

OPINION NO. 244

A state employee with regulatory responsibilities had been a state inspector since November of 1968. In the latter part of 1973, he began operations as a grower and, at that time, became a member of an agricultural cooperative. The cooperative had since acquired a substantial interest in a business which was preparing to begin operations in the packing and fumigation of produce grown by the employee. As a member of the cooperative he possessed an equal ownership interest in the business with the other members of the cooperative. As part of his state duties he would be responsible for the inspection of this fumigation process. Accordingly, he asked the Commission to determine if his acquisition of an interest in the company constituted a conflict of interest with his state duties.

As a state inspector, he was responsible for inspecting, certifying, and treating certain materials moving to and from the State and between the various islands. Inspections were carried out to enforce restrictions placed upon these materials by both state and federal regulations. Because the federal government did not have an office or staff on the island of his employment, he had been appointed, in his state capacity, as a collaborator with the federal government. In this capacity, he was required to inspect, certify, reject, and/or treat materials intended for export to the continental United States. His supervisor indicated that the federal program had been in effect for several years and that he had been a collaborator in the program for a number of years preceding the acquisition of the private interests that were the subject of this opinion.

He had leased 15 acres of cooperative agricultural land for a period of 25 years for the purpose of growing and marketing a particular crop. He was a member of a farmers' cooperative which was organized in October of 1973 to obtain a lease to 757 acres of land. The purpose of the cooperative was the production of a certain crop for the export market. The cooperative consisted of a number of members who had each contributed a small sum as a membership fee. Each member had an agreement to sell his crop to a certain packing and fumigation plant. The cooperative had recently acquired a 50% interest in the plant by means of a state loan. Each member of the cooperative shared equally in the 50% ownership. The purpose of the acquisition of this interest was to establish the fumigation facilities at the company as the company was unable to underwrite the cost of constructing this facility. The cooperative, however, had no part in the management of the company.

His duties in inspecting this company, as for other companies performing fumigation services, would require that he actually visit the plant and observe the fumigation process. When a plant wished to fumigate, it would call his office and he would proceed to the facility to make his inspections. This company's facility had not been completed and the fumigation process was not expected to begin until the spring of 1976. Consequently all the details of the inspection procedure had not as yet been determined. He indicated, however, that his duties would include supervising the loading of the fumigation chamber, assuring proper dosage and treatment time and the unloading and stamping of cartons.

HRS §84-14(b) (Supp. 1975) had application to this situation. That section states:

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.

As an employee of the State, he was subject to the restrictions of the state ethics code. He stated that as a member of the cooperative he possessed an ownership interest in the company. Under HRS §84-3(6)(A), an ownership interest in a business is a financial interest for the purposes of the ethics law. Consequently his interest in this company was a financial interest and subject to the restrictions of HRS §84-14(b). Then, official action is defined to mean "a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." His position description indicated that he had a broad range of authority in the making of inspections and this range of authority would apply to inspections that he would be expected to make at this company's facility. Although his responsibility for inspectional decisions lay within certain guidelines, a large area of decision-making did come within his area of responsibility. We found that he did take official action in his state capacity. Finally, we found that the action he would take in his official capacity would directly involve the company.

In the past, the Commission had stated that a state employee should not acquire a financial interest in a business or other undertaking if there was a strong probability, rather than a mere possibility, that that business would be involved in official action to be taken by him. In Opinion No. 135 we stated that:

An employee should not establish or acquire new business relationships with business enterprises which are subject to the law he enforces and are therefore likely to be involved in official action to be taken by him.

He was assigned inspection duties prior to the time he began growing operations and prior to his acquisition of an interest in this company. The company would be subject to the inspection laws and regulations that he was charged with enforcing. His acquisition of an ownership interest in the company was, therefore, proscribed by HRS §84-14(b).

It was our opinion that this analysis of his ownership interest in the company should not apply to his agreement to sell the produce of his growing operation to the company. It was our view that under the definition of financial interest set forth in HRS §84-3(6), his agreement to sell his output could not be considered to give him a financial interest in the company.

His supervisor indicated that because the staff was small it would be very difficult to appoint someone else to relieve him of those duties related to the inspection and control of the company. However, even if it were possible for him to disqualify himself from taking action with regard to that business, it was the Commission's belief that the purpose of the statutory provision was to prohibit employees from voluntarily placing themselves in conflict situations. For an individual to regularly disqualify himself from performing those duties for which he has been trained and hired would be to deprive the State of services which it has a right to expect from its employees. As the Commission had stated in the past, such disqualification would be contrary to the spirit and purpose of HRS §84-14(b).

The employee stated that it would be possible for him to divest his ownership interest without giving up his farm. We believed that this would be the proper course for him to follow. We reminded him that he should not transfer his interest to either his spouse or minor child. He might transfer the interest to anyone else. However, we stated that he should be mindful that selling or transferring his interest to a very close relative might present an appearance of conflict that would be best avoided. It was for him to decide, on the basis of the interest that was being divested and

the familial relationship he had, if any, to the person to whom he made divestment, the best manner in which to accomplish this end.

We had still to determine whether he might sell his produce to the company without violating HRS §84-14(b). He stated that only that produce intended for export required fumigation under government regulations. Produce sold for consumption solely within the State did not require fumigation and he would not inspect such produce in the course of his official duties. He at the same time indicated that if necessary he would likely be able to market his produce within the State with the result that he would be able to avoid any contact with the company. We were of the opinion, however, that his business would not be directly involved in actions to be taken by him as he made inspections of the fumigation process at the company. The involvement would be, at best, indirect and insubstantial. Our opinion on this point was based on the fact that he had the option of sending his produce directly to another island and was therefore not totally dependent upon the company for the disposition of his output and on the further fact that the produce he would inspect would not be identified as to grower. Accordingly, it was the opinion of the Commission that he might sell his output to the company. If, however, under all the circumstances, he felt that an appearance of impropriety would be created by his continuing to do business with this company, he might wish to consider voluntarily terminating all business contact with it.

It followed from the foregoing discussion that official action he took in the future would not have a direct effect upon his own private business and, therefore, such action would not be in violation of HRS §84-14(a) (Supp. 1975), which prohibits an employee from taking official action directly affecting a business in which he has a substantial financial interest.

In summary, we made the following findings and conclusions:

1. He possessed an ownership interest in the company which would be directly involved in official action to be taken by him, and he should therefore divest himself of this interest;
2. Under the particular facts of this matter, his agreement to sell the produce of his growing operation to the company did not give him a financial interest in the company and should not be considered the acquisition of an interest prohibited by HRS §84-14(b);
3. Even if he should sell his produce to the company, his own private business would not be directly involved in official action he took in inspecting produce fumigated by the company. Accordingly, his sale of produce to the company would not be prohibited by HRS §84-14(b);
4. Official action he would take with regard to the company would not have a direct effect upon his own private business and such official action would therefore not constitute a violation of HRS §84-14(a).

We requested that he advise the Commission of action he took pursuant to this opinion.

We commended him for bringing this matter to the attention of the Commission prior to the time that any official action was actually taken by him.

Dated: Honolulu, Hawaii, February 20, 1976.

STATE ETHICS COMMISSION
Audrey P. Bliss, Chairman
Paul C.T. Loo, Vice Chairman
I.B. Peterson, Commissioner

Note: There were two vacancies on the Commission.