

OPINION NO. 159

A state employee inquired whether a conflict of interest arises when a state employee has a financial interest in a corporation which provides educational services similar to those provided in his state capacity. He further asked whether his corporation may rent public school facilities, equipment and text books to conduct a proposed summer school program.

The state employee is an officer of the corporation; he is the assistant director and fiscal officer of a state agency whose functions include projects in the field of education. Another corporation officer is a public elementary school teacher.

The state employee indicated that because of his interest and expertise, he is generally chosen as a principal consultant to projects in the field of education. His functions include recommendations on project formats and the training of personnel in implementing a project. As fiscal officer of the state agency, he negotiates, prepares and transmits contracts to the contracting officer with recommendations. He indicated that he had gained considerable knowledge about matters of public education through his official functions.

The corporation's proposed summer school program would involve the use of commercially prepared instructional texts and achievement tests. The corporation also plans to use material prepared by the elementary school teacher on his own time for use in his school-year class using consumable materials and supplies purchased by and for the DOE. The course will emphasize certain techniques. It will also include weekly testing by the state employee. The corporation plans to rent public school facilities, equipment and instructional texts for the program. The corporation will achieve publicity for its program by forwarding a brochure to all public elementary schools in a specific area through the district superintendent's office. The state employee indicated that he had not ascertained whether the DOE considered the procedures and the elementary school teacher's materials to be DOE property.

Before proceeding to answer the state employee's specific questions, the Commission reminded both employees that as professionals they owed their first allegiance to their employer, the State. The Commission advised that their activities with the corporation should not detract from or conflict with their responsibilities as state employees in terms of time or spirit.

The Commission turned next to discussion of the state employee's specific questions.

The Commission advised that because the interest of the two state employees in the corporation constitute a controlling interest, state agencies are prohibited by §84-15(a) from entering into a contract with the corporation for services in excess of \$1,000, unless the corporation was awarded the contract after public notice and competitive bidding.

We also advised the state employee that where both the state agency and the corporation were being considered for a particular project by a private or governmental agency, he should disqualify himself from recommendations on that contract or he would be in violation of §84-14(a)(1) which provides:

No employee shall take any official action directly affecting a business or other undertaking in which he has a substantial financial interest.

His recommendation would constitute official action within the meaning of §84-3(7). The prospective employment of the corporation on the project is a financial interest within the meaning of §84-3(6)(C). Further warning of possible violation of that section was not necessary because the state agency had an unwritten policy that contracts for services to be provided the state agency will not be made with employees of the state agency.

Section 84-14(b), HRS, provides:

No employee shall acquire financial interests in any business or other undertaking which he has reason to believe may be directly involved in official action to be taken by him.

The Commission advised the state employees that pursuant to that section, they should refuse applications to the summer school program from present school year pupils of the elementary school teacher while he still has official authority over them. They should also refuse applications from persons either of the state employees have reason to believe will be students in the elementary school teacher's forthcoming school year class. (See Opinion No. 150).

The Commission further advised the state employee that a possible violation of §84-13(3) could occur by reason of the corporation's use of procedures and materials prepared by the elementary school teacher in the course of his teaching duties. That section prohibits the use of state time, equipment and other facilities for private business purposes. Such violations would occur only if the Department of Education considered the procedures and materials to be its property. There would be no violation of this section if the procedures were considered public property and the materials to be the property of the elementary school teacher. The Commission informed the state employee that it was not its function to make this determination.

The Commission advised that the same subsection applied to the corporation's desire to use school facilities, equipment and instructional texts in the operation of the summer school program. We advised the state employee that there would be no violation of §84-13(3) if the use of these items were open to the public under rules determined by the Department of Education and referred him to Opinions 139 and 150. The same advice applied to their plan to use the district superintendent's office to distribute their publicity brochure.

Both employees were advised that in providing consulting services and in conducting the summer school program, neither employee should seek employment or contracts for services for the corporation by the use of their official positions. Likewise, neither of the state employees should use state time, equipment or other facilities in providing consultation services or in conducting the summer school program, with the exceptions noted above. We advised them that such conduct would violate §84-13.

Lastly, we advised the state employees that with regard to their consulting services and the conduct of their summer school program they should not disclose information which by law or practice is not available to the public which either acquired in the course of his official duties nor should they use the information for their personal gain or gain of the corporation.

The Commission expressed its appreciation to the state employee for his concern about the ethics of state employees and for the substantial amount of detail which he had provided the Commission.

Dated: Honolulu, Hawaii, March 28, 1973.

STATE ETHICS COMMISSION
Vernon F.L. Char, Chairman
Audrey P. Bliss, Commissioner
Walters K. Eli, Commissioner

Note: Vice Chairman Gwendolyn B. Bailey was absent from the meeting at which this opinion was considered. There was one vacancy on the Commission.