

BEFORE THE HAWAII STATE ETHICS COMMISSION

STATE OF HAWAII

IN THE MATTER OF THE PETITION OF	)	Declaratory Action Case No. 2015-1
	)	
HAWAII STATE TEACHERS	)	ORDER DENYING HAWAII
ASSOCIATION, ON BEHALF OF	)	STATE TEACHERS ASSOCIATION'S
ITS MEMBERS IN UNIT 5	)	PETITION FOR DECLARATORY
	)	ORDER OR ALTERNATIVELY FOR
FOR A DECLARATORY ORDER	)	A CONTESTED CASE; EXHIBIT "A";
OR ALTERNATIVELY FOR	)	EXHIBIT "B"; CERTIFICATE OF
A CONTESTED CASE	)	SERVICE
	)	

ORDER DENYING HAWAII STATE TEACHERS ASSOCIATION'S
PETITION FOR DECLARATORY ORDER OR ALTERNATIVELY
FOR A CONTESTED CASE

Upon consideration of (a) the Petition for Declaratory Order or Alternatively for a Contested Case, filed on August 26, 2015, by the Hawaii State Teachers Association ("HSTA"), on behalf of its members in Bargaining Unit 5; (b) the issues raised and arguments made therein; and (c) the oral arguments made by HSTA's counsel at a hearing before the Hawaii State Ethics Commission ("Commission") on September 16, 2015, it appears that the HSTA seeks: (1) a declaratory ruling from the Commission that the Commission's August 4, 2015, memorandum, see Exhibit "A," to the Hawaii State Department of Education ("DOE") teachers ("Guidance Memorandum") is "null and void" for failure to comply with the provisions of the Hawaii Administrative Procedures Act ("HAPA"),

set forth in Hawaii Revised Statutes ("HRS") section 91-1 et seq.; or, alternatively, (2) a contested case hearing on the issues addressed in the Guidance Memorandum.¹

Specifically, the HSTA seeks a declaratory order that:

(1) Repeals the Guidance Memorandum for failure to comply with the provisions of HAPA by: (a) not engaging in proper rulemaking in issuing the Guidance Memorandum; and (b) not promulgating administrative rules to define words and phrases in the State Ethics Code, HRS chapter 84, such as "reasonably be inferred that the gift is intended to influence" and "unwarranted privilege"; or, alternatively,

(2) Convenes a contested case proceeding on the issues addressed in the Guidance Memorandum, to wit: those issues related to free travel offered to DOE teachers by private tour companies.

Preliminarily, however, the Commission observes that the Petition was brought pursuant to HAPA and Hawaii Administrative Rule ("HAR") 21-6-6.² The applicable provision in HAPA provides that "[a]ny interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency."³ HRS section 91-8.

¹ On August 19, 2015, the Commission clarified and confirmed its guidance to the DOE teachers about free travel through its Advisory Opinion 2015-1 ("Advisory Opinion"). See Exhibit "B." Although HSTA, through counsel, represented at the hearing that it was unaware that the Commission had issued the Advisory Opinion when the Petition was filed, it argued that the more formal "format" of the Advisory Opinion does not render its Petition moot. See Transcript of Hearing on Petition for Declaratory Order or Alternatively for a Contested Case ("Tr.") at 38. The background and circumstances leading to the issuance of the Guidance Memorandum and the Advisory Opinion are set forth in Exhibits "A" and "B," respectively, and incorporated herein by reference.

² HSTA also cites Article XIV of the State Constitution and the State Ethics Code, generally, as supporting its Petition. Neither the State Constitution nor the State Ethics Code, however, contains any provision providing for petitions for declaratory order.

³ Although its members must adhere to the standards of conduct contained in the State Ethics Code, HSTA is not subject to the statute. See HRS section 84-2. The Hawaii Supreme Court has defined "interested party" to be someone with an interest that may be adversely affected by an administrative agency's

The Commission's administrative rules, implemented in accordance with HRS section 91-8, contain a similar provision:

Any interested person may petition the commission for a declaratory order as to the applicability of any statutory provision or of any rule or order of the commission. . . . The petition shall state the controversy or question, shall cite the statutory provision, rule, or order involved, and shall include a complete statement of the facts and the reasons or grounds prompting the petition, together with full disclosure of petitioner's interest, and shall be signed by the petitioner.

HAR 21-6-6 (emphasis added).⁴

Neither HRS section 91-8 nor HAR 21-6-6 support the relief sought by HSTA in the Petition. As reflected by the plain language of the statute, a petition for declaratory order is intended to provide a vehicle for an interested person to obtain a declaratory ruling "as to the applicability of any statutory provision." HRS section 91-8 (emphasis added); see also HAR 21-6-6. Interpreting that language, the Hawaii Supreme Court has reiterated that "the declaratory ruling procedure is intended to allow an individual to seek an advance determination of how some law or order applies to his or her circumstances." Citizens Against Reckless Dev. v. Zoning Bd. of Honolulu, 114 Hawai'i 184, 198, 159 P.3d 143, 157 (2007).

In Citizens, the director of the City's Department of Planning and Permitting ("DPP") rejected a petition for declaratory order filed by Citizens Against Reckless Development ("CARD") pursuant to HRS section 91-8. Id. at 191, 159 P.3d at 150. CARD's petition asked

decision. Life of the Land v. Land Use Comm'n, 63 Haw. 166, 177-78, 623 P.2d 431, 441 (1981). Certain DOE teachers may be "interested parties"; however, none of those individuals affected by the Guidance Memorandum has petitioned the Commission. The Commission is unclear whether, simply because some of its members may be "interested parties," HSTA has standing under HRS section 91-8 and HAR 21-6-6 to seek a declaratory order. For purposes of this Order, however, the Commission assumes that HSTA is an "interested party" under HRS section 91-8 and HAR 21-6-6.

⁴ "Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition." HRS section 91-8.

the director to issue a declaratory order that: (1) a conditional use permit that the department had previously issued was void; and (2) a certain project for which the permit had been issued violated the existing zoning regulations. Id. at 190, 159 P.3d at 149.

In affirming the director's refusal to issue a declaratory order, the Court held that "the declaratory ruling procedure was intended for advance determinations of applicability, rather than review of already-made agency decisions."⁵ Id. at 198, 159 P.3d at 157. The Court explained that, "[b]ecause HRS § 91-8 only allows for declaratory rulings as to questions of 'applicability,' an administrative agency has no discretion to issue rulings under this section that do not bear on such questions. . . . In fact, such a ruling would be in excess of the DPP's statutorily-defined authority." Id. at 200, 159 P.3d at 159 (emphasis added).

Similar to the declaratory relief sought by CARD, HSTA's Petition seeks review of an "already-made agency decision[]," i.e., for a declaration that the Guidance Memorandum is "null and void." Id. at 198, 159 P.3d at 157. It does not ask the Commission for a determination as to how the State Ethics Code applies to a prospective situation. HRS section 91-8 is not the appropriate statutory vehicle for HSTA to seek "repeal" of the Guidance Memorandum or, alternatively, for a contested case. Id. at 196-97, 159 P.3d at 155-56. The Commission simply has no statutorily-defined authority to issue declaratory rulings under HRS section 91-8 or HAR 21-6-6 that do not bear on questions of applicability of a statute, agency rule, or order. Id. On that basis alone, the

⁵ The director had previously issued a conditional use permit and the time in which a party had to contest the permit had expired. Although the Commission has not issued any decision with respect to a specific teacher, the Court's reasoning is equally applicable to HSTA's Petition.

Commission denies the Petition. However, given the significant procedural issue raised by HSTA, the Commission considered the merits of the arguments raised in the Petition.

With regard to the issue of “rulemaking,” HSTA asserts that the Commission’s guidance is “arbitrary and capricious.” HSTA further asserts that the Commission violated the teachers’ due process rights because the guidance was rendered without first enacting a rule that addresses the specific question whether the State Ethics Code prohibits teachers from accepting free travel from travel companies.⁶

HSTA characterizes the Advisory Opinion to be a “rule” and argues that the Commission failed to follow the statutory requirements under HAPA to implement administrative rules. HSTA further alleges that the Commission must promulgate administrative rules to define statutory phrases such as “reasonably be inferred that the gift is given to influence” and “unwarranted privilege.”

First, HSTA’s contention that the Commission must define terms like “reasonably be inferred” and “unwarranted privilege” through rulemaking is untenable. HSTA offers no legal support for its argument that an agency is required to engage in rulemaking pursuant to HAPA to define words or phrases in a statutory scheme that the agency administers. Administrative agencies routinely must construe statutory language, such as “reasonable to infer” and “unwarranted privilege,” based on judicial precedent and the well-settled rules of statutory construction. HSTA’s position, extended to its logical extreme, would require the Commission and every other administrative agency to define virtually

⁶ As previously noted, the HSTA’s position is that the more formal Advisory Opinion, issued after the Guidance Memorandum, does not render its Petition moot. In fact, HSTA’s counsel agreed with the Commission that both formats were “one and the same.” Tr. at 38. Therefore, inasmuch as the Advisory Opinion was issued subsequent to the Guidance Memorandum and both are substantively similar, the Commission’s discussion herein refers to the Advisory Opinion. The Commission’s analysis and decision with respect to the Advisory Opinion, however, are equally applicable to the Guidance Memorandum.

each word or phrase in the statutes that the agencies administer through formal rulemaking before those agencies may perform their statutory duties. The Commission cannot agree with HSTA's argument that the Commission is unable to administer the State Ethics Code without first defining the words and phrases contained therein through a formal rulemaking process under HAPA.

The Commission similarly rejects HSTA's contention that the Advisory Opinion is a 'rule' that the Commission was required to implement through the rulemaking process in HRS chapter 91. In arguing that the Advisory Opinion is a "rule," HSTA ignores the plain language of HRS section 91-1(4) which defines a "rule" for purposes of HAPA as:

[E]ach agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting the private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, or intra-agency memoranda.

HRS section 91-1(4) (emphasis added).

As previously observed, a declaratory ruling allows an interested person to obtain a determination "as to the applicability of any statutory provision or of any rule or order of the agency." HRS section 91-8. The clear purpose of a declaratory ruling is to provide a means by which someone who is subject to an agency's action can obtain an "advisory opinion" as to how the agency applies a statute to a particular situation.

The legislature specifically conferred on the Commission the authority to issue advisory opinions regarding the application of the State Ethics Code to specific situations. The statute describes the Commission's powers and duties to include:

It shall render advisory opinions upon the request of any legislator, employee, or delegate to the constitutional convention, or person formerly holding such office or employment as to whether the facts and circumstances of a particular case constitute or will constitute a violation of the code of ethics.

HRS section 84-31(a)(2) (emphases added); see also HAR 21-4-1 and HAR 21-4-2. The advisory opinion that the Commission is mandated to render by the State Ethics Code is the same type of guidance issued through declaratory rulings under HAPA.

In the instant case, the Commission issued the Advisory Opinion to inform teachers about the application of the State Ethics Code to the free travel and other benefits offered by private tour companies under the particular circumstances identified in the Advisory Opinion. HRS section 84-31(a)(2) requires the Commission to render an advisory opinion if so requested by someone who is subject to the State Ethics Code; however, the provision does not prohibit the Commission from rendering an advisory opinion, *sua sponte*, to provide guidance based on a particular factual situation that is substantially similar to circumstances involving other employees subject to the State Ethics Code.

HSTA provides no support for its argument that the authority to render an advisory opinion regarding the application of the State Ethics Code to a particular situation is somehow limited only to those situations where someone “opts” for an advisory opinion or that the Commission otherwise must engage in rulemaking to provide that type of guidance. See Tr. at 23-26. In short, HSTA’s position is that, unless someone requested the advisory opinion, the Commission’s issuance of an advisory opinion infringes on employees’ due process rights. Id. Under HSTA’s reasoning, an advisory opinion can only “apply” to the employee who requested the guidance. The Commission disagrees

with HSTA. HSTA's interpretation of the statute is contrary to the legislative intent and is unpersuasive. The legislature clearly intended that the Commission 'publish' the advice rendered to an employee to aid other employees' understanding of the Commission's application of the statute to a particular situation. See HAR 21-4-2(e) (the Commission shall publish a deleted, i.e., redacted, opinion within 45 days after an advisory opinion has been rendered and the deleted opinion shall be public); see also HRS chapter 84, Preamble (stating that the purpose of the State Ethics Code is to "educate the citizenry with respect to ethics in government" and to establish an Ethics Commission to "render advisory opinions and enforce the provisions of this law so that public confidence in public servants will be preserved").

The type of guidance offered through the Advisory Opinion is precisely the type of guidance that the statute requires and the legislature intended the Commission to render through advisory opinions, i.e., whether the facts and circumstances of a particular situation constitute or will constitute a violation of the State Ethics Code. HRS section 84-31(a)(2); see also 1967 Conference Committee Report No. 16 regarding House Bill No. 6.⁷ It is precisely the same type of guidance issued through requests for declaratory rulings under HRS section 91-8 and, accordingly, is not a "rule" as defined by HAPA.

Moreover, in considering whether an administrative agency must engage in rulemaking, the Court repeatedly has explained that a literal construction of the definition

⁷ In its report, the conference committee expressed its intention, as reflected by the plain language of the statute, that the Commission issue advisory opinions:

With the passage of time, it is hoped that the advisory opinions will furnish valuable guides, to be a source of reference for all persons concerned and contribute to a proper understanding of the code. These opinions should reflect the practical operation of the code and begin to develop a body of 'case law' on ethics.

1967 Conference Committee Report No. 16 regarding House Bill No. 6 (emphasis added).

of “rule” renders the administrative process meaningless. Shoreline Transp., Inc. v. Robert’s Tours & Transp., Inc., 70 Haw. 585, 593, 779 P.2d 868, 873 (1989). For that reason, the Court has narrowed the types of situations requiring rulemaking by essentially ignoring the words “or particular” in HAPA’s definition of “rule.”

If the words ‘or particular’ [therein] are literally applied, almost every [administrative] process . . . becomes rulemaking. 2 K. Davis, Administrative Law Treatise § 7:3, at 10 (2d ed. 1979). For example, ‘an order of [a regulatory agency] requiring a [regulated] company to cease and desist from a practice . . . fits perfectly the . . . definition of ‘rule.’ Yet [the] order is still regarded as an ‘order.’ And the . . . proceeding leading to it is regarded as adjudication.’ Id.

Id. at 593, 779 P.2d at 872-73; see also Aguiar v. Hawaii Housing Authority, 55 Haw. 478, 485-86 n.13, 522 P.2d 1255, 1261 n.13 (1974).

In this case, the Advisory Opinion provided guidance with respect to the “student educational trips,” Advisory Opinion at 1, and involved a “particular” application of the statute. In other words, the Advisory Opinion sets forth the Commission’s opinion as to how the State Ethics Code applies to free travel offered to teachers under specific circumstances. The Advisory Opinion is not -- and HSTA does not contend otherwise -- a “statement of general . . . applicability,” and for that reason alone, the Advisory Opinion is not a “rule” as defined in HAPA. See Shoreline Transp., supra.

Finally, HSTA alternatively argues, if the Commission was not required to engage in rulemaking, the Commission was required to convene a contested case hearing to consider the issue regarding the free travel offered by travel companies before issuing the Advisory Opinion. HSTA’s position, however, is unsupported by either the actual circumstances of the Advisory Opinion or HAPA.

HAPA defines a “contested case” as “a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.” HRS section 91-1(5); see also Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm’n, 79 Hawai’i 425, 431, 903 P.2d 1246, 1252 (1995) (holding that a contested case hearing is an agency hearing that is required by law and determines the rights, duties, or privileges of specific parties).

The Commission has not adjudicated “the legal rights, duties, or privileges” of any teacher.⁸ The Commission has simply, through the Advisory Opinion, offered guidance as to how the State Ethics Code applies to the free travel offered to teachers under specific circumstances. The Advisory Opinion does not have any “binding effect.” In other words, if a teacher accepts free travel under circumstances as described in the Advisory Opinion, such acceptance would not constitute a *per se* violation of the statute. If the Commission decided to initiate administrative action against a teacher for an alleged

⁸ HSTA acknowledged that the Commission has not initiated administrative action against any teacher.

CHAIR DEGUZMAN: Right. But you’re saying that your alternative request is that we do a contested case ---

MS. HANABUSA: Contested case on this specific issue.

CHAIR DEGUZMAN: On the issue. But then a contested case is adjudicating some person’s right. So who do we then file a charge? On one of the teachers? Is that what you’re suggesting ---

MS. HANABUSA: Well, that’s what I’m saying that the difference is that it could be, depending on how this Commission looks at it. It could be basically based on what your context of your advisory opinion, as well as the context on the August 4th memo. It would be a challenge. It would be like a challenge on an application, very similar to what the PUC situation is. In that situation, it’s an application that’s filed and people intervene into the proceeding to give their opinion.

So, by analogy, you could put your advisory opinion, it that’s what you deem it to be, up like an application, and your August 4th memo; and people like us and others -- the DOE wants to intervene -- could all intervene or we could file to be intervenors, but everyone else are intervenors and we proceed on that.

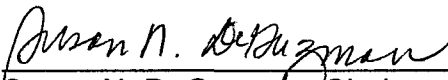
violation of the State Ethics Code, the Commission would determine the teacher's legal rights through a contested case hearing convened pursuant to HRS chapter 91 and would consider the facts and circumstances to determine whether that specific teacher violated the statute. See HRS section 84-31(c) ("All hearings shall be in accordance with chapter 91.").

Accordingly, having carefully considered the issues raised and argued in the Petition, as well as the oral arguments presented by HSTA's counsel at the hearing,

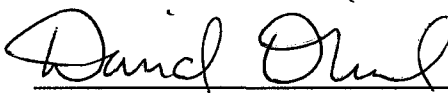
THE COMMISSION HEREBY ORDERS that HSTA's Petition for Declaratory Order, or Alternatively for a Contested Case, filed on August 26, 2015, be DENIED.

DATED: Honolulu, Hawaii, December 2, 2015.

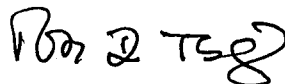
HAWAII STATE ETHICS COMMISSION



Susan N. DeGuzman, Chair



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HAWAII STATE ETHICS COMMISSION

State of Hawaii • Bishop Square, 1001 Bishop Street, ASB Tower 970 • Honolulu, Hawaii 96813

EXHIBIT A

MEMORANDUM

Date: August 4, 2015
To: Department of Education Teachers
From: Hawaii State Ethics Commission
Subject: Free Travel Offered to Teachers By Travel Companies

The State Ethics Code¹ prohibits Department of Education ("DOE") teachers and other employees ("teachers") from accepting free travel and other benefits from tour companies for serving as chaperones on student educational trips. More specifically, teachers who are involved in planning the trip itinerary and selecting the tour company, promoting the trip to students and their parents, deciding who will chaperone the students, and requesting DOE approval of the trip cannot accept free travel and other benefits from the tour company.

The Hawaii State Ethics Commission ("Commission") is issuing this memorandum to help teachers who intend to serve as chaperones on upcoming trips organized through tour companies understand the application of the State Ethics Code to the free travel and to help prevent teachers from acting in a manner that is contrary to state law.

The Commission is aware that teachers have received free travel and other benefits from tour companies for trips that have already occurred. The Commission also is aware that teachers have been offered free travel and other benefits from tour companies for a number of upcoming trips that are planned or are being planned, including trips for which students have already paid. The Commission will discuss each situation separately.

I. Travel Already Completed

- A. The Commission will take no action against teachers for accepting free travel and other benefits from tour companies for student educational trips that occurred before July 31, 2015, i.e., the travel was completed before July 31, 2015.

¹ Hawaii Revised Statutes ("HRS") Chapter 84.

B. Teachers who accepted free travel and other benefits from tour companies for student educational trips that occurred after June 1, 2014, must report the travel and other benefits that they received on a Gifts Disclosure Statement² filed with the Commission, as explained below:

1. For trips that occurred between June 1, 2014 and June 1, 2015, teachers must report the travel and other benefits they received from the tour company on a Gifts Disclosure Statement filed with the Commission no later than September 15, 2015.³
2. For trips that occurred after June 1, 2015, teachers must report the travel and other benefits they received from the tour company on a Gifts Disclosure Statement filed with the Commission no later than June 30, 2016.

The Gifts Disclosure Statement form and instructions are available on the Commission's website at http://ethics.hawaii.gov/gifts_form/. The following is an example of how to properly report travel and other benefits received from a tour company on a Gifts Disclosure Statement:

- | | |
|---|---|
| 1. Donor: <u>XYZ Education Tour Company</u>
Gift (Description): <u>Washington, DC and NY City Educational Trip</u> | Date Received: <u>3/22/15</u>
Value/Cost: <u>\$3,500</u> |
| 2. Donor: <u>XYZ Educational Tour Company</u>
Gift (Description): <u>Stipend</u> | Date Received: <u>3/22/15</u>
Value/Cost: <u>\$150</u> |
| 3. Donor: <u>XYZ Educational Tour Company</u>
Gift (Description): <u>iPad</u> | Date Received: <u>2/25/15</u>
Value/Cost: <u>\$400</u> |
| 4. Donor: <u>XYZ Educational Tour Company</u>
Gift (Description): <u>Group Leader Orientation Travel (NY City)</u> | Date Received: <u>1/17/15</u>
Value/Cost: <u>\$800</u> |

The "Value/Cost" of the travel is the fair market value of the trip, which includes the cost of airfare, lodging, meals, admissions, gratuities, travel insurance, and other covered expenses. For the trip, the "Date Received" is the departure date. Any benefit received from the tour company in addition to the trip should be reported as a separate entry. Other benefits include separate "orientation" travel; a stipend; and other personal gifts, such as an iPad.

² HRS section 84-11.5.

³ Gifts Disclosure Statements for the June 1, 2014 through June 1, 2015, gifts reporting period were due on June 30, 2015. Therefore, a Gifts Disclosure Statement for this gifts reporting period must be filed as soon as possible, but no later than September 15, 2015.

If you have any questions regarding filing a Gifts Disclosure Statement, please contact the Commission's office at (808) 587-0460.⁴

II. Upcoming Trips (Travel That Was Not Completed Before July 31, 2015)

With regard to upcoming student educational trips (i.e., travel that was not completed before July 31, 2015), including trips that are already planned and scheduled and trips for which students have already paid, the Commission reminds teachers that the State Ethics Code prohibits teachers from accepting free travel and other benefits from the tour companies if the teachers were involved in planning the trip itinerary and selecting the tour company, promoting the trip to students and their parents, deciding who will chaperone the students, and/or requesting DOE approval of the trip.

Teachers who accept free travel and other benefits after July 31, 2015, that are prohibited under the State Ethics Code may be subject to action by the Commission.

The Commission's position as reflected in this memorandum does not prohibit, and is not intended to be interpreted to prohibit, trips that are planned; the State Ethics Code simply prohibits teachers from accepting the free travel and other benefits offered by the tour companies for these trips.

The Commission has offered to assist the DOE develop policies and procedures to address the State Ethics Code issues associated with the acceptance of free travel as discussed above, including possible ways to fund the teachers' travel for upcoming student educational trips. The Commission anticipates that the DOE will inform teachers and parents about upcoming trips and the policies and procedures that the DOE may implement to address the Commission's concerns regarding the free travel.

If you have questions regarding how teachers and others may raise funds to pay for the teachers' travel, please submit your questions, including any fundraising proposals you have, in writing, to:

Virginia Chock, Hawaii State Ethics Commission, at ethics@hawaiiethics.org

and a copy to:

Malia Espinda, DOE Government Affairs Specialist, at malia_espinda@notes.k12.hi.us.

Thank you very much for your cooperation.

⁴ We recommend that teachers who accepted travel and other benefits from tour companies consult their tax advisors as to whether the value of the free travel and other benefits they received must be reported as income for tax purposes. See Taxable and Nontaxable Income, Publication 525 (2014), Department of the Treasury, Internal Revenue Service.



HAWAII STATE ETHICS COMMISSION

State of Hawaii • Bishop Square, 1001 Bishop Street, ASB Tower 970 • Honolulu, Hawaii 96813

EXHIBIT B

ADVISORY OPINION NO. 2015-1

The Hawaii State Ethics Commission ("Commission") has learned that it is a longstanding practice for Department of Education ("DOE") teachers and other DOE employees (collectively, "teachers") who serve as chaperones on student educational trips to be offered free travel and other benefits from tour companies through which the teachers plan and organize these trips.

The State Ethics Code, Chapter 84, Hawaii Revised Statutes ("HRS"), prohibits teachers from accepting free travel and other benefits from tour companies for serving as chaperones on student educational trips, where the teachers are directly involved in planning a trip and selecting a tour company to help organize the trip, promoting the trip to students and their parents, deciding who will chaperone the students, and/or requesting DOE approval of the trip.

I. Facts

Based on the Commission's understanding of the facts, a teacher or group of teachers plans and organizes an educational trip for students. The trips that are the subject of this Advisory Opinion (also referred to as "student educational trips") are organized and arranged as follows:

- The teachers decide to offer students the opportunity to participate in an educational trip and decide on a particular destination.
- The trip usually relates to a particular subject such as history or foreign language. The trip is not mandatory or a required part of the curriculum but, rather, an "enrichment" activity offered to interested students and their parents.
- The trip usually is scheduled to occur around the time of a school break, such as Spring Break or summer.
- Teachers who are interested in and/or willing to accompany the students and serve as chaperones plan and organize the trip.
- The teachers select a particular tour company to help organize the trip. When selecting the tour company, the teachers do not appear to follow formal state procurement procedures. The choice of tour company appears to be based on the teachers' own subjective criteria.

- The teachers select a particular tour package offered by the tour company or work with the tour company to develop a trip itinerary.
- The teachers generate interest in and promote the trip to students and their parents. Typically, this involves meeting with the parents and disseminating and presenting informational and promotional material about the trip prepared by the tour company.
- The tour company may prepare a letter to the students' parents from a particular teacher, on the tour company's letterhead, to generate interest in the trip. The teacher's name may appear as the signatory of the letter. In addition to providing information about the trip, the letter may include an endorsement of the tour company by stating that the teacher chose that particular tour company due to the quality and affordability of that company's services.
- The tour company may also prepare a PowerPoint slide show promoting the trip, which the teachers present at an informational meeting with parents. The slide show may bear the tour company's logo and identify a particular teacher as the person who will be leading the student travel group. The tour company customarily offers one free travel package to a teacher per a certain number of paying travelers. For example, for a trip to the East Coast, the ratio may be one free travel package per 10 paying travelers; whereas for a trip to Europe, the ratio may be one free travel package per six paying travelers.
- The travel package typically covers airfare, hotel accommodations, meals, overnight hotel security, illness and accident insurance coverage, entrance fees to the sites visited, and gratuities. Some tour companies provide emergency and/or other types of assistance during the trip as part of the travel package.
- The fair market value of a teacher's travel package is several thousand dollars, e.g., \$3,500 or more for a tour of East Coast cities, and \$5,500 or more for a tour of European countries.
- Travelers who must pay for the trip include the students, parents who want to accompany their children on the trip, and other members of the students' families, if they are invited to join the travel group. Paying travelers also may include a teacher's spouse and/or family members.
- The tour company may also offer a teacher additional benefits. For example, the tour company may offer a teacher who will be leading a student travel group for the first time a free weekend "orientation" trip to the mainland, to experience a tour firsthand and obtain additional information from the tour

company. The tour company may also offer a teacher a stipend for the trip, "points" that can be earned and applied toward obtaining other benefits from the tour company, or a personal gift, such as an iPad.

- The students may conduct fundraising activities to help pay for their travel expenses.
- Teachers must obtain approval for the trip from their school principal and complex area superintendent. In requesting the approval, the teachers must articulate an educational purpose for the trip.

II. Application of the State Ethics Code

Based on the Commission's understanding of how student educational trips are currently organized and arranged, it is the Commission's opinion that the State Ethics Code prohibits teachers from accepting free travel and other benefits from the tour companies. Several sections of the State Ethics Code apply.

A. Gifts Law, HRS section 84-11

The gifts law, HRS section 84-11, prohibits an employee from soliciting, accepting, or receiving any gift, including travel, under circumstances where it can reasonably be inferred that the gift is intended to influence the employee in performing the employee's official duties or is intended to reward the employee for official action.¹ Because the gifts law is based on an appearance of impropriety, it is immaterial whether the employee is actually influenced by the gift or whether the donor of the gift actually intended to influence the employee. If it appears to a reasonable person that the gift is given to influence or reward the employee for official action, the employee is prohibited from accepting the gift.

¹ HRS section 84-11 states:

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 "a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority."² Official action includes providing input to decisions even if one is not the final decision maker, exercising judgment, expressing opinions, giving advice, and taking other action that is non-ministerial in nature.

Teachers who participate in planning and organizing a student educational trip engage in official action that includes: selecting a tour company with which to plan and organize the trip, planning the trip itinerary, promoting and recommending the trip to students/parents, deciding who will chaperone the students, and requesting DOE approval for the trip by justifying the purpose of the trip to the principal and complex area superintendent.

The Commission believes it is reasonable to infer that the free travel and other benefits offered to teachers by a tour company are intended as both an incentive for the teachers to promote the trip to as many students/parents as possible and a reward for the teachers' efforts in generating revenue for the tour company. Therefore, the free travel and other benefits are prohibited gifts.

In the Commission's view, the "educational purpose" of the trip that may be proffered by the teachers does not outweigh or negate the inference that free travel and other benefits are intended to influence or reward the teachers for official action.

Many teachers have emphasized that the trip is a "working trip" for them, and they do not construe the free travel and other benefits provided to them by a tour company as "gifts." The Commission does not doubt that a teacher who serves as a chaperone takes on additional work responsibilities. At the same time, however, the free travel package has substantial monetary value that provides a personal benefit to the teacher by allowing the teacher to travel for free. Additional personal benefits the teacher may receive from a tour company also have significant monetary value. The Commission emphasizes that the free travel and other benefits constitute prohibited gifts because of the way the trips are currently organized and arranged.

B. Gifts Reporting Law, HRS section 84-11.5

The gifts reporting law, HRS section 84-11.5, requires an employee to report a gift to the State Ethics Commission on a gifts disclosure statement filed by June 30 of each year, if: (1) the value of the gift or gifts received from a single source, singly or in the aggregate, exceeds \$200; (2) the source of the gift has interests that may be affected by official action by the employee; and (3) the law does not exempt the gift

² HRS section 84-3.

from the reporting requirement.³ A teacher who accepts a free trip and other benefits from a tour company for serving as a chaperone on a student educational trip must report these items on a gifts disclosure statement.

The Commission emphasizes that reporting the free travel and other benefits on a gifts disclosure statement does not mean that the teacher was allowed to accept them

³ HRS section 84-11.5 states:

- (a) Every legislator and employee shall file a gifts disclosure statement with the state ethics commission on June 30 of each year if all the following conditions are met:
 - (1) The legislator or employee, or spouse or dependent child of a legislator or employee, received directly or indirectly from one source any gift or gifts valued singly or in the aggregate in excess of \$200, whether the gift is in the form of money, service, goods, or in any other form;
 - (2) The source of the gift or gifts have interests that may be affected by official action or lack of action by the legislator or employee; and
 - (3) The gift is not exempted by subsection (d) from reporting requirements under this subsection.
- (b) The report shall cover the period from June 1 of the preceding calendar year through June 1 of the year of the report.
- (c) The gifts disclosure statement shall contain the following information:
 - (1) A description of the gift;
 - (2) A good faith estimate of the value of the gift;
 - (3) The date the gift was received; and
 - (4) The name of the person, business entity, or organization from whom, or on behalf of whom, the gift was received.
- (d) Excluded from the reporting requirements of this section are the following:
 - (1) Gifts received by will or intestate succession;
 - (2) Gifts received by way of distribution of any inter vivos or testamentary trust established by a spouse or ancestor;
 - (3) Gifts from a spouse, fiancé, fiancée, any relative within four degrees of consanguinity or the spouse, fiancé, or fiancée of such a relative. A gift from any such person is a reportable gift if the person is acting as an agent or intermediary for any person not covered by this paragraph;
 - (4) Political campaign contributions that comply with state law;
 - (5) Anything available to or distributed to the public generally without regard to the official status of the recipient;
 - (6) Gifts that, within thirty days after receipt, are returned to the giver or delivered to a public body or to a bona fide educational or charitable organization without the donation being claimed as a charitable contribution for tax purposes; and
 - (7) Exchanges of approximately equal value on holidays, birthday, or special occasions.
- (e) Failure of a legislator or employee to file a gifts disclosure statement as required by this section shall be a violation of this chapter.
- (f) This section shall not affect the applicability of section 84-11.

from the tour company. In other words, if the free travel and other benefits were prohibited gifts in the first place, reporting them on a gifts disclosure statement does not “cure” a violation of the gifts law.⁴

C. Fair Treatment Law, HRS section 84-13

The fair treatment law, HRS section 84-13, prohibits an employee from using or attempting to use the employee's official position to secure unwarranted advantages or benefits for himself or herself or anyone else. A teacher's personal and direct involvement in selecting a particular tour company to help organize a trip, promoting the trip, deciding that he or she will serve as a chaperone, and securing DOE approval for the trip raises concerns that the teacher may be misusing the teacher's official position to secure free travel and other personal benefits for himself or herself. Under these circumstances, the free travel and other benefits appear to be unwarranted benefits the teacher obtains in violation of HRS section 84-13.

D. Conflicts of Interests Law, HRS section 84-14

When an employee takes official action that personally benefits the employee, concerns arise that the employee's state work is influenced by personal interests. This undermines public confidence in government. The State Ethics Code is intended to prevent an employee from being involved in official action that places the employee in a conflict of interest with his or her state position.

1. HRS section 84-14(a)(2)

HRS section 84-14(a)(2), part of the conflicts of interests law, prohibits an employee from taking official action directly affecting a private undertaking in which the employee is engaged as a representative or in some other agency capacity.⁵

A trip that a teacher organizes and arranges through a particular tour company using the tour company's letterhead, PowerPoint presentation, and/or other promotional material prepared by the tour company appears to be a private undertaking in which the teacher in essence is a representative of the tour company. By taking official action directly affecting this undertaking in his or her capacity as a teacher, i.e., selecting the

⁴ See HRS section 84-11.5(f).

⁵ HRS section 84-14(a)(2) states:

No employee shall take any official action directly affecting . . . [a] private undertaking in which the employee is engaged as legal counsel, advisor, consultant, representative, or other agency capacity.

tour company, planning the trip itinerary, promoting the trip, deciding who will serve as chaperones, and/or requesting DOE approval of the trip, the teacher has a conflict of interest under HRS section 84-14(a)(2). Under these circumstances, the teacher's acceptance of free travel and other benefits from the tour company is prohibited under the State Ethics Code.

HRS section 84-14(d)

HRS section 84-14(d), another part of the conflicts of interests law, prohibits an employee from assisting or representing a business for compensation on a matter in which the employee participates or will participate in the employee's state capacity, or on a matter before the employee's own state agency.⁶

In the Commission's view, the free travel and other benefits a teacher receives from a tour company is "compensation"⁷ for assisting or representing the tour company on a matter in which the teacher participates in his or her DOE (state) capacity. By promoting the trip to the students and their parents, the teacher assists or represents the tour company in generating revenue for the tour company and is "compensated" by the tour company for these efforts. The teacher also is "compensated" for securing approval for the tour company's trip from the DOE, i.e., assisting or representing the tour company on a matter before the DOE.⁸ The teacher's acceptance of free travel and other benefits from the tour company under these circumstances is a conflict of interest and, therefore, prohibited under HRS section 84-14(d).

⁶ HRS section 84-14(d) states:

No legislator or employee shall assist any person or business or act in a representative capacity for a fee or other compensation to secure passage of a bill or to obtain a contract, claim, or other transaction or proposal in which the legislator or employee has participated or will participate as a legislator or employee, nor shall the legislator or employee assist any person or business or act in a representative capacity for a fee or other compensation on such bill, contract, claim, or other transaction or proposal before the legislature or agency of which the legislator or employee is an employee or legislator.

⁷ HRS section 84-3 defines "compensation" 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."

⁸ It is possible that the free travel and other benefits (i.e., "compensation") a teacher receives from a tour company may be considered as "income" the teacher earns for services rendered. The Commission notes that the Internal Revenue Service ("IRS") may recognize the fair market value of the free travel and other benefits as "income" the teacher must report to the IRS for tax purposes. See Taxable and Nontaxable Income, Publication 525 (2014), Department of the Treasury, IRS.

III. Upcoming Trips

The Commission is aware that teachers have been offered free travel and other benefits by tour companies for a number of upcoming trips that are scheduled or are being planned, including trips for which students have already paid. For the reasons discussed above, the teachers are prohibited from accepting the free travel and other benefits from the tour companies.

The State Ethics Code does not prohibit the trips from occurring, nor does the State Ethics Code prohibit the teachers from serving as chaperones on the trips. However, if the teachers are directly involved in planning and organizing the trips with the tour companies and engage in the official action described above, the State Ethics Code prohibits the teachers from accepting free travel and other benefits from the tour companies.

IV. Trips That Already Occurred

The Commission is aware that teachers have received free travel and other benefits from tour companies for trips that already occurred. The Commission has decided to take no administrative action⁹ against teachers for accepting free travel and other benefits from tour companies for student educational trips that already occurred. However, in accordance with the gifts reporting law, teachers who accepted free travel and other benefits from the tour companies must report the travel and other benefits that they received on a gifts disclosure statement filed with the Commission.¹⁰

V. Summary

The Commission emphasizes that the State Ethics Code does not prohibit student educational trips from occurring, nor does the State Ethics Code prohibit teachers from serving as chaperones on these trips. However, the State Ethics Code prohibits the teachers from accepting free travel and other benefits from the tour

⁹ The Commission may take administrative action by issuing a charge against an employee for alleged violations of the State Ethics Code. A charge commences formal proceedings against an employee that may lead to an administrative hearing and penalties that may include a fine. See HRS section 84-31.

¹⁰ The Commission issued a memorandum to all teachers, dated August 4, 2015, which addresses trips that already occurred. The memorandum states that the Commission will take no administrative action against teachers for accepting free travel and other benefits from tour companies for student educational trips that were completed before July 31, 2015. The memorandum also explains that teachers who accepted free travel and other benefits from tour companies after June 1, 2014, must file a gifts disclosure statement with the Commission to report those gifts.

companies if the teachers engage in official action vis-a-vis the tour companies as described above. In short, because of the way the trips are currently organized and arranged, the State Ethics Code prohibits teachers from accepting free travel and other benefits from the tour companies.

The Commission has offered to assist the DOE in reviewing policies and procedures to address the State Ethics Code concerns associated with the teachers' acceptance of free travel and other benefits, including possible ways to fund the teachers' travel for upcoming student educational trips.

Dated: Honolulu, Hawaii, August 19, 2015.

HAWAII STATE ETHICS COMMISSION

Susan N. DeGuzman, Chair
David O'Neal, Vice Chair
Ruth D. Tschumy, Commissioner
Melinda Wood, Commissioner
Reynaldo D. Gaulty, Commissioner

BEFORE THE HAWAII STATE ETHICS COMMISSION

STATE OF HAWAII

IN THE MATTER OF THE PETITION OF	)	Declaratory Action Case No. 2015-1
	)	
HAWAII STATE TEACHERS	)	
ASSOCIATION, ON BEHALF OF	)	CERTIFICATE OF SERVICE
ITS MEMBERS IN UNIT 5	)	
	)	
FOR A DECLARATORY ORDER	)	
OR ALTERNATIVELY FOR	)	
A CONTESTED CASE	)	
_____	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Order Denying Hawaii State Teachers Association's Petition for Declaratory Order or Alternatively for a Contested Case, with Exhibits A and B, were served upon the following individual by email and by U.S. Mail, first-class mail, on December 3, 2015, as follows:

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DATED: Honolulu, Hawaii, December 3, 2015.



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