



HAWAI‘I STATE ETHICS COMMISSION

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

ADVISORY OPINION NO. 2021-1

March 18, 2021

A state agency (“Agency”) project coordinator (“Coordinator”) requested an advisory opinion regarding the application of the State Ethics Code, Hawai‘i Revised Statutes (“HRS”) chapter 84, to the payment of stipends to participants in a state project (“Project”). The Coordinator asked whether she could authorize five Agency employees (“Employees”) to accept \$100 stipends from a group of nonprofit corporations (“Nonprofit Corporations”) as compensation for participating in the Project outside of state work hours. As discussed below, the Commission believes that the Employees may accept the stipend, so long as they are not compensated for work that was performed or reasonably expected to be performed during state work hours.

I. Facts

In 2019, the Agency collaborated with a nonprofit corporation on the Project; the Project was to develop materials to meet certain goals that the Agency itself had previously set. Five Agency employees will participate in the Project. A small portion of the Project will occur at the Agency’s premises during state business hours, and most of the work performed by the Employees will occur outside of state work hours. The Employees will test the content during state work hours and then provide written feedback about the content to the Nonprofit Corporations. The Employees must provide extensive comments, examples, and a final written summary to the Nonprofit

Corporations; they may also be contacted if further adjustments to the Project are made. The Agency estimates that each Employee will spend between 4.5 and 7 hours providing feedback on the Project, which will be completed during the Employees' personal time.

The Nonprofit Corporations offered to provide a \$100 stipend to each of the Employees as compensation for the work performed outside of their state hours. Neither the Agency nor the Employees solicited the stipend, and none of the Nonprofit Corporations does business with or has contracts with the Agency. The Coordinator requested an advisory opinion as to whether the Employees may accept the stipend.

II. Application of the State Ethics Code

As state employees, the Employees are subject to the requirements of the State Ethics Code.¹ As discussed below, although the Employees may accept the stipend from the Nonprofit Corporations, they must not be compensated for any work performed during their state hours.

¹ See HRS § 84-2 (“This chapter shall apply to every nominated, appointed, or elected officer, employee, and candidate to elected office of the State and for election to the constitutional convention . . .”).

A. The Fair Treatment Law, HRS § 84-13, Does Not Prohibit Acceptance of the Stipend

The Fair Treatment law, HRS § 84-13(a), prohibits state employees from using their state positions to obtain unwarranted advantages or benefits for themselves or others; this law prevents employees from obtaining special perks or treatment for themselves or others as a result of their state employment.² The Fair Treatment law also specifically prohibits state employees from “accepting, receiving, or soliciting compensation or other consideration for the performance of the . . . employee’s official duties or responsibilities except as provided by law.” HRS § 84-13(a)(2).

The Commission does not believe that the Employees’ acceptance of the stipend constitutes improper additional compensation for performing their state duties, because they will receive the stipend for doing additional work during their personal time beyond the scope of their state duties.³ The total compensation of \$100 also appears reasonable in light of the Agency’s expectation that the Employees will spend between 4.5 and 7 hours performing this additional work.

² HRS § 84-13(a) states that: “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”

³ See Informal Advisory Opinion No. 96-5, 1996 WL 35069008, at 6 (“The Commission explained that it interprets HRS section 84-13(2) as prohibiting state officials and employees from unjustly enriching themselves by soliciting or accepting anything of value simply because of the performance of their official duties.”), available at <https://files.hawaii.gov/ethics/advice/IAO96-05.pdf>. See also Advisory Opinion No. 275 (1976), 1976 WL 452389, at 1 (stating that “if the outside work that he did was of the type that was required of him by his state job, he could not receive additional compensation from the private sector” (emphasis added)), available at <https://files.hawaii.gov/ethics/advice/AO275.pdf>.

Finally, the Commission does not believe that the stipend constitutes an unwarranted benefit for the Employees for two reasons: first, the Agency has collaborated with the Nonprofit Corporations in the development of the content; and second, the Agency specifically encouraged the Employees to undertake this additional work. So long as the Employees are neither receiving additional compensation for performing their state duties nor receiving excessive compensation, the Commission does not believe that their acceptance of the stipend violates the Fair Treatment law.

B. The Gifts Law, HRS § 84-11, Does Not Prohibit Acceptance of the Stipend

The Gifts law, 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.

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. See, e.g., Advisory Opinion No. 2019-7, 2019 WL 6918522, at 4.⁴ Hawai'i Administrative Rule § 21-7-2 further clarifies the Gifts law as follows:

⁴ Available at <https://files.hawaii.gov/ethics/advice/AO2019-7.pdf>.

(b) In determining whether a gift is prohibited, the commission shall examine the circumstances surrounding the offer of the gift and consider:

- (1) The donor's relationship to the recipient. Except as specifically provided in this chapter, a gift is generally prohibited where the recipient is in a position to take official action specifically affecting the donor, such as where the donor is a party to a contested case hearing before the recipient, regulated by the recipient or the recipient's agency, involved in procurement with the recipient or the recipient's agency, or a lobbyist seeking legislative or administrative action from the recipient or the recipient's agency;
- (2) The value of the gift. Generally, the higher the value of the gift, the more likely the gift is prohibited; and
- (3) Whether the gift supports a state purpose. Generally, cash, gift cards, and complimentary admission to events or venues that are primarily intended as entertainment, such as concerts, movies, sporting events, or golf tournaments, do not serve any state purpose and are more likely to be prohibited.

As to the first factor, a \$100 stipend is a substantial gift. However, the remaining two factors weigh in favor of allowing the stipend. As to the second factor, the Nonprofit Corporations do not have any business before or contracts with the Agency.⁵ As to the third factor, the Agency has collaborated with the Nonprofit Corporations on this Project,

⁵ The Commission is mindful that private non-profit organizations may seek to influence state agencies even if they do not seek to profit from that influence. Nevertheless, in this case, the third factor of the Commission's gifts analysis weighs heavily in favor of acceptance. Cf. Advisory Opinion No. 2019-7, 2019 WL 6918522 (concluding that a very high state purpose was sufficient, under the circumstances, to allow a state official to accept a gift, notwithstanding the Commission's concerns with the first two factors).

such that the Employees are essentially participating in a State project. The Agency supports the Employees' participation in the Project and acceptance of the stipend because it will assist the Agency in meeting its standards. There is no risk that the Nonprofit Corporations – or other private entities – will be able to use gifts to persuade an individual employee to implement the Project in a manner that is inconsistent with Agency's priorities: the Agency itself is acting as a gatekeeper for projects such as this. Offering the Employees modest compensation for extra work in furtherance of an Agency-approved project is not prohibited by the Ethics Code. Consequently, under these circumstances, the Employees may accept the stipend without violating the Gifts law.

III. Conclusion

For the reasons discussed above, the Commission believes that the Coordinator may authorize the Employees to accept the stipend from the Nonprofit Corporations, so long as they are not being compensated for any work performed or reasonably expected to be performed during state work hours. The Commission thanks the Coordinator for seeking guidance from the Commission.