

## INFORMAL ADVISORY OPINION NO. 96-6

The Hawaii State Ethics Commission ("Commission") issued a charge against a state official alleging violations of the State Ethics Code, Chapter 84 of the Hawaii Revised Statutes ("HRS"), in connection with his participation in certain golf tournaments during his tenure as the director of a state agency.

The charge arose from the official's participation in three golf tournaments, and alleged that the official improperly accepted gifts of invitations to participate in the events and gifts of golf clubs given in connection with his participation in the events. In this opinion, the Commission applied the relevant provisions of the State Ethics Code to the issues raised in the charge. As mandated by Article XIV of the Hawaii State Constitution, the State Ethics Code was established on the premise that "[t]he people of Hawaii believe that public officers and employees must exhibit the highest standards of ethical conduct . . . ." In issuing this opinion, the Commission was guided by HRS section 84-1, which states that the State Ethics Code "shall be liberally construed to promote high standards of ethical conduct in state government." [Emphasis added.]

With respect to the first golf tournament, referred to hereinafter as "Golf Tournament 1," the Commission was informed that the tournament was an annual event for professional and amateur golfers. The tournament was held on a neighbor island. The official participated in the event on one day, upon the invitation of a business that was the "site host" and title sponsor of the event. The host/sponsor was given the privilege of requesting an invitation for four people, as part of a host site/title sponsor agreement it had with a certain company, referred to hereinafter as "Company A." It was explained that professional-amateur ("pro-am") slots for the tournament were given to select clients of Company A, in appreciation for purchasing advertising time on national television to help sponsor the event. The official was personally contacted by an officer of the host/sponsor to participate in the event. According to the officer, the tournament was strictly an invitational event; "pro-am" slots could not be purchased and had no dollar value.

It appeared that the invitation included hotel accommodations for two nights, at least one meal, and other amenities. The official said that the hotel provided leis and a fruit basket. The Commission was informed that the official's room was provided by Company A, which received a large room block as part of the host site/title sponsor contract Company A had with the host/sponsor. The host/sponsor did not provide airfare or ground transportation. The official said he believed that he used "frequent flyer" coupons for his airfare, not funds from his state agency. The official did not pay for all of his meals. He said that he paid for his own dinner one night and had a buffet breakfast at the golf course the next day. He also said he attended a formal dinner that night, where he socialized with the tournament sponsors, business and government leaders, and others involved with the event. That dinner appeared to have been an awards banquet, which, according to the host/sponsor, was provided by Company A for the sponsors. According to Company A, each player in the tournament received a plaque commemorating the event. The official also reported that he received from a sponsor two T-shirts and two visors advertising the event.

The official also received golf clubs and a golf bag in connection with his participation with Golf Tournament 1, which he said were sent to him by a certain company, hereinafter referred to as "Company B." According to the host/sponsor, Company B donated golf clubs and a bag for each participant in the pro-am tournament. Also, according to the host/sponsor, those items were part of the "thank you" package given to the sponsors. It was believed that the dollar value of the items was substantial. The Commission was informed that in the two previous years the event was held,

each participant was given a set of golf clubs and a golf bag valued at approximately \$1,200. The official said that Company B also gave each participant caps, towels, and other items.

The official reported to the Commission that he gave the golf clubs and bag he received to a certain organization, hereinafter referred to as "Organization A," an organization in which his wife served on the board of directors. The official explained that Organization A was a non-profit educational organization whose purpose was to provide employment referral, recruitment, customized training, and a support system for people with disabilities. The official said that the items were auctioned off at a fundraiser for that organization.

The official was charged with violating HRS section 84-11, the State Ethics Code's gifts law, for: (1) accepting the host/sponsor's invitation to participate in the golf tournament; and (2) accepting golf clubs given in connection with his participation in that tournament. HRS section 84-11 states 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, 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 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.

"Official action" is defined by HRS section 84-3 as "a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." HRS section 84-11 prohibits a state official or employee from accepting a gift if one can "reasonably infer" that the gift is intended to reward or influence discretionary action on the part of the state official or employee.

The official was also charged with violating section 84-14(a) of the State Ethics Code, which deals with conflicts of interest, for giving the clubs to an organization in which his wife served on the board of directors. HRS section 84-14(a) states in relevant part as follows:

**§84-14 Conflicts of interests.** (a) No employee shall take any official action directly affecting:

- (1) A business or other undertaking in which he has a substantial financial interest . . . [Emphasis added.]

A "financial interest," as defined by HRS section 84-3, includes:

[A]n interest held by an individual, the individual's spouse, or dependent children which is:

- (1) An ownership interest in a business.
- (2) A creditor interest in an insolvent business.
- (3) An employment, or prospective employment for which negotiations have begun.
- (4) An ownership interest in real or personal property.

- (5) A loan or other debtor interest.
- (6) A directorship or officership in a business.

[Emphasis added.]

For purposes of the State Ethics Code, the official was deemed to have a financial interest in Organization A, through his wife's financial interest in that organization as a member of its board of directors. The charge alleged that the official violated HRS section 84-14(a) by taking official action that directly affected a business in which he had a substantial financial interest. The official action was the donation of the clubs to Organization A.

The official denied the charge issued against him. He denied that his participation in Golf Tournament 1 violated HRS section 84-11. He also denied that he violated HRS section 84-14(a) by giving away the golf items he received in connection with that tournament to Organization A. He contended that it could not "reasonably be inferred" that his participation in Golf Tournament 1 and his acceptance of gifts related to such participation were intended to influence or reward him for any official action on his part. He contended that he did not take any official action directly affecting Organization A and that he did not have a "substantial financial interest" in that organization. The official also asserted that the host/sponsor did not have any matter directly before him in his official capacity or before his state agency, that could be improperly influenced during the relevant period. In addition, the official said that Company B, the company that reportedly donated golf clubs and a bag for each participant in the pro-am tournament, would not have been subject to his official action unless it entered into certain new areas of business, and that Company B did not have any business pending before him or his state agency during the relevant period. Finally, the official asserted that he only accepted the hospitality offered to other participants in the tournament.

The first issue before the Commission was whether the official's acceptance of the host/sponsor's invitation was permissible under the gifts law. The Commission stated that, pursuant to HRS section 84-11, acceptance of the gift was prohibited if it was "reasonable to infer" that the gift was given to influence or reward official action. The Commission explained that the gifts law focused on the appearance of a gift's influence on the recipient, rather than on the actual intent of the donor to influence or reward the recipient. The Commission further explained that in determining whether it was "reasonable to infer" that a gift was given with an intention to influence or reward a state official or employee, the Commission considered all relevant factors, such as the value of the gift and the nature of the discretionary action the state official or employee had taken or might take with regard to the donor of the gift. The Commission added that one's contention that a gift would not actually influence him or her was not a factor in determining the legality of accepting a gift under HRS section 84-11.

The value of a slot to participate in Golf Tournament 1 appeared to have been substantial. Although no market value was given, the tournament reportedly was an exclusive event held at a resort. An invitation to participate in the event apparently included hotel accommodations, at least one meal, and other amenities. To provide some comparison, in the year Golf Tournament 1 was held, the Commission was informed that the fee for a pro-am slot in a golf tournament that appeared to be similar to Golf Tournament 1 had been approximately \$4,000 for the prior two years.

The second relevant factor considered by the Commission was the nature of any official action the official might have taken with respect to the host/sponsor. It did not appear that the

official took any official action directly affecting the host/sponsor. With respect to some matters, the host/sponsor fell under the jurisdiction of the official's state agency. The facts did not indicate, however, that the official exercised any discretionary authority that had a direct impact on the host/sponsor. The official informed the Commission that his state agency was working on policies that involved establishing criteria for evaluating applications for the development of certain facilities. At one time, the host/sponsor considered developing a facility that would have been subject to the policies under consideration. It appeared that the host/sponsor could have been affected by the new policies if the new policies had been adopted and if the host/sponsor had pursued its development plans. It appeared, however, that the host/sponsor eventually decided not to pursue that course of action and subsequently made plans to develop another type of facility. The host/sponsor indicated that it did not know whether the agency's new policies would have applied to the host/sponsor's subsequent project. Additionally, it appeared that had the host/sponsor pursued its original project, the official's state agency would have had jurisdiction over the host/sponsor with respect to certain matters. The official explained that, pursuant to state statute, his state agency reviewed certain permit applications for "consistency" with various established requirements. The official said that had the host/sponsor decided on the original project, his state agency would have been involved, but that such involvement probably would have been two to three years in the future, after he had planned to leave his state agency.

The host/sponsor would have been subject to the official's official action if the host/sponsor had submitted petitions to a certain state board. The official explained that, pursuant to state statute, his state agency was a party to any petition filed with that state board and as such, his state agency filed position statements or recommendations with that state board on such petitions. The official said, however, that the host/sponsor had not submitted any petitions during his tenure, nor did he expect that the host/sponsor would do so for the next several years. He remarked that the host/sponsor appeared to have no need to submit petitions for the foreseeable future. Moreover, the official stated that if the host/sponsor had filed a petition, his state agency would have recommended denial, and that the host/sponsor knew that. The official informed the Commission that with respect to the types of actions just described, his staff made recommendations to him and his signature was on his state agency's submissions, so in effect, they were his decisions. The official informed the Commission that the host/sponsor, however, did not have any petitions or requests pending with his state agency at the time of Golf Tournament 1.

The official did, however, have contact with the host/sponsor during his tenure with his state agency. The official explained that as the head of his state agency, he had spoken on several occasions to representatives of the host/sponsor, as he did with all similar business, regarding matters such as general state policies and approaches. The official said, for example, that he met with businesses to inform them that they would have to meet a particular requirement of his state agency if they wanted a favorable recommendation from his state agency on a petition. It did not appear, however, that the official's dealings with the host/sponsor regarding general state policies and approaches involved the exercise of discretionary authority (official action) on his part.

Although it appeared that the official's state agency had jurisdiction over the host/sponsor with respect to some matters, the facts did not indicate that the official personally took any official action directly affecting the host/sponsor. Had the host/sponsor pursued its plans to develop a certain type of facility, it appeared that the host/sponsor could have been subject to the official's official action. The host/sponsor's plans, however, apparently did not materialize. Had the host/sponsor submitted proposals in connection with other matters or petitions, it appeared that the official would have been involved, but that apparently did not occur, either. In short, it appeared

that any official action on the part of the official that would have had a direct impact upon the host/sponsor was speculative.

It appeared that the official participated in Golf Tournament 1 in his official capacity, as a substitute for the Governor. The official stated that he participated in the event in his state capacity, as a prominent government official who represented the State of Hawaii. The official said that at the event, he expressed the State's support for the event. He thanked the sponsors for staging the tournament in Hawaii and told them that if they needed assistance, the State had an agency established to do that. The official assured the sponsors that the State wanted to continue the event in Hawaii. He informed the Commission that he happened to be a personal friend of the person who had initially contacted him on behalf of the host/sponsor about playing in the tournament. According to that person, the official was invited because it was felt that he could represent the State well and was an "excellent proponent of Hawaii as a place to visit as well as a place in which to invest and do business." Also, the Governor had been invited but had declined. Moreover, it was believed that the official could "hold his own" with professional and amateur golfers.

Under the facts and circumstances, it appeared that the official's participation in Golf Tournament 1 served a legitimate state purpose. It appeared that the official was an appropriate individual to represent the State at the event, because he was a prominent state official associated with the Governor. Moreover, it did not appear that the official took any official action directly affecting the host/sponsor. Therefore, the Commission did not believe it was "reasonable to infer" that the host/sponsor's invitation was intended to influence or reward the official for official action. The Commission believed that the official's acceptance of the invitation to participate in the tournament and anything given to facilitate his participation, such as hotel accommodations and meals, thus was permissible under the State Ethics Code. In addition, the Commission did not believe that the official's acceptance of hospitality items and his acceptance of other items of nominal value given to advertise or commemorate the event were prohibited by the State Ethics Code.

The Commission did believe, however, that the official's acceptance of the golf clubs and bag given in connection with his participation in Golf Tournament 1 was prohibited by the State Ethics Code. The "fair treatment" section of the State Ethics Code, HRS section 84-13, and its subpart, HRS section 84-13(2), were relevant to that issue. Those provisions state 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:

...

- (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.

The Commission explained that HRS section 84-13 prohibits state officials and employees from using or attempting to use their state positions to obtain unwarranted benefits for themselves or others. The Commission stated that, more particularly, HRS section 84-13(2) prohibits state

officials and employees from accepting or soliciting any "compensation" or other "consideration" for the performance of official duties unless the compensation or consideration is provided for by law. The Commission explained that the term "compensation" is defined in section 84-3 of the State Ethics Code 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 further explained that because the term "compensation" includes any thing of value or of economic benefit, "compensation" also includes any gift that might be given to a state official or employee "for the performance of" that individual's official duties or responsibilities. The Commission added that the term "consideration" in its general legal sense also includes gifts or anything of economic benefit. The Commission explained that it interprets HRS section 84-13(2) as prohibiting state officials and employees from unjustly enriching themselves by soliciting or accepting anything of value simply because of the performance of their official duties.

It appeared that the official's participation in Golf Tournament 1 was in the performance of his state duties. The Commission therefore believed that the golf clubs and bag given in connection with his participation in the event would be deemed "compensation" given "for the performance of" his official duties or responsibilities. The official thus was prohibited from accepting the items under HRS section 84-13(2). Moreover, since the official was participating in the event in his state capacity, the items at most would be considered gifts to the State as opposed to personal gifts to him. Therefore, the official was prohibited by HRS section 84-13 from accepting the items.

It appeared that the golf items did not come directly from the host/sponsor, but rather from Company B. The official could have been prohibited under the gifts law, HRS section 84-11, from accepting the items from Company B, if he took official action affecting that company. The official said, however, that Company B would not have been subject to his official action unless it entered into certain new areas of business, and that Company B did not have any business pending before him or his state agency during the relevant period. The Commission informed the official that, in any event, he was prohibited from accepting the golf clubs and bag under HRS sections 84-13(2) and 84-13, for the reasons previously discussed.

The manner in which the official disposed of the golf clubs and bag normally would have raised the issue of a possible violation of HRS section 84-14(a), which deals with conflicts of interest. Under HRS section 84-14(a), the official would have been prohibited from taking official action directly affecting a business or undertaking in which he had a substantial financial interest. As previously discussed, the official was deemed to have a financial interest in Organization A by virtue of his wife's membership on the board of directors of that organization. The Commission noted that because it appeared that the official acquired the golf items in his official capacity, it followed that his decision to donate the items to Organization A was made in his official capacity. The Commission noted that while the official's donation of the items to Organization A inadvertently may have raised a problem under HRS section 84-14(a), that issue would not be further pursued by the Commission, as the Commission believed that the official was acting in good faith to take corrective action to come into compliance with the law.

The Commission stated that, assuming for the sake of argument that in the official's private, rather than official, capacity, he had decided to donate the golf items to Organization A, a problem under HRS section 84-13 would have arisen. The Commission pointed out that HRS section 84-13 prohibits state officials from using or attempting to use their state positions to secure or grant unwarranted advantages for themselves or others. Since it appeared that the official acquired the golf items in his state capacity, a decision made in his private capacity to donate those items to a

charitable organization in which he had a financial interest would have created concerns under HRS section 84-13. The Commission, however, did not see any evidence of an intent on the official's part to give anyone preferential treatment.

The Commission was informed that another golf tournament for professional and amateur golfers, similar to Golf Tournament 1, was held annually on a neighbor island. The official was charged with violations in connection with his participation in this other tournament in two different years. The events are hereinafter referred to as "Golf Tournament 2" and "Golf Tournament 3." For each tournament the official was charged with violating the gifts law, HRS section 84-11, for: (1) accepting an invitation to participate in the event; and (2) accepting golf clubs given in connection with his participation in the event.

The official was invited to participate in Golf Tournament 2 by a certain company, referred to hereinafter as "Company C." It was reported that tee-gift packages were provided to all pro-am tournament participants.

The official was invited to participate in Golf Tournament 3, which occurred the next year, by another company, hereinafter referred to as "Company D." It was reported that Company D was a sponsor of the event and that Company C was the title sponsor. The Commission was informed that participants received, as part of their entry fee, a gift package that included a set of golf clubs, golfing apparel, and golf balls, estimated at a retail value of \$2,000. In the year following Golf Tournament 3, a representative of Company C informed the Commission that the fee for a pro-am slot in the tournament had been approximately \$4,000 for the prior two years.

The Commission had limited information on the facts and circumstances of the official's acceptance of the invitations and possible acceptance of golf clubs given in connection with Golf Tournaments 2 and 3. The official informed the Commission that he had often been asked to play in tournaments similar to the events in question as a prominent state official who was associated with the Governor. The official denied being in violation of HRS section 84-11 for his involvement with Golf Tournaments 2 and 3. In his response to those allegations, the official asserted the following affirmative defenses: it could not "reasonably be inferred" that his participation in the tournaments and his acceptance of gifts related to such participation were intended to influence or reward him for official action; neither Company C nor Company D had any matter directly before him or his state agency that could be improperly influenced during the relevant period; the corporations that donated the clubs did not have any business pending before him or his state agency during the relevant period; and he only accepted the hospitality offered to other participants of the tournaments.

Although the Commission had relatively little information about the official's involvement with Golf Tournaments 2 and 3, the same issues arose for those events as for Golf Tournament 1. Therefore, rather than to inquire further into the particulars of the official's involvement with Golf Tournaments 2 and 3, the Commission believed it was more useful to discuss how the law would have applied with respect to those events. The first issue was whether HRS section 84-11 would have prohibited the official from accepting the invitations. If it was assumed that the official participated in the events in his state capacity, the question arose as to whether he took any official action affecting the donors of the invitations. The Commission stated that if the donors were subject to the official's official action, questions would have arisen under HRS section 84-11 as to the propriety of his acceptance of the invitations. The Commission further stated that if the official did not take any official action affecting the donors, and if his participation in the events served a

legitimate state purpose, then his participation may have been permissible. The second issue was whether the State Ethics Code would have prohibited the official from accepting gifts of golf clubs given in connection with the tournaments. As previously discussed, the Commission believed that if the official participated in the events in his state capacity, his acceptance of the golf clubs would have been prohibited.

The Commission is authorized under HRS section 84-31(b) to render an "informal advisory opinion" in lieu of pursuing further charge proceedings. In this case, the Commission believed that an informal advisory opinion was appropriate to address the issues that arose when state officials and employees participated in events such as the golf tournaments in question. The Commission recognized that at times, a state official or employee might be invited to participate in a golf tournament as a representative of the State or in place of the Governor. The Commission noted that questions might arise, however, if the recipient of the invitation took official action with respect to the donor of the invitation. The Commission therefore encouraged one who received such an invitation to contact the Commission for advice prior to accepting the invitation, so that the nature of the official action and other relevant factors could be reviewed and a determination could be made as to whether acceptance of the invitation would be permissible under the State Ethics Code. The Commission stated that in any case, one who participated in the event in his or her official capacity would be prohibited from accepting a gift of golf clubs given in connection with that event.

The Commission appreciated the cooperation shown by the official throughout the Commission's investigation and review of this matter.

Dated: Honolulu, Hawaii, June 28, 1996.

STATE ETHICS COMMISSION  
Cassandra J.L. Abdul, Chairperson  
Bernard E. LaPorte, Vice Chairperson  
Arlene Kim Ellis, Commissioner  
Carl T. Sakata, Commissioner

Note: There was a vacancy on the Commission when this opinion was signed.