this case without an opinion from the Office of Information Practices.

Finally, the State Ethics Commission noted that there was a possibility that ethics issues might arise if a recipient of outside funds found himself or herself in a situation involving state duties that might affect a donor to his or her salary. The Commission advised that individuals who receive outside funds might wish to contact the Commission for advice with regard to such situations.

Dated: Honolulu, Hawaii, September 7, 2006.

Hawaii State Ethics Commission

Robert R. Bean, Chairperson
Carl Morton, M.D., Vice Chairperson
Maria Sullivan, Commissioner
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