

OPINION NO. 138

An employee has inquired whether pursuant to Opinions Nos. 89 and 124 he must terminate his membership from the board of trustees of a private, non-profit, organization. He has further inquired whether his staff members must also terminate their connections with various organizations as board members or as members of standing or ad hoc committees.

He is an agency administrator, and is responsible for recommending to the director of his department annual contracts with these organizations, involving several thousand dollars for rendering services to clients of his agency.

He has indicated that the contracts with the organizations are negotiated contracts which must receive the certification of the department director that the contracts do not lend themselves to the bidding process, formal or informal. He and his staff are involved in the negotiation of the contracts and the review of performance of the contracts. He has indicated that if the terms of a contract are not fulfilled, an audit exception may be made requiring the organization to return funds.

It was our understanding that these organizations render services which are needed by clients of the department and which services are not provided for by the State but may be subsidized by state and/or federal programs. Each agency tends to specialize in providing services to a particular type or group of persons with certain problems. For this reason, the State tends to approach the agency which it believes is most capable of rendering the services needed.

We also noted that where there was no existing private agency, employees of the state agency worked with interested community groups and individuals to organize such non-profit associations. This employee and his staff members are affiliated with these associations either by board memberships or membership on standing or ad hoc committees. Government time is allowed for attendance at these meetings. He has indicated that the rationale for staff participation on the committees of the private association is so that his agency may be able to provide the best service for clients of his department. The committees in particular provide an opportunity for discussion between staff and the managers and supervisors of the private association on the quality and quantity of the services rendered under the contract.

It was our opinion that pursuant to Opinions Nos. 89 and 124, this employee and members of the staff who are directors of such organizations should discontinue a legal affiliation, i.e., a legal fiduciary responsibility as a director, if he takes official state action as described above. We stated that this is particularly important 1) when a public, negotiated contract is involved, because such contracts tend to be highly discretionary in nature, and 2) when the performance of the contract must be evaluated for performance and consideration of future contracts.

We did not believe that the ethics law prohibited membership on committees which have as their objective evaluation of the program under the contract. This limited involvement did not appear to involve any financial liability, nor any peculiar relationship which may be detrimental to the making of an independent, unbiased decision or recommendation.

In rendering this opinion, we did not intend to discourage activity and membership in public interest and charitable organizations in general. What we did discourage was a fiduciary or personal financial relationship to those organizations which may be affected by the employee's official action. Freedom of action in his government capacity may be, at times, restricted or

restrained by possible fiduciary liabilities. Moreover, such close relationships with the organizations may increase the likelihood of using one's position to obtain unwarranted treatment, including the effect of discouraging other agencies or groups from attempting to negotiate for such contracts.

Dated: Honolulu, Hawaii, May 2, 1972.

STATE ETHICS COMMISSION
Vernon F. L. Char, Chairman
Gwendolyn B. Bailey, Commissioner
Audrey P. Bliss, Commissioner

Note: Commissioners Walters K. Eli and Fred S. Ida were excused from the meeting in which this opinion was considered.