

ADVISORY OPINION NO. 93-4

A state employee asked for an advisory opinion from the State Ethics Commission ("Commission") as to whether the State Ethics Code, chapter 84, Hawaii Revised Statutes, prohibited the employee from renting a room in her home to a client of the state agency that employed her and where she supervised the client. The rental arrangement began several months earlier when the client, who is afflicted with a chronic illness, was homeless and unable to find a place to live.

The relevant section of the State Ethics Code is HRS section 84-13(4). It reads as follows:

§84-13 Fair treatment. No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others; including but not limited to the following:

....

- (4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom the legislator or employee inspects or supervises in the legislator's or employee's official capacity.

HRS section 84-13(4) prohibits substantial financial transactions between employees and person or businesses that the employee inspects or supervises in his or her official capacity. HRS section 84-13(4) is intended to prevent potential abuses that may result when a supervisor engages in a substantial financial transaction with someone he or she supervises or when an employee engages in a substantial financial transaction with a person or business he or she inspects. The unequal bargaining relationship means that the employee in a position of authority generally stands a greater chance of profiting from the financial transaction than does the person or business subject to the official action of the employee in authority. In this case, however, the information gathered by the Commission in connection with the rental arrangement between the employee and the client indicated that the rental arrangement worked to client's advantage, as well as to the employee's, although, initially, the mutually beneficial arrangement was not apparent.

The Commission first learned about the rental arrangement when the Commission received a report that the client left the employee's home and moved to another residence. The report stated that the employee, after learning the client left her home, physically removed the client from the new residence and returned the client to the employee's home against the client's will. No witnesses to the alleged incident were available to provide information to the Commission. When the employee was asked about the alleged incident, the employee stated that while the client did leave her home after a minor argument, the employee met with the client at the new residence, where the employee talked with the client about returning to the employee's home. The employee reported that the client volunteered to do so.

The Commission's staff talked with four other employees of the agency. All four were supervisors of the employee who asked for the advisory opinion, and all four had frequent contact with the employee and the client. At the Commission's request three of these employees wrote a letters to the Commission. In their letters, all three stated that they had talked with the employee and the client about the rental arrangement. All three concluded that the rental arrangement worked to the client's benefit. The three supervising employees reported that the client was more stable after renting a room from the employee. They also stated that the client's quality of life improved as a result of the rental arrangement with the employee. One of these supervisors reported that the client explained the alleged incident at

the new residence by saying she was confused and that she decided voluntarily to return with the employee to the employee's home. A second supervisor stated that the rent paid by the client was within the range of reasonable payment for the room and other services provided by the employee. All three agreed to monitor the arrangement between the employee and the client, should the Commission determine that HRS section 84-13(4) did not prohibit the employee from renting a room to the client.

In order to answer the employee's question, the Commission had to determine whether the Legislature, in adopting HRS section 84-13(4), intended to prohibit the rental arrangement between the employee and the client. In its deliberations, the Commission considered other cases that it has addressed in the past. These cases presented questions similar to the question raised in this case. In Advisory Opinion No. 459, a state health practitioner asked whether he could privately treat for compensation individuals who were then eligible for free treatment at a clinic associated with a state facility that employed the practitioner. The health practitioner explained that many of the people employed as teachers at the facility and possibly some of the students as well, did not wish to be seen at the clinic. Instead, they preferred to pay for treatment at the health practitioner's private office. The health practitioner asked whether he could treat for compensation at his private office those teachers and students who were then eligible for clinic services at no cost. The Commission ruled that the best interests of the potential patients were overriding, and as a result, HRS section 84-14(b) did not prohibit the practitioner from treating these teachers and students for a fee in his private practice. Under ordinary circumstances, HRS section 84-14(b) would prohibit an employee such as this practitioner from acquiring a financial interest in an undertaking which the employee had reason to believe would be subject to the employee's official action. In this case, the private treatment of teachers and students represented an undertaking that the practitioner had reason to believe would otherwise be subject to his official action as a practitioner at the clinic.

Similarly, in Advisory Opinion No. 360, a state health practitioner assigned to a state facility took a one year leave of absence. Certain clients of the facility expressed a desire to continue seeing the practitioner during the time when the practitioner would be on leave. The Commission concluded that the services provided by the practitioner were unique. It therefore ruled that HRS section 84-14(b) and 84-13(4) should not be interpreted to prohibit the practitioner from acquiring those clients for his private practice or from engaging in the financial transactions with these clients that would result from private treatment.

In reaching the decision in Advisory Opinion No. 360, the Commission determined that the Legislature in adopting HRS section 84-13(4) intended to prohibit situations in which employees in positions of authority would have the opportunity to intimidate their subordinates or people or businesses subject to inspection by these employees. The Commission concluded at the same time that the Legislature did not intend to deprive individuals in need of medical assistance from obtaining that assistance. The Commission therefore ruled that HRS section 84-13(4) should not be interpreted to apply in those particular and extraordinary circumstances because medical treatment of the practitioner's clients were at stake.

The Commission held that the rationale applied in Advisory Opinion No. 360 could be applied in this case as well. The Commission determined that the benefits to the client from the rental arrangement with the employee began with a stable living arrangement, which the employee provided to the client. The client was no longer homeless and on the streets. Instead, the client was engaged in meaningful work, which in turn led to an improvement in the client's personal happiness and self esteem. The three supervising employees who had daily contact with both the employee and the client attested to these results. Furthermore, both the employee and the client reported that the client's life had improved as a result of the rental arrangement. For this reason, the Commission decided that HRS section 84-13(4) did not prohibit the rental arrangement between the employee and the client, so long as three conditions were met. The first condition was that the rental arrangement continued to be

medically warranted by the client's condition. The second was that the rental arrangement benefitted the client. The third condition was that the three supervisors monitored the rental arrangement between the employee and the client in order to be certain that the first two conditions were met.

Dated: Honolulu, Hawaii, October 13, 1993.

STATE ETHICS COMMISSION

Rev. David K. Kaupu, Chairperson
K. Koki Akamine, Vice Chairperson
Cynthia T. Alm, Commissioner

Note: Commissioner Don Daley was not present during the discussion and consideration of this opinion. There was also a vacancy on the Commission when this opinion was considered.