

OPINION NO. 278

A state commission requested an opinion on the eligibility of four of its commissioners to participate in a contested case proceeding which might come before it. At the time of the request an appeal in this proceeding had not yet been filed but because that commission was required to decide cases submitted to it on appeal within 30 days, it requested our opinion in advance of the filing of the appeal.

The matter to be appealed to that commission was the non-acceptance by an agency of a corporation's (hereinafter corporation A) informational materials for a certain project. Corporation A was a wholly-owned entity of a trust on whose land the proposed project was to be built. Corporation A had requested two permits from the agency involved which were necessary for this project.

In accordance with certain statutory provisions the agency had required corporation A to submit the materials after the agency determined that the proposed project would require them. Under the same statute the agency had the authority to accept or not to accept the materials as complete; such acceptance was a condition precedent to approval of the request for permits and commencement of the proposed project. The subject commission acted as the appeals board for any case of non-acceptance of these materials.

The commission also set the regulations for the preparation of these and certain similar materials which were required under the statute. Those regulations included content requirements and in some areas specified the way in which information necessary for content should be gathered. For instance, one regulation required that the applicant consult with all appropriate agencies, other citizen groups and concerned individuals with regard to the project. The applicant was to send written requests for comments accompanied by sufficient information for the group to make informed comments. The applicant was also required to respond to all comments it received and all correspondence was included in the materials.

The materials in question were prepared and filed in accordance with all procedural requirements under the commission's regulations. However, the agency found the materials inadequate, citing three specific reasons. The commission stated in its request that if an appeal were filed by corporation A, the issue would be the non-acceptance of the materials on those three grounds and not whether the permits should be granted.

Through their work or community involvement, four commissioners had had prior involvement with the project, the informational materials or corporation A. Accordingly, the commission asked whether those members' participation in this appeal, if it were filed, would be in conflict with the ethics code.

The conflict of interest section of the statute, HRS §84-14(a) (Supp. 1975), states in part that

[n]o employee shall take any official action directly affecting: (1) a business or other undertaking in which he has a substantial financial interest; or (2) a private undertaking in which he is engaged as legal counsel, advisor, consultant, representative or other agency capacity

An employee is defined by HRS §84-3(4) to include members of boards and commissions. Accordingly, we pointed out that the provisions of this section applied to the members for whom this opinion was requested. Because each commissioner's prior involvement had been somewhat different, we discussed the application of the statute to each of the four in turn.

Commissioner 1

This commissioner was president of a community group when it was invited to review design plans for the subject project. The group had been contacted because of its interest in the surrounding area, which would be affected by the project. At that time the group had expressed concern over certain losses to the community which might occur with the completion of the project.

Later the group was invited to review more recent design plans and a model of the project. This commissioner, then a member of the board of directors of the community group, had participated in the review. Following that review the group had submitted comments on the materials in question. This commissioner had participated in the discussion that led to the development of those comments.

First, we stated that the participation of any of the commissioners in this potential appeal involved official action. However, for HRS §84-14(a)(1) to apply, commissioner 1 had to have a financial interest in the subject materials or corporation A. As neither he nor the community group had such an interest, that section would not apply. The provisions of HRS §84-14(a)(2) appeared to be more closely related to his situation. That part speaks in terms of being "engaged" as a "consultant" or "advisor." The group had been asked to submit comments and to review the design plans on a voluntary basis. We stated that although the voluntariness of the actions did not in and of itself negate engagement as a consultant or advisor, we felt that there must be some more binding relationship between the two parties than was found here.

We stated to the commission that we felt that HRS §84-14(a) had to be read as an entire section prohibiting the taking of official action where a relationship exists between a state employee and a private interest which would influence that employee's official actions with regard to that interest. We noted that Part (1) deals with financial interests. Part (2) is concerned with a consultant or advisor relationship; while this relationship need not be financial, we believed that there must be some binding substance to it before the restrictions of the section could be applied. We did not find that this commissioner and his community group had such a binding relationship with corporation A or the trust with regard to the subject materials. Corporation A had sought this community group's and other's comments on its materials because of statutory requirements, not because it had desired to engage the various groups and individuals as consultants or advisors.

Since we found that no part of HRS §84-14(a) applied to this commissioner in his previous interaction with corporation A and its materials, the ethics code did not preclude him from participating in the commission's decision on that appeal, if it were instituted.

Commissioner 2

This commissioner sat on an advisory board to an organization that was a beneficiary of the trust which was the owner of the site of the project and the sole stockholder of corporation A. This commissioner had no voice over transactions undertaken by the trust except when the trustees failed to derive sufficient revenue for the organization.

We found that HRS §84-14(a)(2) did not apply to this commissioner for he had not been engaged as a consultant or advisor or in any agency capacity by corporation A or the trust. In considering the application of HRS §84-14(a)(1), we noted that as a member of the advisory board

to this organization, he had a fiduciary duty to the organization which was a beneficiary of the trust. We stated that we had found in the past that a fiduciary relationship constituted a substantial financial interest. That was so because of the potential liability that arose in any mismanagement situation. However, because this commissioner's fiduciary relationship was with the beneficiary-organization and not with the trust, we did not find that he had a substantial financial interest in the informational materials or the issue of their acceptance. Accordingly, we found that he might participate in the appeal if it were raised.

We noted that we could see, however, that while the delay caused by a finding by this commission that the materials were not acceptable might not cause financial difficulties to the beneficiary-organization, such action might directly affect a substantial financial interest of the trust. It was apparent that even though this commissioner's actions on the commission in this matter would not directly affect a substantial financial interest of his, it would involve an interest of the trust. In his position, he could not help but have had a close relationship with the trust. For this reason, we stated that he might wish to consider voluntarily disqualifying himself if the appeal were raised.

Commissioner 3

In addition to his service to this commission, this individual was also employed in a state position which required that he review and comment upon materials which were similar to those that were the subject of this request. During preparation of the subject materials, he, in his official capacity, had offered consultative comments to corporation A upon its request. Later he had commented on the materials themselves. Before coming to its decision, the agency involved had requested an opinion from this commissioner on the acceptability of the subject materials. He had responded to this request by pointing out three inadequacies which the agency later had cited as its reasons for not accepting the materials.

We found that HRS §84-14(a)(2) was most applicable to this commissioner's situation. In our view, however, his comments to corporation A established the same relationship that arose between corporation A and the community group and commissioner 1. Therefore, we found that he had not been engaged as a consultant or advisor to corporation A. Further, because his comments to the agency on the issue of the acceptability of the materials had arisen from his state responsibilities, his relationship with the agency did not constitute a "*private* undertaking" under the statute. As this commissioner did not have a relationship with corporation A or the materials that would come within the restrictions of HRS §84-14(a), we found that he could take official action in this matter if it were appealed.

Commissioner 4

This commissioner was an officer in a business association. The association had an interest in the general area surrounding the proposed project. The association was funded by membership dues and its membership included a number of individuals and businesses located near the area of the proposed project. The trust was a member and its dues made up 2% of the operating funds of the association.

This commissioner sat on the design competition jury for the project and was the advisor to the association's design review subcommittee which recommended that the association actively endorse the project, an action later taken. As in the case of the community group, the association

also had offered comments to corporation A, over the signature of this commissioner, during the preparation of the subject materials.

From those facts, we found that this commissioner had no substantial financial interest in the materials, corporation A, or the trust, and that the provisions of HRS §84-14(a)(1) did not apply to him. He did, by virtue of his employment, have a financial interest in the association. Further, his salary was paid from the dues paid by all members of the association. However, the percentage of the overall budget of the association contributed by the trust was not sufficient to justify a finding that this commissioner had an employment relationship with the trust. We also found that HRS §84-14(a)(2) had no application to him. His comments on the materials had been made in the same manner as those forwarded by commissioner 1 and commissioner 3; we found no consultant or advisor relationship between him and corporation A or the trust. While we noted that commissioner 4's activities on the design competition jury might have constituted an advisor or consultant relationship, it was our view that the design competition was distinct from the preparation and submission of the subject materials. Therefore, we found that commissioner 4 might also participate in any action taken by his commission on an appeal brought by corporation A in the matter of the subject material.

Although we stated that all four of the commissioners could participate in an appeal brought in this matter, we pointed out the provisions of HRS §84-13 (Supp. 1975) which state that "[n]o ... 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" We suggested that any commissioner who felt that his participation might grant an unwarranted advantage to any party should disqualify himself from participation.

We commended the commission for its concern for and appreciation of the ethics questions which were involved in this potential appeal. We appreciated the commission staff's very complete letter and the foresight of the commission in submitting this timely request.

Dated: Honolulu, Hawaii, November 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.