

## OPINION NO. 275

A professional employee who was the chief of a major branch of a certain division in a state department had wide-ranging administrative, consultative and technical responsibilities. Part of these responsibilities included conducting various types of investigations and providing consultative services to other professionals and to lay personnel relative to all phases of the subject of his expertise.

The employee asked if he would be in conflict with the ethics code if he (1) accepted payment for his consultation time outside of his regular working hours on all aspects of his expertise; (2) accepted from an industry all or partial repayment of his expenses to attend scientific meetings on the mainland and neighbor islands; and (3) accepted breakfast, lunch, dinner or agricultural products from any of the individuals or firms to whom he provided consultation services.

With regard to his first question, the employee stated to the staff that he performed general consultation work primarily for a certain industry and performed certain services at the request of private practitioners. We told the employee that although the requests were not limited to those two groups, the type of work requested was the same so in discussing this question any reference to those two groups should be understood by him to include any other group or person requesting those services.

The section of the statute most applicable to this question was HRS §84-13(2) and (3) (Supp. 1975). It states that:

No ... employee shall use or attempt to use his official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for himself or others; including but not limited to the following:

....

- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of his official duties or responsibilities except as provided by law.
- (3) Using state time, equipment or other facilities for private business purposes.

If the consultation or services were of the type which the employee's job required him to engage in or perform, they were his "official duties or responsibilities" and part 2 of this section prohibited him from accepting any additional fee for this work no matter when it was performed. We were aware that he received calls from people for whom he provided those services during the evenings and on weekends and that he generally responded to their requests at the time they were made. However, we stated to the employee that the remedy for having to perform his state duties during time other than his normal working hours was not to receive or accept compensation from those persons contacting him, but to bring this to his supervisor's attention for remedial action on the department's part. We were aware that he was presently the only practicing professional in his area of expertise in the State with access to the complete facilities necessary for practice and could appreciate the demands on his time, but if the outside work that he did was of the type that was required of him by his state job, he could not receive additional compensation from the private sector. We warned him that to do so would be a violation of HRS §84-13(2).

We stated that if the consultation work or the services requested of the employee were a type which were not required of him in his state position they were not a part of his official duties and the employee could engage in such activities for a fee during his non-state hours. We noted, however, that HRS §84-13(3) prohibited him from using state time and facilities for private business purposes. If he were paid a fee for his work this would have been his private business and thus he would have been prohibited from using state facilities. In addition, if he did not receive a fee and there was no state benefit involved in this work, his activities would have been for the private business purposes of the private practitioner requesting the work and the statute still prohibited his use of any state facilities or time in completing the work.

However, we stated that if he did not receive a fee for his work and if there was a state benefit involved, he could use state time and facilities to complete the work. We then discussed certain specific instances in his job where there would be a state benefit involved in his performing these services though they were not specifically required as part of his job. We stated that in those and similar situations he would be able to use state time and facilities for the completion of this work. However, we warned him that if he chose to continue doing this type of work, he should be careful to establish priorities in his use of the facilities so that his state responsibilities did not suffer and that one private practitioner would not be given an advantage in receiving his services over another.

In addition, we pointed out to him that if he decided to provide services which were not his state responsibility and to accept payment for those services, he must be careful not to use his state position to obtain those private clients. This use of position was prohibited by HRS §84-13(1).

The second question he asked was whether he could accept all or partial expenses from an industry to attend scientific meetings on the mainland and neighbor islands. In speaking to the staff he indicated that the State provided reimbursement for one trip annually to the mainland for such a meeting. He had, however, taken a second trip to a conference held on the West Coast. His department granted him administrative leave to take the trip; he paid approximately two-thirds of his expenses and an industry association, whom he solicited, paid the remaining one-third.

The section of the statute most applicable to this question was HRS §84-11 (Supp. 1975). It states that:

No ... employee shall solicit, accept, or receive, directly or indirectly, any gift whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it can reasonably be inferred that the gift is intended to influence him in the performance of his official duties or is intended as a reward for any official action on his part.

In applying this section to the specific trip which he described, we pointed out that the partial reimbursement for his travel expenses was a gift for purposes of this section. He had stated that he was the only person in the State in his field who provided services to the industry which had helped him pay his expenses in attending the conference either in a state or private capacity. He had also become his department's liaison with that industry. Because of this relationship and because he solicited the funds from the industry association, there was a reasonable presumption raised that the money was given to him with the intention of influencing him in his future dealings

with the industry and also as a reward for the past services which he had rendered to them. Thus we found that the funds had been accepted in violation of the statute. We did not go so far as to request that he return the money. However, we warned him that he should not solicit such funds in the future.

We understood that while these trips were beneficial to the particular industry involved, the information the employee gained was also of benefit to the State. We stated that he should not, however, solicit this or any other industry for funds which were the State's responsibility to provide if it felt the trip was beneficial. This solicitation not only placed him in a compromising position but when done with the department's consent (which it appeared that it was since it approved the administrative leave) it gave rise to the implication that his services were being bartered in an apparent unethical manner so as to gain additional funds for the department.

With regard to the general question of his acceptance of travel expenses, we stated that we had found in the past that under certain circumstances a state employee could accept travel expenses from a private person or industry. In doing so, we established certain guidelines, the first and most important of which was that the gift had to be freely offered or, in a case involving a solicitation, the department or employee receiving the funds was not presently taking any official action with regard to the solicitee nor had they taken such action in the past. This clearly was not this employee's case since he dealt with this industry in his official capacity on a regular basis. We suggested, however, that if a gift of transportation and travel expenses was freely offered to him, he might request a further opinion from the Commission. We stated that at that time we could apply the criteria set forth in certain of our past opinions to a specific situation rather than the more general one which he presented in his question.

Finally, the employee asked whether he might accept meals or gifts of specific products from persons or firms to whom he provided consultation services. We noted that HRS §84-11 had application to this question as well. The crucial determinant was whether those gifts were intended to influence him in his official capacity or were given as a reward for past actions on his part. We did not find that either of these reasons were present in his case.

He stated that his job often required him to travel to all parts of the island to view the subject of his expertise both during his working day and his evenings and weekends. If he were in the field during a meal time, he oftentimes was offered a meal by the person or firm who requested his services. At other times, generally as a result of his trip to the specific site, he was offered specific products. The Commission did not read the statute as being so restrictive as to rule out all gifts to public employees. The Commission noted that there had been a longstanding tradition of giving small token gifts of aloha to those persons with whom one deals whether on a public or private business basis. A small gift to a person who had gone out of his or her way to aid another was a prime example and we saw this as being so in his case. The Commission cautioned, however, that he must be careful to accept only those small items which were given in the spirit of aloha. Once the gift became a matter of substance, then the cloud of attempted influence or reward overshadowed that spirit and a violation of the ethics code might occur.

In summary then, we stated that he might not accept a fee for any consultant services or other services in his area of expertise if they were a part of or related to his official duties. If they were not, he might accept a fee but he must not use state time and facilities in performing those services and he must not use his state position to gain private clients. Secondly, he might not accept travel funds from individuals in the industry which he had solicited. However, if such funds

were freely offered in the future, he should request a further opinion from the Commission concerning that specific offer. And, finally, he might accept token gifts of aloha of small amounts of products or services. He must be careful not to accept large gifts or services which were given at times and in amounts out of the ordinary.

We commended him for his concern in maintaining an ethical position in his dealing with the public and for having requested this opinion. We thanked him for providing us with such candid information concerning his situation.

Dated: Honolulu, Hawaii, October 5, 1976.

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

Note: Commissioner Gary B.K.T. Lee was excused from the meeting at which this opinion was considered.