

OPINION NO. 282

For the past few years an employee of the University had been the director of an office which provided a number of services to University, governmental, professional, and other groups in the community.

For fiscal and budgetary reasons, the Chancellor directed that the activities of this office be phased out by December 31, 1976. All contracts for the office's services signed on or before July 1, 1976, were to be completed, but work on any request for services which had not been formulated into a contract by that time was not to be begun or continued. The employee indicated the work on all signed contracts had now been completed.

Because of his concern for those state and private groups who had counted on the services of this office and his verbal commitments to them, although not formulated into a contract by July 1, the employee had helped these groups with their conferences on his own time. He asked the Commission whether he might offer those services during his non-state time as a business rather than on a voluntary basis while still employed by the University. In addition, he stated he would be retiring from the University as of July 1, 1977, and asked whether he might then enter into this business on a full-time basis.

With certain restrictions we found that he might offer his services in this field for compensation both before and after his retirement from state employment. These restrictions were outlined to him through our discussion of the various sections of the ethics code which applied to his question.

We indicated that with regard to his offering those services before he retired, the first section which applied was HRS §84-14(b). That section states that "[n]o 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." Also, HRS §84-3(6) defines a financial interest to include "[a]n ownership interest in a business." Therefore, we indicated that for purposes of the ethics code, his proposed business would be a financial interest. Official action is also defined by that section as "... a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." The Commission had in past opinions stated that an employee may not acquire a financial interest in a business or undertaking if there was a probability, rather than a mere possibility, that the employee would be required to take official action directly involving the financial interest. In this employee's case, he was accordingly advised that he might not begin his business if there were a strong probability that his business would be directly involved in action he would take as a state employee.

We did not see this probability in his case. At the time of this request, he had indicated to the staff that his duties with his state office involved only closing out its records and writing reports. After he had completed those tasks, he did not know where in the University he would be assigned to work until his retirement. We found that in his present situation he would not be taking any official action with regard to any on-going programs which used the type of services his office provided. Therefore, HRS §84-14(b) would not prohibit him from beginning this business while he was still working at that office. We indicated that if he began this business and the University later assigned him to some position where he would be called upon to take official action with regard to his business, HRS §84-14(a) would apply. That section prohibited him from taking any official action directly affecting a business or undertaking in which he had a substantial financial

interest. In his case, this meant that he would be required to abstain from any action involving his newly-created business.

We further indicated that he should not begin his proposed business if he were transferred to a University position that would require him to take action involving his proposed business. It did not appear likely, however, that the University would place him in such a position for the duration of his state employment.

We noted that a second section of the ethics code which applied to his question was HRS §84-15(a) and (b). This section deals with the contracts that an employee may enter into with a state agency. HRS §84-15(a) (Supp. 1975) states that

[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.

We understood that he would be operating his business on his own; this, of course, was a controlling interest for purposes of this statute. Further, he stated that he would like to contract with the State, specifically with certain of the colleges of the University. We pointed out that if the value of any one of those contracts was in excess of \$1,000, this part required that the college put that contract out for bid. We understood, however, that at the present time there was no person or business able to offer the kind of services that he intended to provide. We stated that the Commission had recognized that in some limited instances it might be reasonable for the State to enter into such a contract without requesting bids. We had stated that this should occur only where the contract would be in the best interests of the State and would not undermine the public's confidence in government.

We indicated to the employee that in past opinions the Commission had established certain criteria to be used in judging whether a contract could be entered into under these circumstances. These considerations included but were not limited to such factors as whether the circumstances were such that to require a bidding procedure would be a meaningless exercise; whether the cost of the process would far outweigh the value of the contract; whether better terms could be gained through the process; and, whether there was any violation of HRS §84-13, relating to fair treatment in obtaining the contract. (See Opinion No. 168.)

Since there presently was no other person or business offering the kind of services that he intended to provide, it seemed that a request for bids would not only be a meaningless exercise and a useless expense but would fail to provide better terms to the State. In addition, we saw no evidence that he had used his present position to obtain an unwarranted advantage for himself in obtaining these contracts. Therefore, we found that if a state agency wished to enter into a contract with him before he retired and the contract was in excess of \$1,000, the agency should determine if it was in the best interest of the State to enter into such a contract, and, if so, it should prepare a letter of justification to be sent to this Commission for its approval. We pointed out that although contracts entered into in violation of the statute were void, our approval of the justification would indicate our intention not to proceed with a charge of violation of the ethics law because of extenuating circumstances. Without a determination by the Commission that there had been a violation of this section, the Attorney General could not initiate an action to void the contract. (See HRS §84-16.)

We noted that HRS §84-15(b) (Supp. 1975) also had application to the question the employee had raised. That section states that

[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.

Under this section, no state agency, including the University and any of its divisions, could contract with a company the employee formed on any matter that he had participated in as an employee within two years of the date of a proposed contract.

In a previous opinion, however, we had stated that where it appeared that the finding of a violation under this section would not be in the best interests of the State, contracts coming within the coverage of this section may be evaluated along the lines established for like contracts coming within the language of HRS §84-15(a). (See Opinion No. 250.) We noted that the procedure we outlined earlier in the opinion in discussing the application of HRS §84-15(a) would also apply here.

As concerned his particular situation, we noted that he proposed to enter into contracts to provide services to certain programs which were held on an annual basis. As each program appeared to us to be a separate matter, with its own unique arrangements, budget, and oftentimes directing personnel, absent further involvement, the fact that a program had been held annually and that he had worked on it in the past would not preclude him, under HRS §84-15(b), from contracting for a future program. We stated that should he have worked on a particular program in his state employment, however, the State could not contract with him for services on such a contract unless the Commission granted a waiver as previously outlined.

Finally, the post-employment provisions of the ethics code applied to his establishing this business on a full-time basis after his retirement.

HRS §84-18(b) (Supp. 1975) states that

[n]o former ... employee shall, within twelve months after termination of his employment, assist any person or business or act in a representative capacity for a fee or other consideration, on matters in which he participated as an employee.

We noted that this section applied not only to the University, but also to any other state agency with which he may have worked as a state employee on a program. Therefore, he could not, for a fee, offer his services or assist anyone else in offering services with regard to the planning or execution of a program with which he had participated as a state employee, until twelve months following his date of retirement. This section did not prohibit him, however, from offering his services on a non-compensated basis.

In addition, we stated that because of HRS §84-18(d), this section would not prohibit an agency from contracting with him to act on a matter on behalf of the State within the twelve-month period. This section would have particular application to this employee's proposed business as many of the programs he would be servicing would be sponsored by state agencies.

Finally, the employee advised us that all private business he had engaged in in recent months had been on his own time and at his own expense. We noted that this was in conformance with HRS §84-13 which prohibited his using state time and facilities in carrying out his business. In addition, we indicated he should not solicit business from those persons with whom he had dealt in his state capacity nor from those persons who contacted his state office unaware of its closure.

It appeared to us that a number of the contracts the employee intended to enter into would be with departments of the University. For that reason we informed the employee that we were sending a copy of this opinion to the fiscal officer responsible for reviewing such contracts.

We appreciated the employee's concern for the ethics questions involved in his proposed business and we thanked him for requesting this opinion.

Dated: Honolulu, Hawaii, December 22, 1976.

STATE Ethics COMMISSION
Audrey P. Bliss, Chairman
Paul C.T. Loo, Vice Chairman
Gary B.K.T. Lee, Commissioner
I. B. Peterson, Commissioner

Note: Commissioner Dorothy K. Ching was excused from the meeting at which this opinion was considered.