ADVISORY OPINION NO. 2000-1

A state employee requested an advisory opinion from the Hawaii State Ethics Commission ("Commission"). The employee was the head of an office ("Office") within a state agency ("Agency"). The employee's spouse was employed with a business ("Business") that had multiple contracts with the Agency. The employee was responsible for overseeing those contracts. The employee's situation raised the issue of whether he had a conflict of interest under the State Ethics Code, Chapter 84, Hawaii Revised Statutes ("HRS").

The Commission applied the relevant provisions of the State Ethics Code to this case. As mandated by Article XIV of the Constitution of the State of Hawaii, the State Ethics Code was established on the premise that "[t]he people of Hawaii believe that public officers and employees must exhibit the highest standards of ethical conduct . . . ." In issuing this opinion, the Commission was guided by HRS section 84-1, which states that the State Ethics Code "shall be liberally construed to promote high standards of ethical conduct in state government."

After reviewing the employee's situation, the Commission determined that his spouse's employment with the Business created a conflict of interest for the employee with respect to his state employment. The Commission, however, also recognized that the facts and circumstances of the employee's case were unique. Given the special circumstances of his case, the Commission did not believe that the State Ethics Code was intended to be applied in so restrictive a manner as to preclude the employee from continuing to serve in his current position with the State or affect his spouse's employment situation with the Business. The Commission determined that safeguards could be implemented to help mitigate the ethics concerns generated by the employee's situation.

I. Employee's state duties and responsibilities.

The Office, headed by the employee, administered certain programs within a large industry. The employee was responsible for planning, directing, and executing the programs, and served as the Agency's key advisor and authority on the programs. A number of entities belonging to the industry, including the Business, participated in the programs. Participation was established through contractual agreements with the Agency, which were monitored by the Office. The employee was involved in setting and administering policies, procurement and contracting, overseeing contracts, conducting investigations, and handling grievances.

The Business had several contracts with the Agency, including a large contract that had been awarded through competitive bidding. The Agency had also awarded similar contracts to other companies through competitive bidding. It appeared that the employee's staff, with his oversight, set the technical criteria under which a bidder had to qualify in order to obtain a contract to participate in one of the programs. The employee had the discretion to limit a bidder's involvement in the program. It appeared that the employee evaluated the contract bids, approved and awarded the contracts, and provided his recommendations to his supervisor, who executed the contracts on behalf of the Agency.

Other contracts that the Business had with the Agency were not awarded through competitive bidding. Those contracts were issued on the basis of satisfying certain federal guidelines. The employee said that his staff evaluated those contracts as to whether the guidelines were met, and that his name was stamped on the contracts by his staff. The employee indicated that he was not directly involved with all of the day-to-day activities with respect to procurement, but served as the administrative authority on procurement.

The employee's duties and responsibilities also involved monitoring contractors to ensure that they were meeting certain federal requirements specified by contract. With the assistance of staff, the employee was responsible for following up on complaints and investigating matters involving possible noncompliance of contract. In addition, the employee was responsible for handling complaints and grievances relating to the delivery of services and related contract matters. The employee informed the Commission that his staff conducted investigations and consulted with him on such matters, and that cases might come to him for administrative decisions.

The employee's spouse was employed full time by the Business. The spouse had been employed with the Business for many years prior to the time the employee began his state employment with the Agency.

II. Application of the State Ethics Code, Chapter 84, HRS.

The employee's state duties and responsibilities vis-a-vis his spouse's employer, the Business, implicated HRS section 84-14(a), which pertains to conflicts of interest. Section 84-14(a) states in pertinent part:

> **§84-14 Conflicts of interests.** (a) No employee shall take any <u>official action</u> directly affecting:
>
> (1) A business or other undertaking in which he has a <u>substantial financial interest</u> . . . .

(Emphasis added.)

Pursuant to HRS section 84-3, "official action" means "a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." A "financial interest" is defined by section 84-3 as "an interest held by an individual, the individual's <u>spouse</u>, or dependent children which is:

(1) An ownership interest in a business.
(2) A creditor interest in an insolvent business.
(3) An <u>employment</u>, or prospective employment for which negotiations have begun.
(4) An ownership interest in real or personal property.
(5) A loan or other debtor interest.
(6) A directorship or officership in a business.

(Emphasis added.)

In interpreting HRS section 84-14(a), the Commission has considered full-time employment to be a substantial financial interest.

HRS section 84-14(a) prohibits a state employee from taking discretionary action that directly affects a business or undertaking in which the employee has a substantial financial interest. This law is intended to prevent situations where a state employee's ability to properly carry out his or her state duties and responsibilities is compromised, due to conflicting loyalties. In order to avoid having a conflict of interest under section 84-14(a), the employee must disqualify himself or herself from taking official action that directly affects the business or undertaking in which he or she has a substantial financial interest, and someone else must take the action. Disqualification removes the employee from being in a position to accord preferential treatment to the business or undertaking, or to be compromised in the ability to properly carry out his or her state duties and responsibilities. A conflict of interest can also be avoided, of course, if the employee divests himself or herself of the financial interest prior to taking the official action.

The employee's spouse was a full-time employee of the Business and had an employment interest in the Business. This created a substantial financial interest for the employee in the Business. HRS section 84-14(a) therefore prohibited the employee from taking official action directly affecting the Business.

It appeared, however, that the employee's state duties and responsibilities required him to take official action directly affecting the Business, because he administered programs in which the Business participated. The employee's duties and responsibilities with respect to making policy decisions, procurement and contracting, contract monitoring, conducting investigations, and handling grievances required the exercise of his discretionary authority and were not ministerial.

It appeared that the employee had in fact taken significant action directly affecting the Business. For example, in the area of procurement and contracting, it appeared that he had taken one or more of the following types of official action with respect to the Business' contracts with the Agency: setting criteria, evaluating bids, approving or awarding contracts, signing off on contracts or having his name stamped on contracts, and making recommendations to his supervisor. In addition, the employee in his state capacity had participated in the settlement of a legal matter involving the Business, which constituted official action on his part. The Commission also noted that the employee's duties and responsibilities required him to maintain working relationships with the Agency's contractors, and it appeared that he was in regular communication with the Business. The employee indicated that he was involved in program meetings to discuss policy issues and problems, and was accessible to contractors by telephone. The employee indicated that the administrator of the Business, like the administrators of other contractors, might call him to discuss problems or answer questions. The employee's activities in this respect involved taking official action directly affecting the Business.

The employee's exercise of official action with respect to the Business created a conflict of interest for him under HRS section 84-14(a). The employee indicated that he could not in every instance disqualify himself from taking official action directly affecting the Business. His situation therefore raised serious ethics concerns.

It seemed that the employee's recusal from acting on policy matters directly affecting the Business would be problematic, as it appeared that he set and administered policy that related to all contractors, including but not limited to the Business. It appeared that the employee's recusal in this area would prevent him from carrying out a large segment of his duties and responsibilities. With respect to procurement and contracting matters directly affecting the Business, it did not appear that his complete disqualification would be workable, either. The employee described procurement as a large part of the work he did and indicated that, in fairness to his staff, he could not recuse himself from all of his duties and responsibilities in this area. It also appeared that his complete recusal with respect to monitoring contracts, conducting investigations, and handling grievances would be problematic. Although the employee's staff assisted him in those areas, he oversaw his staff and they consulted with him on their work. Therefore, it appeared that the employee might not be able to completely disqualify himself from participating in every matter that directly affected the Business. Further, it appeared that the employee's recusal from communicating with the Business' administrator on substantive matters would be difficult, as he indicated that there was an expectation on the part of contractors that he would be accessible to them to answer questions and discuss problems.

The Commission determined that, due to the nature of the employee's work, his disqualification from taking any and every type of official action that directly affected the Business might not be possible. The Commission noted that, while the employee might be able to disqualify himself from certain individual actions, such as signing a particular contract, it appeared that recusal from other types of actions, such as setting policy or approving or awarding contracts, might be problematic. It appeared that complete disqualification on the employee's part in order to avoid a conflict of interest would prevent him from performing a large part of his work and keep him from doing an effective job. Also, it seemed that the delegation of a large portion of the employee's duties and responsibilities to others in the Agency would work a hardship on them. Moreover, it appeared that divestiture of his financial interest in the Business would be an extreme measure, as the employee indicated that it would cause his spouse to end her employment with the Business.

The employee informed the Commission that when he began his employment with the Agency, he brought the matter of his spouse's employment to the attention of his supervisor. The employee indicated that his supervisor, however, did not see a problem with the situation.

Because of his position with the State, the employee was required to file a disclosure of financial interests statement ("Disclosure Statement") annually with the Commission. Upon commencing his state employment with the Agency, the employee filed a Disclosure Statement in which he reported his spouse's employment with the Business. The Commission issued the employee an acknowledgment letter for that filing and provided him with information explaining the conflicts of interests laws. Included in this information was the definition of the term "financial interest." The Commission provides this information to filers to help them understand how the conflicts of interest laws applies to them. The following year, the employee again reported his spouse's employment with the Business in his Disclosure Statement. The year after, the employee reported that there had been no changes to his situation since his previous filing. The Commission sent the employee acknowledgment letters for each of those filings and again provided him with information explaining the conflicts of interest laws. The employee did not, however, seek advice from the Commission until this year.

The employee said that he associated the ethics laws with "ownership interests," as opposed to "just employment." He stated that his spouse was not an owner of the Business and did not have profit sharing or stock options with the Business, and he did not believe that his actions materially affected his spouse's employment. The employee indicated he would have considered there to be more of a problem had his spouse been an officer of the Business. Further, he informed the Commission that his spouse had no supervisory or management responsibilities. He said that he and his spouse did not discuss his actions as the head of the Office and she was not privy to information regarding the Business's corporate strategies or financial position.

The Commission informed the employee that, in order for him to have a substantial financial interest in the Business, it was not necessary that his spouse be an owner or officer of the Business. As previously discussed, a financial interest can take several forms, including an ownership interest in a business or an officership in a business. A financial interest, however, also includes employment. (HRS section 84-3(3).) The Commission informed the employee in this case that it was his spouse's employment with the Business that created a substantial financial interest for him in the Business. Section 84-14(a) prohibited the employee from taking official action directly affecting a business or undertaking in which he had a substantial financial interest. The Commission explained that it did not matter whether the employee's official action directly, materially, or specifically affected his spouse's employment per se; the issue was whether he took official action that directly affected the Business itself. The Commission further explained that the nature of the work the employee's spouse did for the Business was not determinative to whether the employee had a conflict of interest under section 84-14(a).

The Commission observed that, had the employee sought advice from the Commission earlier, his situation could have been addressed sooner and measures implemented to help mitigate the ethics concerns. In any event, the Commission appreciated that the employee eventually realized the seriousness of his situation and contacted the Commission.

A. Employee's disqualification required, to the extent possible.

While the employee's situation raised serious concerns, the Commission also recognized that his circumstances were unique. The employee worked in an industry that spanned a large section of the workforce. The likelihood of a husband and wife both having jobs in the same industry therefore was high. The employee stated that both he and his spouse grew up in this industry and came together as a result of their involvement in it. It appeared that the employee's state work had a far-reaching effect in this industry, in that his work impacted a multitude of entities belonging to this industry, including the Business, which happened to employ his spouse.

In the Commission's experience, the Commission has found that in most cases, a state employee faced with a potential conflict of interest under HRS section 84-14(a) can avoid the conflict through disqualification, and the matter requiring official action can simply be delegated to someone else in the state agency. This did not appear to be a completely workable solution for the employee, however, as it appeared that the particular duties and responsibilities of his position were entrusted to only one person in the Agency–him. Moreover, the area under the employee's purview as the head of his Office was vast, and it appeared that in many instances, official action he took directly related or pertained to the Business. The options available to the employee to avoid a conflict of interest were difficult. It appeared that disqualification from taking official action directly affecting the Business in all situations would prevent the employee from performing a large portion of the duties and responsibilities expected of him and keep him from doing an effective job. Also, it seemed that the delegation of a major portion of the employee's work to others in the Agency would work a hardship on them. The divestiture of the employee's financial interest in the Business appeared to be a difficult choice as well, as it meant that the employee's spouse would end her employment with the Business.

The Commission recognized that the employee was in a unique and difficult situation. In applying HRS section 84-14(a) to his case, the Commission did not believe that this law was intended to be so restrictive as to preclude the employee from continuing to serve as the head of the Office or require his spouse to terminate her employment with the Business. The Commission, however, advised the employee that he must disqualify himself from taking any official action that directly affected the Business, to the extent possible or practicable.

Subsequent to requesting advice from the Commission on this matter, it appeared that the employee had already taken steps to disqualify himself. He informed the Commission that he was recusing himself from signing any document that specifically related to the Business. The Commission informed the employee that executing official documents, however, was only one form of official action. The Commission explained that official action encompassed a wide range of activities. The employee was reminded that official action means any action, even inaction, that involves the exercise of one's discretionary authority. The Commission stated that official action includes but is not limited to developing policy; developing requests for bids; developing contracts or criteria for evaluating contracts; evaluating bids; awarding or approving contracts; personally executing contracts and other official documents or having the documents stamped in one's name; monitoring contracts; making decisions; making recommendations; providing input in substantive matters; handling complaints and grievances; conducting investigations; making referrals; issuing advice; interpreting laws, policies, and rules; and rendering administrative decisions. The Commission added that the employee's oversight of any of those activities would also constitute official action. The Commission further explained that official action also included any discretionary action (or inaction) on the employee's part with respect to others, if that action directly affected the Business. The Commission explained, for example, that a decision to reduce the size of a contract award to a competitor of the Business that enabled the Business to receive a larger award might constitute official action directly impacting the Business.

The employee was advised that, to the extent possible, he must recuse himself from taking the above types of official action and any other types of discretionary action (or inaction), if they had a direct effect on the Business. The Commission advised the employee to work with his supervisor and his staff to develop procedures that would accommodate his disqualification whenever possible or practicable.

B. Supervisor's review and approval of the employee's official action required, to the extent possible.

The Commission advised the employee that, as a safeguard, in situations where he could not disqualify himself from taking official action directly affecting the Business, his supervisor must review and approve his official action, to the extent possible or practicable. The employee was asked to discuss with his supervisor as to how this could be accomplished.

The Commission noted that there appeared to be a mechanism already in place for the employee's supervisor to oversee policy matters with which the employee was involved, as the employee's position description indicated that his supervisor was to provide guidance in that area. The Commission advised that, in addition to reviewing and approving the employee's official action with respect to policy matters, the employee's supervisor must review and approve official action taken by the employee with respect to other matters directly affecting the Business, to the extent possible or practicable, if the employee could not recuse himself from taking the action. The Commission believed that an independent review and approval of official action taken by the employee directly affecting the Business regarding policy and other matters would help to safeguard against preferential treatment, actual or perceived, being given to the Business.

C. Preferential treatment prohibited.

The subject of preferential treatment is addressed in HRS section 84-13, known as the "fair treatment" law. This section of the State Ethics Code states in pertinent part 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 . . . .

Section 84-13 prohibits a state employee from using or attempting to use the employee's official position with the State to secure or grant unwarranted benefits for the employee or anyone else. Section 84-13 safeguards against the misuse of one's official state position to obtain preferential treatment for anyone.

The employee was informed that HRS section 84-13 applied to all aspects of his work. He was advised that he should be particularly aware of the application of this provision as a safeguard in instances where he could not recuse himself from taking official action directly affecting the Business. The Commission explained that HRS section 84-13 prohibited the employee from using or attempting to use his position as the head of the Office to give the Business preferential treatment. It appeared that other safeguards were already in place. For example, it appeared that some of the decisions the employee made might be based on federally established criteria. It seemed that those externally created standards would limit the potential for a misuse of position when taking official action.

In summary, the employee was advised that he must disqualify himself from taking official action directly affecting the Business, to the extent possible. If the employee could not disqualify himself, he was advised that his supervisor must review and approve such official action, to the extent possible. In addition, the employee was informed that he was prohibited from using or attempting to use his official position to give the Business unwarranted benefits or advantages. The employee was asked to apprise his supervisor of his situation and work with his Agency to develop policies and implement measures to deal with the actions he took that affected the Business.

III. Conclusion.

This advisory opinion applied to the particular facts and circumstances of the employee's current situation, which had been presented to the Commission and which were set forth in this opinion. The employment of the employee's spouse with the Business created a conflict of interest for the employee with respect to his state employment. Given the unique facts and circumstances of the employee's case, however, the Commission did not believe that the State Ethics Code was meant to be so restrictive as to preclude the employee from continuing to serve as the head of the Office or require his spouse to terminate her employment with the Business. The Commission determined that appropriate safeguards, when in place, could help to mitigate the ethics concerns generated by his situation.

The employee was advised to notify the Commission in the event that his circumstances changed or his spouse's situation changed. The Commission explained that a change to either of their situations might affect the advice issued. The employee was informed that the Commission would retain jurisdiction over this matter and would review his situation further, if subsequent problems or concerns arose.

The Commission thanked the employee for seeking its advice on this matter and appreciated his candor in discussing the facts of this case.

Dated: Honolulu, Hawaii, March 15, 2000.

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