

OPINION NO. 78

The State Ethics Commission studied the following factual situation consciously aware of its duty to promote high standards of ethical conduct in State government without needlessly stifling the creativity of public professional employees.

We have seriously weighed the ethical questions involved and have placed restrictions on private financial activities of professionals where we believe the public interest requires that this be done.

The employee in this case is the head of a division in the educational system in this State. He is a stockholder, President, and Board Chairman of a local corporation. The other shareholders of this corporation are staff members in his own division.

The corporation is presently involved in developing, promoting and marketing two products, with patent applications pending.

The first item was developed on State time in conjunction with the State duties of the inventors.

The second item was developed at the expense and time of the inventors who utilized the research and techniques they had learned in developing the first item.

The inventors requested that a committee having jurisdiction of such matters review their invention. In connection therewith, this employee submitted a memorandum to the committee, in which he concurred with the comments, recommendations and proposals relating to the division of profits and patent interests contained in the inventors' memorandum. The committee recommended a contract between the inventors and a State agency, which terms are not relevant to this advisory opinion.

The materials developed and marketed by the corporation are desired by this employee's division. It is proposed that the purchase be based upon the out-of-pocket cost per item.

This employee has directed the following questions to this Commission:

1. Is it appropriate for publicly supported agencies of the State of Hawaii to purchase materials from his corporation on an out-of-pocket cost basis?
2. Is it appropriate for employees like him to engage in investment activities of this nature? Are there, or can there be written, some general guidelines for such participation?
3. Is it appropriate for this division head to remain active in the corporation?

1. Purchases by State Agencies

Purchases by State agencies are subject to the restriction stated in HRS, §84-16(a), relating to contracts:

(a) A State agency shall not enter into any contract with a legislator or employee or with a business in which a legislator or employee has a controlling interest, involving services or property of a value in excess of \$1,000 unless the contract is made after public notice and competitive bidding.

We have repeatedly held (see Op. Nos. 14, 15, 37, 39, and 40) that any contract, including purchases, in excess of \$1,000 must be made only after public notice and competitive bidding, when the contract is with an employee or with a business in which a legislator or employee has a controlling interest.

Since the corporation is wholly-owned by State employees, all of whom are in the same division and directly responsible to this employee, the corporation is, in the opinion of the Commission, a business in which an employee has a controlling interest.

The immediate sale of 500 items is permitted under the law, since the contract will not be in excess of \$1,000; subject, however, to the further ethical limitations discussed in sections 2 and 3 of this opinion.

Future purchases by the same or other State agencies, involving purchases of \$1,000 or more for each contract would be improper under the law, unless made after public notice and competitive bidding.

2. Private Investments by State Employees

Having financial interests related to one's State employment does not constitute a per se violation of HRS §84-14(a), relating to conflicts of interest. That section primarily prohibits an employee from acting officially on a matter in which he has a substantial financial interest. Specifically, neither this employee nor the other shareholders should participate in any decision or recommendation to purchase materials from their corporation. By this, we do not mean to say that the professional may not request that he be permitted to use his own textbook or invention in his class or laboratory. It is our opinion that such a request would be proper with appropriate and timely disclosure of his interest to the individual who will make the final decision. We presume that in this case the purchase of materials from the corporation may be referred to a higher official within the system. If this is impossible, then he would be in a conflict of interest situation from which disqualification is impossible. He would be unable to perform his official duties without violating the ethics laws.

The ethics law further prohibits an employee from using his official position to secure or grant unwarranted treatment for himself or others. (HRS, §84-13.) For example, the employee should not use or attempt to use his State position or facilities to market his product. This includes the use of the institutional name in association with substantially revised publications, advertisement as a State product, or the use of State stationery or other endorsement of the product.

It is also appropriate to make full disclosures to the relevant State or agency committees and authorities. The inventors should apprise the appropriate agencies of the copyrights related to their patent applications and should disclose the data reflected in the cost basis quotations being charged to other State agencies.

Lastly, whenever an employee has a substantial financial interest which he believes may be affected by a State agency, he should disclose the nature and extent of the interest to this Commission. The filing of the disclosure is a condition of continuing in public employment, HRS, §84-18(a) and (c).

3. Restrictions on Him As a Division Head

This employee may remain head of his division, but he is specifically advised to refrain from any official action related to division matters, including purchases involving his corporation, and should disclose his interest to his superior or superiors as a private individual. He is further advised to review Commission Opinion No. 39 in which we held that a State employee should not participate in any recommendation, discussion or decision with respect to purchases from a corporation in which he has a substantial financial interest.

Lastly, the Commission notes that this employee made an official recommendation to a State committee with regard to a matter in which he had a potential financial interest. Although the corporation was not officially incorporated at the time of the application by the inventors, the employee testified that the plans for an investment venture of some kind, in which he would participate, had been incubating for about a year. Thus, at the time that he made said recommendation to the committee, he had an interest which might have reasonably influenced or affected his action. We hold that, when a man knows or has reason to know that he will have a financial interest in a private venture, and he takes official action with regard to it, that action constitutes a violation of HRS, §84-14(a). Since he is selling the materials to State agencies at an out-of-pocket cost without net profit and has voluntarily submitted these facts to the Commission and sought the advice of the Commission with regard to further involvement with the corporation, we feel that a reprimand in the form of this opinion is sufficient.

Dated: Honolulu, Hawaii, August 25, 1970.

STATE ETHICS COMMISSION
James F. Morgan, Jr., Chairman
S. Don Shimazu, Vice Chairman
Vernon F.L. Char, Commissioner
Walters K. Eli, Commissioner
The Very Reverend John J. Morrett, Commissioner