

ADVISORY OPINION NO. 93-2

A state employee requested an advisory opinion from the State Ethics Commission (the "Commission") regarding the State of Hawaii's participation in an advertising and promotional program by a private company. The employee headed a state agency whose responsibility was to encourage the development and growth of a particular industry in Hawaii. The employee's agency and the company had worked together on a special project to develop a statewide service. The employee's agency and another state agency administered the project.

The employee first contacted the Commission to explain that the company wished to feature the project in a customer relations program. The program included an advertisement describing the company's work for the State of Hawaii. The company requested the State's authorization to publish the advertisement.

The company also wanted to produce a customer brochure featuring the project. The company planned to distribute the brochure to government agencies and other parties across the United States. The brochure included photographs of Hawaii state government officials and statements by the state officials about the project. The employee explained that neither the State nor any state official would receive compensation from the company for participating in this promotional program.

The employee asked the Commission to review the proposed advertisement and brochure. The employee stated that following the Commission's review and opinion, the employee's agency would either approve or disapprove the company's publication of these materials.

The Commission had previously reviewed a copy of the company's proposed advertisement and had determined that the State's consent to the advertisement would not conflict with the State Ethics Code, chapter 84, Hawaii Revised Statutes ("HRS"). In reaching this decision, the Commission noted that the advertisement was not an endorsement of the company by the State of Hawaii or by any state officials. In fact, no Hawaii government officials appeared in the advertisement or were even mentioned in the advertisement. The Commission's opinion regarding the advertisement, and a discussion of the applicable ethics laws, were conveyed to the employee in a letter from one of the Commission's staff attorneys.

The Commission had also determined that the ethics code did not per se prohibit state officials from making statements about the project or about the company in the proposed brochure. However, when the employee first presented this matter to the Commission, the brochure had not yet been drafted. The Commission explained that it could not render an opinion without first reviewing the specific statements to be made by state officials for the brochure. The employee subsequently provided the Commission with a draft of the brochure for review. The employee stated that the draft was near final form and requested the Commission's advisory opinion with respect to the brochure.

The employee also informed the Commission that the company wanted to publish an article about the project in the company's magazine. The company distributed the magazine to its personnel and to select customers. The magazine article would feature statements by Hawaii state government officials about the project. The employee provided a draft copy of the article for review and also requested the Commission's advisory opinion with respect to the article.

The Commission's advisory opinion discussed the application of the State Ethics Code to the State's involvement in the company's promotional program. The State Ethics Code establishes standards of conduct for state legislators and state employees. The Commission explained that the State Ethics Code does not apply to private businesses. Therefore, the

Commission stated, the ethics code did not apply to the private company in this case and the Commission did not have jurisdiction over the company. However, the Commission did have jurisdiction over state legislators and employees who participated in the company's promotional program. The Commission explained that its advisory opinion would address how the State Ethics Code applied to those legislators and employees in this case.

Promotional brochure. The company's proposed brochure described the project and the statewide service provided by the project. The brochure featured several Hawaii state employees and legislators. The brochure included photographs of the state employees and legislators and identified them by name and state title. In addition, the brochure featured quoted statements about the project by the employees and legislators.

The Commission explained that the section of the State Ethics Code to be considered in this case was section 84-13, HRS. That section provides, in relevant part, 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

Section 84-13, HRS, prohibits state legislators and employees from using their official positions to secure unwarranted privileges or advantages for themselves or others. In this case, the Commission had to determine whether the appearance of state government officials in the company's promotional brochure conferred an unwarranted advantage upon the company.

The Commission noted that it has previously advised state government officials to avoid using the prestige of their state offices or their state titles to endorse private companies or to solicit business on behalf of private companies. The Commission stated that it believed that commercial endorsements or solicitations by state officials generally provide unfair competitive advantages to private companies.

At the same time, the Commission noted it has held that where there exists a legitimate state purpose, and where no unwarranted advantage is accorded a private company, state officials may use their official positions for some types of endorsements and solicitations. The Commission stated that whether or not particular endorsements or solicitations are permissible under the State Ethics Code must be determined on a case-by-case basis.

In this particular case, the Commission noted that the state officials who were featured in the proposed brochure did not expressly endorse the company or its products. Nor did the state officials recommend purchases from the company or solicit business for the company in the brochure.

The brochure focused on what the project meant to the State of Hawaii. The brochure depicted state officials discussing (1) the general advantages of a certain industry; (2) the importance of the project's service to Hawaii; and (3) the project's achievements. The Commission believed that state employees and legislators could legitimately comment on these subjects in their official capacities. Further, the Commission determined, statements by state officials in the brochure did not reflect any attempt to convey an unwarranted advantage upon the company.

The Commission also noted that there was a legitimate and important purpose for the State's participation in the company's promotional program. The employee who requested the Commission's opinion described three significant benefits that the State of Hawaii would derive from this program.

First, the employee stated that at no cost to the State, the company's promotional program would complement the efforts of the employee's agency to promote the project. The purpose of the agency's promotional activities was to increase awareness of the project and the State's initiatives in a certain industry; to stimulate use of the service offered by the project; and to sustain interest in the project. The employee stated that these promotional activities would create new business opportunities in Hawaii. The employee also explained that the company's offer to feature the State's achievements in a certain area was consistent with the agency's activities, and that distribution of the proposed brochure would reach markets beyond those targeted by the agency.

The second benefit that the company's promotional program would bring to the State was the potential for an exchange of information and expertise between Hawaii and other state governments. The employee stated that the potential for such exchanges would increase as a result of the distribution of the brochure to other government entities. The employee stated that there might even be an opportunity for the State of Hawaii to market its expertise.

The third benefit that the employee described was the possibility that in response to the promotional program, private businesses would relocate or expand their operations to Hawaii. The employee explained that the State would benefit in many ways, such as by attracting new businesses and by generating more and better jobs, and increased tax revenues.

Based on this information, the Commission believed that there was a legitimate state purpose for the State's participation in the company's promotional program. That purpose was based on the State's interest in promoting the project and the State's activities in a certain industry.

The Commission stated that the proposed brochure appeared to be directly related to this state purpose. The Commission also stated that comments by state officials who were featured in the brochure appeared to be directly related to the State's interest in promoting the project.

The Commission concluded that section 84-13, HRS, did not prohibit state government officials from appearing in the proposed brochure to promote the project. The Commission further concluded that section 84-13 did not prohibit these officials from making statements in the brochure about the project and the State's activities in a certain industry.

The Commission explained that its opinion in this case was based on the draft of the brochure that was submitted for review. The Commission stated that if the final version of the brochure differed substantively from the draft, fair treatment issues could arise under section 84-13, HRS. The Commission therefore advised the employee to inform the Commission of any substantive changes to the draft.

Magazine article. The magazine story to be published by the company actually consisted of two articles: A main article about the project and a smaller accompanying article. Like the proposed brochure, the main article featured several state employees and state legislators discussing the project's achievements. The article discussed how the project benefitted Hawaii and its citizens. The accompanying article discussed a product used in connection with the project and explained how other countries have developed the use of the same type of product. The accompanying article did not feature or mention any state officials.

The Commission explained that the fair treatment section of the ethics code, section 84-13, HRS, was also applicable in determining whether state government officials could participate in the company's magazine story.

Again, the Commission noted that the state officials who were featured in the story did not expressly endorse the company or solicit business for the company. Like the brochure, the magazine article focused on the project's accomplishments. The Commission noted that comments of state officials who were quoted in the article also focused on the project and how the State has benefitted from the project. The Commission determined that the article did not reflect any attempt by state officials to confer an unwarranted advantage upon the company. The Commission believed that the State's participation in this magazine story appeared to be directly related to the State's interest in promoting the project and the development of a certain industry in Hawaii.

For these reasons, the Commission concluded that the ethics code did not prohibit state government officials from being featured in the magazine article to promote the project. The Commission did not believe that this constituted a misuse of official position under the fair treatment law.

The Commission stated again that its opinion was based on the draft article that the employee submitted for review. The Commission explained that if the final version of the article differed substantively from the draft, the employee should inform the Commission of this fact.

The Commission informed the employee that copies of the advisory opinion would be sent to all state government officials featured in the company's brochure and magazine story.

The Commission thanked the employee for seeking the Commission's advice in this matter and for the employee's sensitivity to the ethical considerations involved. The Commission stated that it appreciated the employee's assistance and cooperation in providing the information needed for the Commission's review of all materials in this case.

Dated: Honolulu, Hawaii, March 12, 1993.

STATE ETHICS COMMISSION

K. Koki Akamine, Vice Chairperson
Cynthia T. Alm, Commissioner
Rev. David K. Kaupu, Commissioner

Note: Chairperson Barbara J. Tanabe disqualified herself from consideration of this matter. Commissioner Laurie A. Loomis was not present during the discussion and consideration of this matter.