

## OPINION NO. 213

A staff member of a state commission asked us to review the relationship between another state agency and a non-profit corporation.

The employee indicated that the State of Hawaii, through his commission, provided the funds to support the other state agency. The employee's commission monitored the activities and programs of this state agency.

The state agency in question was headed by an executive director. We were provided with a summary of the director's duties, which included cooperating with all community organizations; promoting the expansion of services where needed; representing the agency with other organizations in the community; and offering guidance and consultation to other organizations.

This director was also the executive director of the non-profit corporation in question. As executive director, he was the chief executive officer of the corporation, having general supervision, direction, and control of the business of the corporation. He was an ex-officio member of the board of directors without vote of the corporation.

### **1. Whether the Individual in Question Might Be the Executive Director of the State Agency and the Executive Director of the NonProfit Corporation.**

We were asked to advise the requester of the advisory opinion on whether it was proper for the individual in question to be the executive director of the state agency and also the executive director of the non-profit corporation.

We pointed out that in a past opinion, the Ethics Commission had held that a state employee who was responsible for directing and administering the programs of his section and for developing and maintaining cooperative relationships with community organizations; implementing referral policies and collaborative efforts in maintaining a high quality of service in the area of control of his section; and in conferring with consultants and professional groups in planning the section's programs was required by the ethics law to resign from the board of directors of certain non-profit corporations that were affected by action that he took in his state capacity.

HRS §84-14(a)(1), provides, in part, the following:

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

The Commission believed that the individual's position as executive director of the non-profit corporation gave him a substantial financial interest in the organization. In HRS §84-3(6), a "financial interest" includes an "employment" interest as well as an interest which is "[a] directorship or officership in a business." In HRS §84-3(1), a "business" includes an "organization ... , whether or not operated for profit." Therefore, we stated that the individual was required, under HRS §84-14(a)(1) to disqualify himself on official action, which is discretionary action, that directly affected the non-profit corporation. It was our opinion that in carrying out his duties and responsibilities as executive director of the state agency, the individual would be taking official action directly affecting the non-profit corporation.

As the head of the state agency, the individual would not be able to disqualify himself on actions directly affecting the non-profit corporation. Thus, we concluded that his resignation as executive director of this non-profit organization was required by HRS §84-14(a)(1).

We added that while the ethics law would require the individual to resign his position as executive director of the non-profit corporation, he would not be prohibited from being a member of this organization. A general membership would not give him a substantial financial interest in this organization.

We stated that we had emphasized in past opinions that we did not discourage activity and membership in public interest and charitable organizations in general. What we discouraged was a state employee having a fiduciary relationship to an organization which was affected by action that he took in his state capacity.

We pointed out that the ethics law would not prohibit the individual from serving the non-profit corporation as a non-compensated consultant. However, we stated that HRS §84-14(a)(2) would be applicable to him in this situation. This statutory section states:

No employee shall take any official action directly affecting [a] private undertaking in which he is engaged as legal counsel, advisor, consultant, representative, or other agency capacity ....

We have construed the term "undertaking" to include an activity, concern, pursuit, or other matter. Thus, under HRS §84-14(a)(2), if the individual should advise the non-profit corporation with respect to a certain matter, he would not be able to take any official action in his state capacity directly affecting this matter at a later time. Of course, this prohibition would not apply if he initially advised the non-profit corporation on a matter in his state capacity.

We stated that although the individual would not be prohibited from being a member of or serving as a consultant to the non-profit corporation, he would have to be careful not to violate HRS §84-13, which is the fair treatment section of the ethics law. This statutory provision prohibits a state employee from using or attempting to use his official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment for himself or others.

## **2. Whether the Non-Profit Corporation Might Utilize the Facility of the State Agency.**

We were asked whether the non-profit corporation might utilize the state-owned and state-operated facility of the state agency as its principal office.

We stated that we felt that this was a question primarily for the administrators of the state agency to answer. Relevant factors to be considered would seem to be the amount of space available at the state agency and whether an organization's purpose was consistent with the program and activities of the state agency. However, we stated that if space at the state agency were made available to an organization, space should be similarly available to other comparable organizations.

## **3. Whether the State Agency Might Contract with the Non-Profit Corporation.**

We were also asked whether the state agency might contract with the non-profit corporation for services.

HRS §84-15(a) and (b) state:

(a) A state agency shall not enter into any contract with ... an employee or with a business in which ... an employee has a controlling interest, involving services or property of a value in excess of \$1,000 unless the contract is made after public notice and competitive bidding.

(b) A state agency shall not enter into a contract with any person or business which is represented or assisted personally in the matter by a person who has been an employee of the agency within the preceding two years and who participated while in state office or employment in the matter with which the contract is directly concerned.

It was our opinion that as long as the individual in question remained the executive director of the non-profit corporation, the state agency would not be able to enter into a contract involving services of a value over \$1,000 with the non-profit corporation unless it was made after public notice and competitive bidding. It was our further opinion that the state agency would be prohibited from entering into a contract with the non-profit corporation on a matter in which the corporation was represented by the individual in question and in which matter he had also participated as the executive director of the state agency. We stated that the state agency, in any event, would have to comply with any applicable contracting procedures established in other chapters of the Hawaii Revised Statutes.

Finally, we were asked the following two questions: 1) Did the non-profit corporation have the authority to contract? 2) Did the non-profit corporation have the authority to contract to do work, then hire others to do the work it contracted to do? We pointed out that the jurisdiction of the Ethics Commission was limited to administering HRS chapter 84. Because these two questions did not relate to the ethics law, we suggested that the Attorney General's office be consulted on these questions.

In rendering this opinion, we relied upon facts submitted by the requester of the advisory opinion. Pursuant to the Rules and Regulations of the Ethics Commission, the individual in question was given an opportunity to review and comment on the facts submitted by the requester.

We commended the state employee who requested the advisory opinion for his concern for ethics in government.

Dated: Honolulu, Hawaii, April 8, 1975.

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

Note: Commissioner Walters K. Eli was excused from the meeting at which this opinion was considered. There was one vacancy on the Commission.