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# HAWAI‘I STATE ETHICS COMMISSION

State of Hawai‘i · Bishop Square, 1001 Bishop Street, ASB Tower 970 · Honolulu, Hawai‘i 96813

## **Resolution of Charge** **2020-05**

**(COMPL-C-19-00336)**

### **Former Chief Examiner’s Acceptance of Gifts of Meals from a State Vendor**

**October 26, 2020**

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The Hawai‘i State Ethics Commission (“Commission”) has resolved a Charge and Further Statement of Alleged Violation issued against Tian Xiao (“Respondent Xiao”), former Chief Examiner, Department of Commerce and Consumer Affairs (“DCCA”), Insurance Division, for alleged violations of the State Ethics Code, Hawai‘i Revised Statutes (“HRS”) chapter 84.

On January 16, 2020, the Commission issued Charge No. COMPL-C-19-00336 against Respondent Xiao for alleged violations of the Gifts law, HRS § 84-11, and the Gifts Reporting law, HRS § 84-11.5, related to gifts of meals from a state vendor. The Commission issued a Further Statement of Alleged Violation on March 19, 2020. The “Charge” refers collectively to Charge No. COMPL-C-19-00336 and the Further Statement of Alleged Violation.

#### I. Facts

Respondent Xiao admitted and declared, under penalty of perjury, that the following facts are true and correct:<sup>1</sup>

- a) From 2016 to 2019, Respondent Xiao was employed by the DCCA, Insurance Division, as the Chief Examiner of the Financial Surveillance and Examination (“FSE”) Branch. Respondent Xiao left employment with the State of Hawai‘i in late 2019.
- b) Respondent Xiao, at all times relevant herein, was a state employee as defined in HRS § 84-3, and was required to comply with the State Ethics Code, HRS chapter 84.

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<sup>1</sup> This Resolution does not make formal findings, but relies on the facts admitted by Respondent Xiao.

- c) At all times relevant herein, Risk & Regulatory Consulting, LLC (“RRC”) was a vendor of DCCA. DCCA paid RRC to conduct financial examinations of certain regulated insurance companies on behalf of the Insurance Division.
- d) As part of his duties as Chief Examiner, Respondent Xiao was responsible for negotiating the contract rate paid to RRC and for monitoring RRC’s performance of its work on all financial examinations conducted on behalf of the Insurance Division. As such, Respondent Xiao took “official action,” as defined in HRS § 84-3, affecting RRC. However, Respondent Xiao was not the final decision-maker as to which entity or entities would receive contracts to perform financial examinations.
- e) On four occasions – in August 2018, October 2018, July 2019, and September 2019 – Respondent Xiao accepted meals from RRC. The combined value of the meals received by Respondent Xiao was approximately \$654.
- f) Respondent Xiao considered these meals to be social dinners with RRC representatives, whom he had known professionally for several years. Respondent Xiao maintains that he took the RRC representatives hiking in Hawai’i and that he paid for meals, baked goods, coffees, and other snacks for these same RRC representatives on other occasions. The RRC representatives do not recall any instances in which Respondent Xiao paid for other meals.
- g) Respondent Xiao maintains that, after the August 2018 meal at Nobu Honolulu – attended by Respondent Xiao, Respondent Xiao’s wife, and a representative of RRC – Respondent Xiao gave the RRC representative \$100 in cash for the meal. The total bill was \$500 for the three attendees, though Respondent Xiao maintains that he did not know the cost of the meal. The RRC representative disputes this contention, however, and claims that Respondent Xiao did not pay for any portion of the meal.
- h) Respondent Xiao did not file a gifts disclosure statement with the Commission prior to the statutory deadline of June 30, 2019, for those meals received in August and October 2018. Respondent Xiao also did not file a gifts disclosure statement with the Commission prior to the statutory deadline of June 30, 2020, for those meals received in July and September 2019.<sup>2</sup>

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<sup>2</sup> Respondent Xiao was no longer employed by DCCA at the time the gifts disclosure statement for the 2019 meals was due (June 30, 2020). However, HRS § 84-11.5(g) provides that, for purposes of the Gifts Reporting law, those individuals required to file a gifts disclosure report include “any individual who was . . . [an] employee for any portion

## II. The State Ethics Code, HRS Chapter 84

### A. Constitutional Mandate and Statutory Purpose

The State Ethics Code arises from the declaration contained in the State Constitution that “[t]he people of Hawaii believe that public officers and employees must exhibit the highest standards of ethical conduct and that these standards come from the personal integrity of each individual in government.”<sup>3</sup> To this end, the Hawai‘i Constitution further directs that the Legislature enact a code of ethics that applies to all appointed and elected state officers and employees.

In accordance with this constitutional mandate, the Legislature enacted the State Ethics Code and charged the Commission with administering and enforcing the law “so that public confidence in public servants will be preserved.”<sup>4</sup> Additionally, the Legislature explicitly directed that the State Ethics Code be liberally construed to promote high standards of ethical conduct in state government. HRS § 84-1. It is in this context that the Commission examines every employee’s actions.

### B. Application of the State Ethics Code to Respondent Xiao

At the time of the alleged events, Respondent Xiao was a state employee,<sup>5</sup> and was therefore bound by the State Ethics Code’s Gifts law, HRS § 84-11, and the Gifts Reporting law, HRS § 84-11.5.

#### 1. Gifts Law

The Gifts law, HRS § 84-11, prohibits a state employee from soliciting, accepting, or receiving, directly or indirectly, any gift, “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” by the employee. The Gifts Law applies to any gift, “whether in the form of money, service, loan, travel, entertainment, hospitality, thing, or promise, or in any other form[.]” HRS § 84-11.

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of the period from June 1 of the preceding calendar year through May 31 of the year of the report.”

<sup>3</sup> Hawai‘i State Constitution, Art. XIV.

<sup>4</sup> HRS Chapter 84, Preamble.

<sup>5</sup> HRS § 84-3.

## 2. Gifts Reporting Law

The Gifts Reporting law, HRS § 84-11.5, requires a state employee to file a gifts disclosure statement with the Commission on or before June 30 of each year if the employee received any gifts that meet the following conditions:

- (1) The . . . employee, or spouse or dependent child of a . . . 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 . . . employee; and
- (3) The gift is not exempted . . . from reporting requirements[.]

HRS § 84-11.5(a).

The Gifts Reporting law serves an important means of enabling the Commission and the general public to monitor the actions of public officials, which in turn promotes greater accountability and public confidence in government. Thus, under the Gifts Reporting law, a state employee has an affirmative obligation to disclose all gifts that fall within the reporting parameters – regardless of whether the gifts were allowable. See HRS § 84-11.5(f) (stating that the Gifts Reporting law does not affect the applicability of the Gifts law).

Reportable gifts must be disclosed on a gifts disclosure statement no later than June 30 each year.<sup>6</sup> The gifts disclosure statement must 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.

HRS § 84-11.5(c). The failure to file a gifts disclosure statement as required by law is a violation of the State Ethics Code. HRS § 84-11.5(e).

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<sup>6</sup> Effective July 1, 2019, the Gifts Reporting law was amended so that the gifts disclosure statement covered the period from June 1 of the preceding calendar year through May 31 of the year of the report. HRS § 84-11.5(b) (2019). Prior to July 1, 2019, the reporting period was June 1 of the preceding calendar year through June 1 of the year of the report. HRS § 84-11.5(b) (2018).

### III. Resolution of Charge

The Commission has made no findings of fact in this matter, nor has the Commission made any conclusions as to whether Respondent Xiao violated the Ethics Code. However, if this case were to proceed to a contested case hearing, based on the admitted facts above, the Commission would likely find and conclude that Respondent Xiao violated the Gifts law, HRS § 84-11, and the Gifts Reporting law, HRS § 84-11.5.

Respondent Xiao has not previously been the subject of a Commission Charge or investigation.

Respondent Xiao maintains that these dinners were social outings. Respondent Xiao further maintains that he paid for some portions of the meal at Nobu Honolulu and that he paid for other meals with RRC representatives, though the RRC representatives dispute these claims. Additionally, Respondent Xiao maintains that his oversight of RRC's contract was not influenced by the gifts of meals by RRC.

The Gifts law, however, does not require proof that a particular gift caused a state employee to take (or refrain from taking) a particular action. Instead, the Gifts law prohibits state employees from soliciting or accepting any gift "under circumstances in which it can reasonably be inferred that the gift is intended to influence the . . . employee . . . or is intended as a reward for any official action[.]" As such, the Commission has consistently advised that, "[a]s a general rule, the Gifts law prohibits state officials from accepting any gifts from vendors and contractors[.]" Advisory Op. No. 2019-7, 2019 WL 6918522, at \*3. Simply put, Respondent Xiao – who oversaw the contract with RRC – should not have accepted anything of value from RRC representatives.

Given the likely violations of the State Ethics Code, the Commission believes it is reasonable, fair, and in the public interest to resolve the Charge by (1) issuing this Resolution of Charge; and (2) requiring Respondent Xiao to pay an administrative penalty of \$5,000 to the State of Hawai'i.