

ADVISORY OPINION NO. 2019-7

October 17, 2019

The Hawai'i State Ethics Commission ("Commission") received a request for an advisory opinion from a State of Hawai'i employee ("Employee") as to whether the Employee may accept a complimentary registration, valued at more than \$1,000, to a conference being held on the mainland. The conference is being organized by a State vendor ("Vendor") that currently has a contract with the Employee's agency valued at more than \$1 million. The Vendor has offered to waive the conference registration fee for the Employee. The Employee also asked whether there are any additional ethics concerns if the Employee participates in two events at the conference: first, if the Employee appears as a panelist in a session on government uses of the Vendor's products; second, if the Employee attends an invitation-only reception for government officials following that session.

For the reasons discussed below, it is the Commission's opinion that the Employee may accept the complimentary conference registration fee and may participate in the government panel discussion, subject to the restrictions described below. However, the Commission advises that the Employee may not attend the invitation-only networking reception following the government panel discussion.

I. FACTS

The Commission understands the facts and circumstances to be as follows:

- The Employee's agency has a contract with the Vendor valued at more than \$1 million.
- The Employee oversees and implements the goods/services provided by the Vendor. The Employee and the Employee's colleagues work closely with the Vendor's employees in implementing these goods/services.
- The Vendor is organizing a conference which, according to the Vendor's website, draws over 10,000 attendees.
- The conference will include a program for public sector employees: a public sector panel discussion, followed by a private reception (both of which will take place during the conference itself).
- The Employee has been invited to be a featured speaker/panelist for the public sector program. The audience will consist of government employees from other parts of the country. The Employee contends that State and local governments are known to be behind in implementing the kinds of goods/services offered by the Vendor, but that governments are increasing their attempts to implement new services and identify savings of time, money, and labor. The Employee's agency would like to show the rest of the country

that Hawai'i is in step with other states (and, in some cases, at the forefront) in making these changes. The Employee has further informed the Commission that the Employee's agency actively uses public relations to create good press for Hawai'i to counteract the negative image that Hawai'i has received from past projects and to promote the advances it has made in its modernization efforts to better serve the public.

- Participants in the public sector program are also invited to attend a networking reception following the panel. The Employee's understanding is that the reception will include snacks and beverages, including beer or other alcoholic beverages. Other meals are included in the registration fee for the conference, but the Commission assumes that these meals are standard for a hotel/conference and would not be extravagant.
- As a speaker, the Employee has been offered a complimentary registration to the conference, valued at more than \$1,000; this includes in-conference meals. The State is paying for the Employee's airfare and hotel.
- The Employee's understanding is that the Employee would not receive a complimentary registration to the conference if the Employee did not appear as a speaker at the public sector program. The complimentary registration is non-transferable.
- If the Employee is not permitted to accept the complimentary registration fee, the State will pay the registration fee so that the Employee can attend the conference.
- By attending this conference, the Employee expects to learn additional skills to better perform the Employee's job. The Employee expects to learn from experts and participate in hands-on labs and workshops. The Employee also expects to learn from, and compare notes with, other government professionals, particularly during the public sector portion of the conference.

II. APPLICATION OF THE ETHICS CODE

A. Gifts Law

The Employee is an “employee” for purposes of the State Ethics Code¹ and is subject to the Ethics Code’s restrictions.² Two sections of the Ethics Code apply to the Employee’s situation. First, the Gifts law, Hawai’i Revised Statutes (“HRS”) § 84-11, states in relevant part:

No . . . 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 . . . employee in the performance of the . . . employee’s official duties or is intended as a reward for any official action on the . . . employee’s part.

As this Commission has explained:

state officials and employees may from time to time receive items of value while performing their official duties. Whether the items can be accepted or not must, in the Commission’s mind, be decided on a case by case basis. Items of a nominal or inconsequential value may pose no problem, while expensive items should be cleared with the State Ethics Commission.

Advisory Opinion (“AO”) No. 1994-3 at 2.³ The Gifts law prohibits state employees from soliciting or accepting any gift where it is reasonable to infer that the gift is given to influence or reward that state official in the performance of her/his official duties:

The Gifts law is based on the appearance of improper influence or reward. The actual intent of the donor in giving a gift is irrelevant to determining whether the Gifts law is violated. Likewise, it does not matter whether the recipient of the gift is actually influenced by the gift. The Gifts law is violated where the facts and circumstances of the situation

¹ HRS § 84-3.

² HRS § 84-2.

³ Available at <http://files.hawaii.gov/ethics/advice/AO1994-3.pdf>.

raise a reasonable inference of improper influence or reward.

AO No. 2018-2 at 3.⁴

The Commission considers three factors in determining whether the Ethics Code prohibits a state official from accepting a gift: “(1) the value of the gift; (2) the relationship between the recipient and the donor of the gift, including whether the recipient takes official action with respect to the donor; and (3) whether the gift benefits the recipient personally or serves legitimate state interests.” Id.

As to the first factor in this case, the value of the gift – more than \$1,000 – is substantial, and weighs against acceptance.

The second factor – the relationship between the Employee and the Vendor – “is perhaps the most important of the three.” Id. The Vendor has not offered the complimentary registration to the State of Hawai‘i. Instead, the registration has been offered to the Employee (in exchange for the Employee’s appearance as a speaker during the public sector program). As a general rule, the Gifts law prohibits state officials from accepting any gifts from vendors and contractors, such that this factor weighs strongly against acceptance. See, e.g., AO No. 164 (1973)⁵ (advising a state official to decline a contractor’s invitation to travel to attend a seminar, where the total value of travel, lodging, meals and entertainment was \$100: “this opinion was based upon the fact that [the state official] had broad discretionary responsibilities vis-a-vis the contractors. Moreover, facts were lacking to indicate that the seminar was beneficially related to his public functions or would be of benefit to the State”). Here, the value of the State’s contract with the Vendor (more than \$1 million) is cause for particular concern and scrutiny.

The third factor, however, weighs very strongly in favor of acceptance. The Employee has provided convincing evidence that this conference benefits the State in myriad ways: the conference will offer the Employee the opportunity to learn from experts, to liaise with other government officials, and to promote Hawaii’s work. The State is paying for the Employee’s airfare and hotel costs, which strongly indicates that there is a state purpose in having the Employee attend this conference. The conference agenda suggests a busy, substantive schedule, rather than a schedule comprised primarily of entertainment events. Moreover, the State would pay for the registration fee if the Employee does not accept the complimentary pass from the Vendor, such that the Employee’s acceptance of this gift from the Vendor will result in a direct savings to the State of more than \$1,000.

⁴ Available at <http://files.hawaii.gov/ethics/advice/AO2018-2.pdf>.

⁵ Available at <http://files.hawaii.gov/ethics/advice/AO164.pdf>.

While this is a close case, the Commission believes that the Employee may accept this complimentary conference registration, subject to the caveats set forth below, and provided the Employee reports the gift on a gifts disclosure statement. In reaching this conclusion, the Commission takes particular notice that the State has already demonstrated its interest in the Employee's attendance at the conference through its willingness to pay for the Employee's travel expenses (and, if necessary, the registration fee itself). Accepting this gift will result in a direct savings to the State of more than \$1,000.

Notwithstanding this conclusion, the Commission cautions the Employee against accepting anything else of value from the Vendor – including food and beverages not available to other attendees.⁶ The Commission further advises the Employee against accepting any alcoholic beverages from this Vendor, regardless of whether they are provided to attendees as part of the conference program, inasmuch as there is no State purpose in accepting free alcohol (let alone accepting free alcohol from a contractor).

The Commission further concludes that the Ethics Code prohibits the Employee from attending the invitation-only networking reception following the government panel discussion. The networking reception is not available to all conference attendees and is being hosted by the Vendor for government officials only. Ordinarily, “networking” – standing alone – is not a sufficient state purpose to justify the acceptance of a gift; if it were, state officials could justify accepting all manner of gifts (e.g., meals, rounds of golf, or tickets to entertainment events) for “networking,” thus undermining the purpose of the Gifts law. State officials are fully empowered to meet with representatives of private organizations, other government entities, and the public in performing their official duties, but this does not mean that state officials are therefore entitled to accept meals or other gifts under the guise of holding a meeting. In this case, the Commission does not dispute that there is value in the Employee meeting with other government officials, but the Employee can do this at other times and locations during the conference without attending an invitation-only event where food and alcohol will be served.

The Commission cautions that acceptance of gifts from contractors can affect the independence of state officials in making procurement decisions. See, e.g., AO No. 247 (1976) at 2 (“the acceptance of a gift such as this by a commissioner might well affect the independent posture that a commission member must maintain with respect to those individuals the commission regulates.”);⁷ see also Marissa King & Peter S. Bearman, “Gifts and influence: Conflict of interest policies and prescribing of psychotropic medications in the United States,” 172 Social Science & Medicine 153 (2017) (research study concluding that gifts have a dramatic impact on recipients’

⁶ Items such as branded tote bags and pens that are truly nominal in value may be accepted, but the Employee should decline any item of more than negligible value.

⁷ Available at <http://files.hawaii.gov/ethics/advice/AO247.pdf>.

behavior: “Physicians in states with gift bans were 39%–83% less likely than their peers in non-regulated states to prescribe newly marketed medications.”)⁸ The Employee should exercise caution in overseeing the implementation of the Vendor’s contract and in determining whether to enter into any other contracts with the Vendor.

B. Fair Treatment

The second applicable provision of the State Ethics Code, HRS § 84-13(a), the Fair Treatment law, reads in relevant part:

§84-13 Fair treatment. (a) 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. . . .

The Fair Treatment law prohibits the Employee from using the Employee’s state position to grant any favoritism or unwarranted benefit to the Employee or anyone else. The Employee’s appearance on the public sector panel raises concerns that the Vendor may try to use the Employee – and the imprimatur of the Employee’s State office – to advertise and promote the Vendor’s products. As the Commission has stated:

The Commission . . . 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.

AO No. 1993-2 at 2.⁹ The Vendor is certainly aware that the Employee, and other attendees, have significant influence on the purchasing power of government entities, and there is a concern that the Vendor will use the Employee to promote its products to other would-be purchasers. Indeed, the Vendor uses this as a selling point in its promotional materials to would-be sponsors at the event. As such, the Employee may participate in the public sector panel to discuss the Employee’s work for the State and Hawaii’s achievements. See AO 1993-2 at 2. The Employee should, however, avoid statements or actions that suggest that the State of Hawai’i endorses the Vendor.

The Fair Treatment law also prohibits the Employee from using the Employee’s state position to obtain gifts or other perks from the Vendor or others. As such, the Employee should decline any gifts or experiences that provide a personal benefit, even

⁸ Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5154797/>.

⁹ Available at <http://files.hawaii.gov/ethics/advice/AO1993-2.pdf>.

if provided to all conference attendees. For example, even if every conference attendee were provided with free concert tickets, rounds of golf, or a bottle of wine (from a Vendor or an exhibitor at the conference), the Employee would still be prohibited from accepting these items.

III. CONCLUSION

Again, the Commission advises the Employee to be cautious in acceptance of this gift from the Vendor, and in the Employee's participation in the public sector session, in order to "promote high standards of ethical conduct in state government." HRS § 84-1. The Commission thanks the Employee for seeking advice on this matter.

Dated: Honolulu, Hawaii, October 17, 2019.

HAWAII STATE ETHICS COMMISSION

Reynard D. Gaulty, Chair
Ruth D. Tschumy, Vice Chair
Susan DeGuzman, Commissioner
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