

INFORMAL ADVISORY OPINION NO. 93-1

The State Ethics Commission ("Commission") received information that an elected official received a campaign contribution from a state agency. The contribution was in the form of a check payable to the elected official's campaign organization. The check was drawn on the state agency's checking account and bore the signature of the agency head and agency head's assistant.

In response to this information, the Commission telephoned the agency head and asked for an explanation of the check. She responded by letter, acknowledging that the agency had issued the check at her direction. The agency head also acknowledged that supporting a political campaign with agency funds was an error on her part. The agency head added that although she realized the error a few days after writing the check, she failed to take corrective action. The agency head went on to say that she was subsequently contacted by the elected official who received the check. The elected official informed her that the elected official could not accept the check and that the elected official had destroyed it. Finally, the agency head said that in the future she would comply with the State Ethics Code.

The Commission asked the agency head to visit the Commission's office for an interview. She did so. During that interview, the agency head elaborated on the information provided in her letter, and she provided new information, as well. The agency head explained that the agency's checking account is used for certain agency purposes. The agency head also said that each check written on this account requires a purchase order and that the records for the account are maintained at the agency. The agency head reported that the elected official for whom the check was intended had been helpful to the agency in the past.

The agency head went on to explain that a subordinate employee at the agency informed her that this employee was holding tickets to a fundraiser dinner for the elected official, who was then a candidate for re-election. The agency head reported that she offered to purchase and did purchase fundraiser tickets from this subordinate employee, after which she directed her secretary to write the check in payment of the tickets. The agency head and her assistant then signed the check. The check was then either given to the subordinate employee who sold the tickets for delivery to the elected official or mailed directly to the elected official. The agency head was not certain on this point, but she maintained that although she agreed to purchase the tickets, she did not accept the tickets for the fundraiser from the subordinate employee who sold them to her. The agency head reaffirmed that shortly afterwards, she realized that writing the check on the agency account had been a mistake but, despite that realization, she took no corrective action. The agency head also stated that at no time did she intend to reimburse the agency's account for this wrongful expenditure. Finally, the agency head stated that no other checks had been written on the agency's account for non-agency purposes.

At the request of the Commission, the agency head sent to the Commission's office a copy of the agency's check ledger for the account covering the immediately preceding eighteen months. Examination of this ledger revealed a check issued by the agency in payment of a traffic citation. The Commission contacted the department to which the agency is attached. The department informed the Commission that a traffic citation issued to a departmental employee is a personal expense and not a state expense. The department said that this is addressed in the department's policy manual.

When asked about the traffic citation, the agency head explained that the traffic citation had been issued to her vehicle while she was on state business. The agency head reported that she believed the traffic citation to be a state expense because she was on state business when the citation was issued. She therefore directed that an agency check be issued to pay the fine resulting

from the citation. Like the earlier check, this check was also countersigned by the agency head's assistant.

The agency head's assistant was interviewed at the Commission's office. She explained that she countersigned both checks at the agency head's direction without realizing that the checks should not have been drawn on the agency's account. At the request of the Commission, the agency head's assistant brought to the interview the check register for the agency's account for the immediately preceding two years.

The Commission next interviewed the subordinate employee from whom the agency head had purchased the fundraiser tickets. The subordinate employee confirmed that in the agency office, the agency head offered to purchase the fundraiser tickets from the subordinate employee and that the agency head did in fact purchase these tickets from the subordinate employee. Like the agency head, the subordinate employee did not recall whether the agency head had given the check to the subordinate employee for delivery to the elected official or had mailed the check to the elected official. The subordinate employee was certain, however, that the subordinate employee gave the fundraiser tickets to the agency head in exchange for the check. During the Commission's interview of the agency head, the agency head had earlier stated that she did not recall receiving the fundraiser tickets, although in a subsequent telephone conversation with the Commission, the agency head acknowledged receiving the tickets. The agency head maintained, however, that she did not attend the fundraiser dinner, nor did she recall what disposition had been made of the tickets.

At the request of the Commission, and with the agency head's approval, a staff attorney of the Commission visited the agency in order to examine the agency's records related to the check register and ledger for the bank account for the immediately preceding two year period. This examination revealed a substantial number of checks drawn and cashed on the agency's account during this two-year period. Of that number, only the check payable to the elected official's campaign organization and the check in payment of the traffic citation appeared to be expenditures not related to the kinds of purchases for which the agency's account is intended.

Based upon the foregoing information, the Commission filed a charge against the agency head alleging violations of the State Ethics Code, chapter 84, Hawaii Revised Statutes. ("HRS"). The charge was comprised of six counts brought under HRS section 84-13, HRS section 84-13(3) and HRS section 84-13(4). This is the Fair Treatment section of the code. The relevant sections read 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:

...

- (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.

HRS section 84-13 prohibits state employees from using or attempting to use their official positions to grant anyone, including themselves, an unwarranted benefit of any kind. The statute also specifically prohibits employees from engaging in certain activities that are deemed to result in unwarranted benefits. Among these are the use of state time, equipment or other facilities for private business purposes (HRS section 84-13(3)), and soliciting, selling or otherwise engaging in a substantial financial transaction with a subordinate or with a person or business whom the employee inspects or supervises in the employee's official capacity (HRS section 84-13(4)).

The expenditure or attempted expenditure of state money for campaign purposes is prohibited by HRS section 84-13. State money expended for such a purpose results in an unwarranted benefit to the candidate receiving the money. The agency head acknowledged that in her official capacity she attempted to give the elected official a campaign contribution taken from the agency's checking account. The agency head's action in this regard was viewed by the Commission as an attempt on the agency head's part to give the elected official an unwarranted benefit. The Commission thus charged the agency head with a violation of HRS section 84-13.

The agency head further acknowledged that she directed her secretary to prepare this check and that she directed her assistant to countersign the check. The use of agency personnel in this manner was similarly viewed by the Commission as an attempt on the agency head's part to grant the elected official for whom the check was intended an unwarranted benefit, likewise prohibited by HRS section 84-13. As a consequence, the Commission charged the agency head with a second violation of HRS section 84-13.

In the agency head's conversations with Commission staff, she acknowledged that the purchase and sale of the fundraiser tickets took place in the agency's office. Because campaigning is considered by the Commission to be a private business, this transaction on agency premises was prohibited by HRS section 84-13(3), which specifically prohibits the use of a state facility for private business purposes. For this reason, the Commission charged the agency head with a violation of HRS section 84-13(3).

The agency head explained that in addition to purchasing the fundraiser tickets in the agency's office and directing agency personnel to prepare the check, the agency head also directed that the check be prepared on state time, using state equipment and facilities. The use of state time, equipment and facilities for this purpose was, in the Commission's view, prohibited by HRS section 84-13(3). Consequently, the Commission charged the agency head with a violation of HRS section 84-13(3).

The agency head acknowledged that she purchased the fundraiser tickets from a subordinate employee. The purchase price was \$50.00. The subordinate employee was subject to the agency head's supervision. The purchase and sale of the fundraiser tickets was seen by the Commission as a substantial financial transaction between a supervisor and a subordinate employee, which was specifically prohibited by HRS section 84-13(4). As a result, the Commission charged the agency head with a violation of HRS section 84-13(4).

Finally, the agency head acknowledged that she expended money from the agency's account to pay the fine resulting from the traffic citation she had received. Although the agency head was on state business at the time the citation was issued, departmental policy makes clear that traffic violations are the personal responsibility of employees, regardless of the circumstances under which the citation is issued. Thus, the Commission viewed the agency head's expenditure of state funds in this manner as the granting of an unwarranted benefit to the agency head, prohibited by HRS section 84-13. Accordingly, the Commission charged the agency head with a violation of HRS section 84-13.

While deliberating all of these issues, the Commission's concern was heightened by the fact that the agency head was vested with supervisory responsibility for a substantial number of employees. The agency head's actions with regard to this charge involved at least three other employees of the agency, all of whom were the agency head's subordinates and all of whom carried out the agency head's wishes. The agency head directed that agency personnel, time, facilities and equipment, be used for the purposes described above, and the agency head expended agency funds for these purposes. The agency head did not acknowledge that she was specifically aware of the prohibitions of HRS section 84-13, although prior to each campaign season, the Commission publishes a flyer entitled Campaign Ethics Guidelines for Public Officials and Employees and sends multiple copies to all departments of state government. The flyer discusses the prohibitions of HRS section 84-13 in detail, including many of the issues addressed in this informal advisory opinion. In any event, the agency head reported that soon after issuing the check to the elected official's campaign organization, she realized that issuing the check in this manner was wrong but nevertheless took no corrective action. The agency head also acknowledged that she had read departmental policy and is deemed to be aware of the prohibition regarding the expenditure of state funds for personal traffic citations. All of this was considered by the Commission when it decided to charge the agency head with violations of the State Ethics Code.

The State Ethics Commission filed the charge against the agency head pursuant to HRS section 84-31. The agency head was notified in writing in accordance with HRS section 84-31(b) and given an opportunity to explain the conduct alleged to be in violation of the law. In accordance with HRS section 84-31(b), the agency head responded to the charge by a letter in which she acknowledged that the allegations were true and that she accepted responsibility for her actions. She also reported that she reimbursed the agency's account in the amount expended on the traffic citation.

The State Ethics Commission determined that further charge proceedings were not warranted in this case and decided to issue an informal advisory opinion to the agency head pursuant to HRS section 84-31(b). The Commission based this decision upon the fact that throughout the investigation of this matter, the agency head had been forthright and cooperative with the Commission in its efforts to secure all of the relevant information. The agency head opened the agency's records to the Commission's attorney and the agency head urged other employees of the agency to cooperate with the Commission in its investigation. Moreover, in addition to acknowledging that her actions in this regard were in error and that she accepted responsibility for those actions, the agency head reimbursed the agency's account in the amount expended on the traffic citation. The Commission also took into account the fact that the amounts of money involved were not great. Finally, the agency head agreed to comply with the State Ethics Code in the future. The State Ethics Commission thus concluded that an informal advisory opinion would suffice under the circumstances.

DATED: Honolulu, Hawaii, July 21, 1993.

STATE ETHICS COMMISSION

K. Koki Akamine, Vice Chairperson
Cynthia T. Alm, Commissioner
Laurie A. Loomis, Commissioner

Note: Commissioner David K. Kaupu participated in the Commission's decision but was unable to be present at the signing of this opinion. There was also a vacancy on the Commission when this opinion was signed.