

OPINION NO. 295

The deputy director of a state department advised the Commission that the department intended to hold a sale of real estate on one of the neighbor islands in order to satisfy a debt to the State. He had learned that a number of the department's employees might bid on the parcels that would be sold at the auction. He wished to know if the ethics code prohibited the department from entering into contracts for the sale of these properties to employees of the department.

The relevant sections of the code were HRS §84-15(a) and (b) (Supp. 1975). Those sections provide as follows:

(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.

As HRS §84-15(a) makes clear, the department could not enter into a contract for the sale of property with any state employee unless the subject matter of the contract had been publicly noticed and competitively bid. In this particular case, the deputy director advised us that the department advertised the auction of a property being sold once a week for four consecutive weeks in a newspaper of statewide circulation. In addition, sales that took place on the neighbor islands were also advertised in newspapers of that island. Further, notice of the sale was given to a number of people, particularly realtors, who were on the department's mailing list. It was quite clear, therefore, that these auctions were quite widely noticed. These procedures clearly satisfied the requirements of HRS §84-15(a).

The Commission's greater concern in this matter was with the language of HRS §84-15(b) cited above. We noted that this section would prohibit the department from entering into a contract with an employee who might be a successful bidder if that employee had participated in his state position in the decision to sell the property. In this context, it was the Commission's view that participation meant some significant contact with the matter. For example, the action of a clerical worker in typing public advertisements did not constitute, in our judgment, participation in the matter. HRS §84-15(b), however, clearly covered the collector assigned to the district, the supervisors who were involved in the decision-making process on the sale of properties for nonpayment of the debts, the collector for the island on which the property was located, and the district administrator. We could see that the appraiser assigned to the property might also be precluded from entering into a contract for the sale of the property. In addition, we stated that the department could not enter into a contract with any other employee whose action on the sale of a property could be considered to be discretionary.

The deputy director indicated in testimony given before the Commission that the sale of property to any employee of his department might create an appearance of impropriety. While we believed that such appearance should be avoided whenever possible, we recognized that state

employees were also citizens and entitled to participate in business matters on an equal basis with persons in the private sector. While we understood the deputy director's concerns, we did not believe that employees who were not involved in the decision-making process had any particular advantage over individuals in the private sector. Our view here was based on the fact that this was very much a public process open to full public bidding and, further, that many individuals and companies appeared at and bid on the properties auctioned by the department. For this reason, it was the Commission's view that the language of the ethics code did not go so far as to prohibit all employees of this department from bidding on and entering into contracts for the purchase of properties sold for debts to the State.

We urged the deputy director to caution all department employees that any activity related to bidding at a public sale must be conducted entirely on the employee's own time. Further, such employees could not make use of state records while they were on state time nor could they make use of any state facilities or state equipment that was not fully accessible to the public. Again, even when such facilities were accessible to the public, use of them had to be made on the employee's own time.

The Commission appreciated the deputy director's bringing this matter to its attention at an early time and recognized the full cooperation that he and the department had provided to this body.

Dated: Honolulu, Hawaii, March 29, 1977.

STATE ETHICS COMMISSION
I.B. Peterson, Acting Chairman
Audrey P. Bliss, Commissioner
Gary B.K.T. Lee, Commissioner

Note: Chairman Paul C.T. Loo and Commissioner Dorothy K. Ching were excused from the meeting at which this opinion was considered.