

OPINION NO. 39

An engineer spends 85 per cent of his time employed in research at the University of Hawaii. The other 15 per cent of his time is spent attending school. He was previously employed 40 per cent of his time by a corporation, which manufactured equipment in his field, for compensation of \$374.80. However, now he acts as an occasional consultant for the corporation at \$46.50 per day. The project on which he is employed by the University is a joint project of two departments of the University and is partially federally funded. The purpose of the project is to conduct research studies in systems in his field.

The project is presently considering the purchase of approximately \$2,400 worth of equipment from the corporation by which he was employed. He states that the equipment is available only from that corporation in Hawaii, and that one desirable feature of that corporation's equipment is available nowhere else in the United States.

In these circumstances, he asks whether this purchase by the state agency from the corporation would violate the state ethics code, chapter 84, HRS.

The provisions of the law which apply to this situation are sections 14, 16, and 18.

Section 14 regulates the action state employees may take affecting their private interests. It prohibits participation in official action directly affecting a business or matter in which the employee has a substantial financial interest.

Section 3(6) defines a "financial interest" to include an employment. Because an employment is "any rendering of services for compensation," this is an employment, even though it may be on an irregular and declining basis.

Substantiality is not defined by the code, but has been interpreted by the Commission to mean an interest of sufficient magnitude to be reasonably likely, in the circumstances, to influence an employee's official action. [Opinion No. 22.] In this instance, he does not know how often he will be called upon to work for the corporation at \$46.50 per day. But, in this case, he is a former employee kept on in a consultant's capacity. It is possible, depending upon the corporation's needs, that his consultant's payments could be quite sizable. This situation, where a former employee is kept on as a consultant, tends, through loyalty in old working ties and the uncertainty of future remuneration, to give additional weight to an interest and make it reasonably likely, in the circumstances, to influence an employee's official actions. It is, thus, substantial.

In applying section 14, the duties of the employee and the structure of the organization in which he works are also important.

As an engineer and a research associate on the project, he has stated that he is responsible for any design and development of equipment necessary for the project.

The project is largely directed by University professors, to one of whom, the project manager, the employee is directly responsible. He reviews and either approves or disapproves the employee's decisions, or may refer his decisions for review by other professors. The employee has stated that, although his decision on equipment is subject to review by the project manager, his decision is considered with much confidence and, thus, he does influence final decisions on equipment purchases.

Official action includes decisions involving the use of discretionary authority. [Section 3(7).] The decisions in this instance clearly involve discretionary authority, and, being considered with much confidence, have a direct effect on that which they concern.

Because the corporation in which he has a substantial financial interest manufactures the equipment required, and, because any decision he makes on the source from which equipment is purchased affects the corporation, the employee must refrain from participation in such decisions in order to avoid violation of section 14.

If bid and other state requirements are complied with, and if the employee is able to disqualify himself from the decision-making process in favor of another who would not likewise be disqualified, there is no reason the project cannot purchase equipment from the corporation. If, on the other hand, he were to make the decision on source of purchase, however, justified, he would be acting in a conflict of interests situation and would be placing himself and the University project in a position which could well arouse public doubt and criticism and undermine public confidence in state government.

Section 16 prohibits a state agency from entering into a contract with a business in which an employee has a controlling interest, involving property of a value in excess of \$1,000 unless the contract is made after public notice and competitive bidding. While the employment with the corporation does not constitute a controlling interest in the business, if another member of the state agency has a controlling interest in the business, the bid procedure outlined in section 16 must be followed. As the employee indicated that it will be followed, this section will not be violated by the purchase.

While section 18, the disclosure section of the code, is applicable, the employee has filed a disclosure of his interests and thus has complied with that section of the law.

Dated: Honolulu, Hawaii, September 11, 1969.

STATE ETHICS COMMISSION
Vernon F.L. Char, Chairman
James F. Morgan, Jr., Vice Chairman
S. Don Shimazu, Commissioner

Note: Commissioners July Simeona and Margaret W. Smalley were excused from the meeting at which this opinion was considered and adopted.