

OPINION NO. 109

A state agency has inquired whether it may enter into a contract under the following circumstances:

1. The proposed contract will be by and between the agency and spouse of an employee of the agency, who, as a specialist, is responsible for the development, implementation and monitoring of the agency's programs in a particular field. The employee has direct responsibility for recommending the issuance of contracts related to his specialty.

2. The employee has recommended that his spouse be a contractor under the proposed agreement. By the terms of the contract, his spouse would be directly responsible to the division head; the spouse would also work under the supervision of his employee. He is, moreover, responsible for accepting the final product under the contract.

The Commission, by its staff, interviewed a personnel officer of the agency and the employee himself. The significant additional facts disclosed in these interviews were as follows:

1. The employee designed the project and determined the qualifications of the contractors needed for the project.

2. The contracts of the other contractors for this project require them to report directly to the employee; whereas, the contract of his spouse alone requires that she report to the head of the division.

3. The employee sought recommendations for the position from only three other individuals in the State, and of those considered and available, his spouse was the best qualified.

In rendering this opinion, the Commission did not presume to judge the qualifications of the proposed contractor. The Commission directed its attention to the standards of conduct which would be violated if the agency should enter into the contract.

The contract placed this employee in a conflict of interest situation prohibited by HRS, §84-14(1)(A). That provision states in part that "no employee shall participate, as an agent or representative of a state agency, in any official action directly affecting a business or matter in which he has a substantial financial interest." Under the terms of the proposed contract, this employee would be responsible for determining whether the work performed by his spouse is satisfactory to the State. His position within the agency would require him to take official action directly affecting a contract in which he has a substantial financial interest, by virtue of his spouse's employment under the contract. Such action would be in violation of HRS, §84-14. It was the Commission's judgment that the special provision calling for the participation of the division head did not avoid a violation of the ethics law because the employee had stated that as a practical matter, the division head would have to rely upon his judgment as a specialist since the division head was not qualified in this area. Such

recommendation on the part of this employee is "official action" within the meaning of the ethics law, HRS, §84-3(7).

We further noted that a violation of HRS, §84-14 had already occurred when this employee had recommended his spouse for the contract. We noted for the record that when this fact was called to his attention, the employee, who participated in this request for an advisory opinion, voluntarily withdrew his recommendation regarding the contract.

The proposed contract would also constitute a violation of HRS, §84-13, which states that "no legislator or employee shall use or attempt to use his official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment for himself or others." The attempt to avoid an ethical violation by providing that the spouse report directly to the division head instead of directly to this employee, who was the director of the project and the person most qualified to judge the performance of the work under the contract, was an attempt to negotiate a contract which would be otherwise prohibited.

State employees should not be placed in a position where they must recommend, supervise, or evaluate persons, projects or other matters in which they may have a financial interest. We therefore advised that the contract in question would be in violation of HRS, §84-13, and would place the employee of the agency in a conflict situation prohibited under HRS, §84-14.

Dated: Honolulu, Hawaii, July 2, 1971.

STATE ETHICS COMMISSION
Vernon F.L. Char, Acting Chairman
Gwendolyn B. Bailey, Commissioner
Walters K. Eli, Commissioner

Note: The vacancies created by the resignation of S. Don Shimazu and James F. Morgan, Jr. have not been filled.