

## OPINION NO. 134

Two employees requested an advisory opinion as to whether there was a violation of the State ethics law under the following circumstances.

1. They indicated that their positions encompassed planning, organizing, evaluating, conducting and finalizing certain projects in specific areas of inquiry.

In response to our questions, they indicated that their job responsibilities included recommending that a particular study be performed, determining its technical requirements and recommending resources to be utilized. They further indicated that although they could participate in decisions on resources to be used, a decision to use outside resources was made either by their division chief or the director of their department. They indicated that once a decision was made to use outside resources, they did not participate in the selection of an individual consultant or firm, nor in the formal state acceptance of the study. However, they indicated that their job included evaluation of studies, but that so far that had been done by either their division chief or the department director.

The department director indicated that the two employees could be held responsible for a) recommending whether a study should be undertaken, b) participating in the development of the requirements of a study or project, and c) reviewing a project or study prior to acceptance by the State. He further indicated that they were in a position to contribute to a decision as to what resources (in-house or contract) would be utilized to perform a particular study.

2. Further information obtained from the department led us to conclude that if one of the divisions or other administrative units within the department had a need for a particular study, a request was submitted to the director. He would normally then refer it to the division, of which the two employees are members, for consideration and/or recommendation. If a decision was made to perform the study by contract rather than in-house, the director's office handled the contracting and the division in which the two employees were assigned normally participated in the review and acceptance of the completed study.

Since the subject of the feasibility study which the two state employees were proposing came within the area of responsibilities assigned to the department, we concluded that the department was the only state agency that would contract for such a feasibility study.

3. The employees indicated that they had recently formed a partnership. They further indicated that their firm had been involved in a) gathering statistics and qualitative information concerning a feasibility study; b) evaluating the possibility of publishing a monthly newsletter relating to a specific area in their field; and c) preliminary research and analysis concerning the possibility and feasibility of establishing a certain type of center in Hawaii.

4. They further stated that the activities of their firm had been performed on their own time and that their state duties had not involved in any way a state project similar to what they propose. In regard to 3(c) above, they indicated that their firm had prepared a research proposal and submitted it to their director. They further indicated that they would take administrative leave to perform the proposed nine-month project which might cost in excess of \$50,000.

In connection with the facts and circumstances set forth above, the state employees asked the following questions:

1. May they be awarded a contract by their department or by any other state agency to undertake the feasibility study?
2. If the State should decide not to go ahead with the proposal or if their firm was not awarded the contract, would they be permitted to continue with this and other projects on their own time and seek contracts from private sources?
3. May their firm publish a monthly bulletin or newsletter? They have indicated that it would not contain confidential information.

The director indicated to us that his department had made a determination that the circumstances set forth above constituted a conflict and that the research proposal would not be considered. It was further indicated that a decision had been made that the outside employment was "prohibited" under HRS, §76-106.

Initially, we noted and called their attention to the determinations made by their department. We stated that although we did not interpret the ethics law, HRS, chapter 84, to mean that a state agency was precluded from adopting its own standards of conduct provided they were as strict or stricter than those set forth in the statute, the Commission must render its own opinions by applying the standards of conduct set forth in the statute. [See HRS, §84-31(a)(2).]

We further noted that any determinations pertaining to their taking "administrative leave" to accomplish this or other studies were appropriate matters for their department; therefore, we made no judgment pertaining thereto.

HRS, §84-14(2), provides that no employee shall "acquire financial interest in business enterprises which he has reason to believe may be directly involved in official action to be taken by him."

We indicated that although we accepted their statements that while performing their state duties they have not been involved in a project concerning a center, their job responsibilities were such that they knew or should have known that they would be in a position to take official action on such a project, if any, whether performed in-house or by contract. They were in a position to contribute to a decision as to whether a study would be done in-house or by contract. Their job responsibilities included participation in the development of the technical requirements of a particular study, reviewing a project or study prior to acceptance by the State and evaluating the performance of a contractor. We stated our belief that §84-14(2) was intended to preclude this situation, and that we have interpreted it to mean that a state employee should not acquire financial interests which will be directly involved in official action to be taken by him. The prohibition of the particular section applies regardless of the ability to disqualify one's self from participation. It was our opinion that a public employee should not voluntarily enter into a position in which disqualification becomes necessary. (See Opinions Nos. 100, 108, and 115.) Therefore, we advised that §84-14(2) precluded them from acquiring financial interests in a business enterprise with the knowledge that it would be directly involved in official action to be taken by them.

Based on the above discussion, we thus answered their first question regarding the feasibility study in the negative.

As to their second question, we found that §84-14(2) also precluded them from seeking contracts from private sources for a study of the feasibility of this specific project for a center; therefore, with respect to that project we answered in the negative. As to proceeding with the other projects on their own time and seeking contracts from private sources in connection therewith, we answered in the affirmative, subject to the following conditions:

1. Their private employment did not interfere with their state duties.
2. They did not use their official position to obtain unwarranted treatment (HRS, §84-13):
  - a. In obtaining contracts for their firm. (See Opinions Nos. 74, 75, and 123.)
  - b. By using state time, equipment or facilities in their private venture.
3. They did not use state information which by law or practice is not generally available to the public (HRS, §84-12).

As to their third question, we advised that their newsletter activity would be permissible under the same conditions stated above. However, we felt it necessary to remind them that because of the similarity between their state duties and their private business, opportunities for disclosure or use of confidential information for personal gain were greatly increased. To avoid a violation of this section, we advised them to be sensitive to this fact and act accordingly, keeping their supervisors informed at all times of their private activity.

Dated: Honolulu, Hawaii, April 20, 1972.

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