

## OPINION NO. 112

A prospective member of a state commission requested an advisory opinion regarding the following situation:

1. In 1968 he was awarded a lease by the state agency which he now serves. In connection with the lease covenants, he had applied for a loan. Due to the lack of adequate funds, his application had been pending until December, 1970, at which time funds became available and he was advised that he should re-apply for a loan.

2. He has two brothers who also hold leases adjacent to his own lease. He and his brothers own a corporation which holds a loan of \$30,000 from the same agency which he serves. This loan was used to purchase improvements and equipment which are presently located on another lot also leased from the same agency.

This individual has inquired whether he may be awarded the loan and further, whether any ethical problems will arise by the award of the loan.

We rendered the following opinion after thorough consideration of all the facts submitted by him and by the commission which he will serve.

Because the loan was closely related to the conditions and terms of the lease acquired in 1968 at which time he was not a state employee within the meaning of chapter 84, HRS, we believed that §84-14(2), relating to acquisition of conflicting interests, and §84-16(a) and (b), relating to state contracts with state employees, were inapplicable in this instance. The conclusion reached, therefore, was that he may execute the loan agreement with the agency of which he was a prospective member, since the loan was a natural consequence of the lease which was acquired prior to his entering public service.

We noted, however, that his agency made many policy and administrative decisions which would directly affect, beneficially or adversely, the leaseholds and the loans held by him and his brothers; and would further directly affect, adversely or beneficially, his financial interest in the corporation. For example, it was our opinion that policy decisions relating to the administration of loans from any of the funds administered by his agency would directly affect, in some way, the loans he had with the agency. Similarly, his leases would be affected by policy decisions regarding the administration or enforcement of lease agreements. Any type of disciplinary action, moreover, regarding loans and leases would also affect his loan and lease directly; since we understood that the loans and lease agreements were quite uniform. We further noted that decisions relating to development projects would also require his disqualification, depending upon whether his financial interest would be directly affected or not. Whether or not there was a direct effect upon his financial interest was a factual issue to be determined by this Commission on a case by case basis. For example, a road project located near his land would probably have a direct effect on his financial interest, whereas, a water project servicing an area which was not considered competitive to him may not have a direct effect on his financial interests.

We suggested that it may be necessary for him to disqualify himself more often than not because so many agency decisions in the future may directly affect his financial interest. The problem was further compounded by the fact that two other commissioners of this agency, to our knowledge, also had some financial interests which would require their disqualification from agency business. There would be times when the commission would be unable to act for lack of a quorum.

We were cognizant of the fact that this individual had been designated as the commissioner from a particular county. Since he must disqualify himself from various loan and lease actions and development project actions as discussed above, the residents of the county which he represented would be handicapped by not having a representative who could participate on decisions of vital interest to them. We emphasized that the statute creating this agency did not mandate that the members of the commission must also be holders of leases or loans administered by the agency. We pointed out that his possession of financial interests which were affected and will be affected by the agency of which he was a member, raised several considerations under §84-14, §84-13 and §84-12 of the ethics law. We referred him to discussion of conflict situations of members of state boards and commissions who have interests which are regulated or affected by their state agency, in Opinions Nos. 4, 5, 6, 20, 24 and 91.

During our interview with him, we briefly discussed HRS, §84-13, relating to the use of official position to gain unwarranted treatment. We believed that he recognized the difficulty of his position as commissioner and private individual. While he may feel that he can keep these interests distinctly separate, there was considerable danger that the appearance will nevertheless be that his decisions have been influenced by his private financial interests. He may have no intention whatsoever to violate this provision (HRS, §84-13); but the appearance would be there. We had previously advised legislators that they should avoid such appearances, inasmuch as the legislative history of the ethics law indicates that it was the spirit and intent of the legislature that appearance of unethical conduct be avoided. (Opinion No. 110).

Finally, we noted that he might have information or advance information which was not generally available to the public. We advised that HRS, §84-12 prohibited disclosure of such confidential information or the use of such confidential information for his own benefit or the benefit of others.

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.