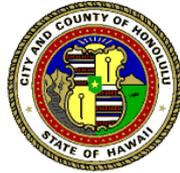


ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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Advisory Opinion No. 2003-2

I. Summary

In hosting a conference of state liquor commissioners and liquor industry members, representatives of the Honolulu Liquor Commission (LQC) accepted about \$9,000 worth of cash, food, liquor and other beverages and services to support the annual liquor industry conference. The Ethics Commission (Commission) finds that the LQC accepted donations on behalf of the annual liquor industry conference and oversaw the coordination of the gifts on behalf of the participants of the conference. This conduct raised an appearance of a conflict of interest.

The Commission does not believe the conduct of the commissioners and staff members involved warrant discipline because the LQC members and staff obtained little personal benefit, if at all, from the gifts. It is recognized that the liquor and hotel industries had traditionally donated goods and services to support past annual conferences. Furthermore, the Commission recommends, and the LQC will adopt, safeguards to prevent similar conduct from recurring.

II. Facts

This matter was brought to the attention of the Commission on or about October 7, 2000. During the Commission's investigation, information was obtained raising the possibilities of ethics violations by a member of the LQC, as well as certain staff members. As a result of the cooperation of the LQC's members and staff and independent witnesses, information was presented to the Commission. No hearing occurred in this matter and the LQC agrees, through its attorney, Robert F. Miller, Esq., to the findings of fact, conclusions of law and recommendations reached in this opinion.

Each year a conference of state liquor commissions and the liquor industry occurs in one of the counties, on a rotating basis. According to staff members of the LQC and industry participants, the conferences have occurred for almost forty years. The purpose of the conferences is to present and discuss work-related programs of interest to the commissioners, their staffs, liquor industry members and members of the public. Traditionally, the liquor

commission of the county where the conference takes place hosts the conference. In addition, donations of food, alcoholic and non-alcoholic beverages, door prizes, services, money and other items are provided to the conference by the hotel and retail liquor sales industry associations and liquor licensees to the host commission to embellish the social events at the conference.

During September 24 through 27, 2000, the LQC hosted the 48th Annual Conference of Hawaii State Liquor Commissioners (Conference) at the Kahala Mandarin Oriental Hawaii Hotel (Hotel), a licensee of the LQC. Preparation for the Conference began in late 1999 and later included organizational meetings called at the request of the Liquor Control Administrator (LCA) with members of the LQC staff and representatives of liquor licensees. The purpose of the meetings was to plan for the Conference and designate tasks among city staff and industry personnel to be accomplished over the next few months. The LQC received \$2,475 in cash donations from the industry associations and two licensees to partially defer costs of a hospitality room and other expenses. These monies were deposited into a separate checking account maintained by the LQC created for the purpose of receiving donations and registration fees and covering the expenses of the Conference.

Members of the Hawaii Hotel Association (HHA) are LQC licensees. HHA and some of its members (Alicensee-donors@) contributed prizes to the Conference amounting to an estimated value of approximately \$6,000. The HHA routinely solicits its membership for donations to community events. Some, if not all, of the licensee-donors were aware that the donations were intended for the Conference. Several HHA members with hotels or restaurants on Oahu indirectly contributed about \$3,100 in door prizes to the Conference through HHA. A similar amount was donated through HHA for door prizes by neighbor island hotels. The door prizes ranged from \$40 up to a grand prize worth \$1,100. Further, liquor, beer, food and soft drinks, valued at about \$3,000 were received from various Honolulu retail and wholesale licensees. The LQC staff arranged or allowed for the foregoing contributions to be provided. Welcome bags provided to participants contained many items of relatively small value (e.g., T-shirts, key chains, caps, and corkscrews) to be donated for welcome bags and additional golf prizes. Industry volunteers also donated their services to help plan and coordinate the Conference.

In late 1999, the Chair of the LQC, inquired of the Hotel about its room rates noting the LQC's interest in having the Conference at the Hotel. He stated to the sales agent that the offered rate of \$185 (which was also the kamaaina rate) was high in contrast to the \$100 room rate charged to the participants at the 1999 conference. The Hotel and the LQC ultimately agreed to a room rate of \$100 per night for mountain-view rooms for the approximately 40 rooms used by Conference attendees. The Hotel management states that the \$100 per night room rate was reasonable in light of the overall package contracted with the LQC for the Conference, including use of Hotel conference rooms and dining facilities. Management adds that the Conference revenues more than covered its associated costs to the Hotel.

The LQC regulates all liquor licensees, including the businesses located on Oahu that contributed gifts to the Conference, and enforces Chapter 281, Hawaii Revised Statutes (HRS).

The LQC does not directly regulate the hotel and retail liquor industry associations, but their members are liquor licensees.

During the period of March 1, 2000 to April 26, 2001, the LQC determined 58 matters involving some of the licensees that made donations to the Conference. Each of the nine donor-licensees for which we requested information had at least one matter decided by the LQC and one chain of retailers had more than 35 actions taken during the period. The matters ranged from approval of license transfers to fines for sales of alcoholic beverages to minors. The Commission found no documentation of preferential treatment towards these licensee-donors when comparing decisions made after the Conference gifts were donated and those decisions made before the donations.

III. Question presented

The issue here is whether a real or apparent conflict exists for the LQC and its administrative staff in the performance of their official duties to receive liquor industry donations to support the Conference.

IV. Analysis

A. Whether donations from the licensees to support the Conference were prohibited gifts

'11-102, Revised Charter of Honolulu (RCH), states:

No elected or appointed officer or employee shall:

- (1) Solicit or accept any gift, directly or indirectly, whether in the form of money, loan, gratuity, favor, service, 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 officer or employee in the performance of such person=s official duties.

See, also, '3-8.7(b), Revised Ordinances of Honolulu (ROH). In other words, if a reasonable person viewing all the circumstances could conclude that the gift was offered to influence the LQC, one of its commissioners or an employee in performing their duties, the gift would be prohibited. Solicitation or acceptance of a prohibited gift is a violation of the ethics laws. The Commission=s Revised Guidelines on Gifts, July 13, 1995, (Guidelines on Gifts) list factors that aid in determining whether gifts may be solicited or accepted by officers or employees of the city.

1. Official duties of the recipient

The first factor requires review of the official duties of the recipient, especially whether they include official action directly affecting the donor. @ Id. Under Chapter 281, HRS, each county administers and enforces the state liquor laws. In this case, the LQC has the sole jurisdiction to control, supervise and regulate the importation and sale of liquors in Honolulu because of its investigative and enforcement powers. HRS '281-17(3). Furthermore, the LQC is empowered to limit the number of licenses, fix the hours of business for classes of licensees, establish book keeping procedures and set fees for licenses and permits. HRS "281(6), (8), (9) and (12), respectively. The LQC also prosecutes and decides cases alleging law violations, such as furnishing liquor to minors or those under the influence of alcohol. The LQC can deny, condition or revoke liquor licenses.

The LQC notes that it has no official duties vis-a-vis the industry associations that made some of the donations and that the associations exercise independent judgment in their distributions and solicitations and in their relationships with the individual county governmental regulators. However, the LQC has a substantial and direct affect on the success of a licensee. The greater the role of a regulator in the affairs of a business, the more important it is for the regulator to appear to, and in reality, be impartial and disinterested in its conduct with the regulated businesses.

2. Interaction between donor and recipient

Another factor in the Revised Guidelines on Gifts is whether there is a past, present or predictable future interaction between the donor and the recipient. The Commission investigated whether the donors had actions pending before the LQC for a period of six months before and eight months after the Conference. The LQC reported that 58 matters involving some of the donors were decided during this period and each licensee donor had matters determined by the LQC during the 14-month period we reviewed. This shows that there is a regular and consistent pattern of oversight by the LQC, which is to be expected from the level of regulation required of the LQC.

3. Personal benefit to recipient

The next criterion to be considered is whether the benefit of the gift runs personally to the officer or employee or accrues to the city. The Conference permits the licensees and industry representatives to have open discussions outside of the LQC's formal processes with the regulators about issues important to the industry. To the extent that the gifts drew more attendees to the Conference, the city may have benefited from the discussions by the LQC staff and commissioners with other experts in the field.

It appears that members of the LQC or its staff took little personal advantage of the gifts. Our investigation found that no commissioners or staff members received door prizes at the Conference. However, a few of the staff and commissioners consumed portions of the food, liquor and other beverages donated at dinners or upon visiting the hospitality room. The personal

benefit received by any LQC members or staff was so diffuse, it is not reasonable to assume the gifts were intended to influence anyone associated with the LQC.

4. Undermining the integrity of the agency

Related to the foregoing point, the Commission also considers whether the receipt of the gift may impugn the integrity of the recipient's agency. We conclude that receiving several thousands of dollars from the businesses regulated by the LQC undermines its reputation and integrity and invites accusations of bias and favoritism by the public and those licensees that did not make donations to the Conference.

The Commission's Guidelines on Gifts emphasize that no person charged with enforcing the law should accept gifts from anyone against whom they may have to enforce the law:

City personnel who have authority to enforce the law may not solicit or accept gifts in any form from persons or businesses against whom they enforce the law. This restriction applies to city personnel who . . . are offered drinks, food or other items free of charge or at a discount from an individual or business over whom the personnel have enforcement power, even if they are offered on non-city time.

This restriction protects the agency and its personnel from accusations of coercion and bias and promotes the confidence of the public that the agency's actions will be based only upon the facts of a case. The LQC's has a similar policy in its Standards of Conduct, Article VIII, which states:

H. Solicitation and Acceptance of Gifts, Gratuities, Fees, Rewards, Loans, Etc. - Commission personnel shall not solicit or accept, either for themselves or others, any bribes, gifts, donations, gratuities, loans, fees, rewards, or anything of value, including refreshments or food from a licensee or employee of any licensee, without the prior written approval of the Liquor Control Administrator. . . . [LQC] personnel shall avoid any and all appearances of impropriety.

Because LQC personnel and commissioners enforce the law against licensees, they should not solicit or accept gifts from the licensees or their representatives.

5. Benefit to the donor

We also review whether there is a benefit that the donor stands to gain from the gift. One employee of a donor described the annual conferences as meetings where the licensees may express their views on regulation in an atmosphere outside of the normal roles which those involved play during the course of the LQC's business. It is an attempt by the licensees and their representatives to build goodwill through donations. Some may see this type of communication as a laudable goal of a conference, while others may contend that the industry may try to co-opt regulators when the public is not represented or the events are not on the public record. We

believe that gifts to the LQC to support the Conference in such a highly regulated industry leave the possibility of real and apparent attempts to influence the regulators.

It is important not to make assumptions about the motives for the donations by the licensees. One cannot assume, for example, that the motive for a licensee's donation was solely for the governmental conference attendees rather than to the conference as a whole, or to foster education and/or goodwill.

6. Size of the gifts

On an individual basis, any gifts that were received by the LQC members and staff were minimal. In the aggregate, however, many of the donations were of alcoholic and other beverages valued at several hundred dollars from each donor. Similarly, the cash donations were between \$250 and \$900 each. Door prizes from Oahu hotels ranged from \$40 to a grand prize valued at about \$1,100. The Conference and Hotel expenses were about \$23,500, which was paid for by the registration fees collected from attendees. The donations totaled about \$9,000. Adding the attendees' payments for the Conference to the value of the gifts, the Conference cost \$32,500, and the gifts make up almost 30% of the Conference costs. We conclude that, although the value of the donations received is difficult to determine on an individual basis as it depends on prizes won and amounts of food and beverage consumed, overall the donations were significant in light of the cost of the Conference.

7. Custom and practice in the community

We review the custom and practice within the community with regard to gift giving to support liquor industry conferences attended by the regulators. Several employees of the LQC and industry members noted that the conferences had been receiving industry donations for over thirty years and that this practice occurred in each county hosting the annual conference. The Commission acknowledges the gifts were received in an industry with a significant tradition of permitting gifts to help defray the costs of the social events at the conferences.

8. Whether the Hotel room rates were prohibited gifts

There is an additional question whether the reduced room rate for the participants was a gift from the Hotel to the extent the room rate was below cost or what the Hotel would offer guests from a similar group. Based on the information received from the Hotel and others, we do not consider the \$100 per night room rate to be a gift to the participants. There is insufficient information to conclude that the room rate, when evaluated in the context of the total Conference package, was below cost or below the rate at which a group of similar size and needs would receive. Therefore, we do not consider that the two staff members who had rooms at the Hotel during the Conference received gifts from the Hotel.

However, the fact that a member of the LQC and its staff negotiated a contract including discounted room rates and other services with the licensee-Hotel raises concerns stemming from the unequal bargaining power between the regulator and its licensee. The relationship between the agency as regulator and the Hotel as licensee may add an advantage to the regulator when negotiating a contract, an advantage not found in a typical, arms-length business transaction. Although negotiating with a licensee for the Conference site was a customary practice at the time, the practice creates an environment where the City officials appeared to be soliciting a discount or seeking other special consideration for the conference participants and themselves. To avoid any similar appearance of a conflict of interest under RCH Sec.11-102(a) or special treatment under RCH Sec. 11-104¹, we conclude that the LQC should not attempt to enter into a business transaction with one of its licensees unless there is a compelling need to do so and there is no alternative to a direct contractual relationship between the LQC and the licensee.

9. Summary

In summary, the actual benefit received by any LQC commissioner or staff member was relatively small and was limited to food and drink items. It is recognized that historically the LQC members and the other liquor commissions in Hawaii have hosted conferences at which donations were made on behalf of the participants in the Conference.

On the other hand, the aggregate value of the donations was significant and the gifts raise the potential for an appearance of impropriety. Based on the affidavits of the Hotel management regarding all the services under the contract, the low room rate appears to be the result of the negotiations between the Hotel and the LQC and not a gift. Yet, the fact that the LQC negotiated a contract with a licensee for the Conference denotes at least an appearance of a conflict of interest. In addition, the LQC has jurisdiction over past, present and future issues arising from the licensees on a regular basis, as shown by our examination of cases around the time of the Conference and thereafter.

After reviewing the pertinent facts and weighing the factors described above, the Commission concludes that the donations received by LQC in support of the Conference raises an appearance of a conflict of interest and it could be inferred that these donations were intended to influence the LQC as an agency, its commissioners and/or its employees in the discharge of their duties, or that they violated RCH '11-102(a). The Commission does not conclude that an actual conflict of interest exists because, among other things, the gifts accepted were of relatively small value and intended for all Conference attendees, not just the LQC members or staff.

¹ RCH §11-104 prohibits a city officer or employee from using his or her city position . . . to secure or grant special consideration, treatment, advantage, privilege or exemption to themselves or any person beyond that which is available to any other person.≡ **A.**

V. Recommendation

Although the facts of this case lead us to conclude that the gifts received were prohibited, we note that they were of small value to the LQC personnel and members interviewed and were accepted in the long-standing historical context of conference donations. Further, the LQC agrees to implement the recommendations made below. Therefore, we do not believe discipline of any individual is appropriate in this matter. It is more important, under these facts, to ensure that similar conduct does not recur.

First, the LQC should no longer be involved in the planning, coordination or implementation of the social events for conferences. Several witnesses in this case stated that the industry gifts were intended only to make the conferences more successful through the social events. If that is the case, the industry may directly handle the social events without the intervention or assistance of the LQC. This should alleviate the need for the LQC to ask for or receive any donations of cash, goods or services from the licensees or their representatives for purposes of a conference. The LQC may continue sponsoring work-related conferences, but should limit its activities to the substantive matters of the conferences. Should the LQC staff and members attend social events related to a conference, they must follow the ethics laws. If, for instance, a dinner or golf tournament at a conference is partially paid for or discounted by a licensee or representative of the liquor industry, LQC members and personnel should request advice from the Commission to determine if the gift may be accepted. This will require that LQC personnel be conscientious in identifying gifts.

Second, the LQC should ensure that all of its personnel and members follow the prohibition against the solicitation or receipt of gifts from any licensee or licensee representative without prior written permission of the LQC as is required under its own Standards of Conduct. As the LQC's rules reflect, solicitation or acceptance of a licensee's gifts casts at least an appearance of a conflict of interest and should not occur.

Third, as noted above, to prevent even the appearance of conflict of interest or special treatment, we recommend that the LQC not enter into a contract with a licensee unless there is a compelling need to do so and there is no practical alternative to a direct contractual relationship between the LQC and the licensee.

Of course, the Commission and its staff will be available to the LQC to aid it in implementing these recommendations and for any future issues.

Dated: June 20, 2003

/S/
ROBIN DAVID LIU, Chairperson
Ethics Commission

APPROVED AND AGREED TO:

/S/
Robert F. Miller
Attorney for the Honolulu Liquor Commission