

OPINION NO. 299

We received a request from the head of a division of a state department. In that capacity, he had been concerned that his division had never been involved in a research project. He had learned that a company located in California was about to submit a proposal to an organization for the funding of a particular project for South American countries in conjunction with a California state agency. He had approached the company and persuaded it to include his division and the Pacific Basin in its proposal. The company was a subsidiary of a firm in which he held a one-third interest. Because of his private relationship with these firms, he had asked whether there would be a conflict if the division were to be listed as a participant in the grant proposal.

We saw two issues involved in his request: (1) were his actions in soliciting this association for his division in violation of the ethics code; and (2) if it were permissible for the division to participate in the project, might he be personally involved.

With regard to the first issue, two sections of the code were involved. HRS §84-14(a) (Supp. 1975) states: "No employee shall take any official action directly affecting ... [a] business or other undertaking in which he has a substantial financial interest." Official action is defined by the statute to include any action which involves the use of discretionary authority. He had indicated that his firm owned over 50 per cent of the company; considering his ownership interest in the firm, we found him to have a substantial financial interest in the company. Therefore, we held that he might not take any official action in his position that would directly affect the company.

He stated to the staff that there were at least two members of the division's staff that he hoped would be involved in the project, and that, whether or not the research funds came through the department, he would recommend to the company that these individuals participate in the project. In fact, he had indicated that even if the department decided not to participate, the project would still be carried out. His chief concern was that the department receive some credit for this project in order to enhance the prestige of the division. From that standpoint we could not see that any official action he had taken to that point with regard to this project had affected or would substantially affect the company. The project could and would be completed with or without the division and department listed as a participant. We found, therefore, that he had not violated the conflicts section of the ethics code by attempting to secure this association for the division.

HRS §84-13 (Supp. 1975) 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." It appeared to us that his actions in soliciting this association for the division in this project had involved a use of both his public and private positions. We felt that the position he had used to gain an advantage for the division, however, was not his state position as head of the division but his private position as a partner in the parent firm of the company. This use of his private position was not within the purview of this section of the ethics code and, therefore, could not constitute a violation. Further, we stated that, subject to our discussion below, any use of official position in this matter, to this point, had been clearly in aid of the division. We found that in this particular instance that advantage to the division was not unwarranted.

By stating that his use of position had not resulted in unwarranted advantages, we were not insensitive to the fact that, generally, in gaining such an association for a division, the head of the division will also benefit--through financial gain from working on the project and/or enhancement

of professional reputation. He had stated that because of time constraints, his actual participation on the project would be minimal and therefore his financial gain limited. Absent an HRS §84-14(b) conflict, discussed below, his participation in the project would not be measurably altered by the association of the division. From that standpoint, we did not see that in soliciting this association for the department and division he had used his state position to gain an unwarranted financial advantage for himself. Also, we noted that in addition to his interest in his firm and numerous other positions, he was now the first vice president of a national professional organization, soon to assume its presidency. With these credentials his professional reputation was certainly secure and we did not see that by working on this project he would be enhancing his professional reputation in a way that we could possibly consider unwarranted. Therefore, we found that he had not used his state position to gain an unwarranted advantage for himself.

With regard to the second issue in this matter, HRS §84-14(b) 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." A financial interest is defined by the statute to include an employment interest; thus his receipt of fees for research or consultant work for the project would make his involvement a financial interest. We had in the past defined an undertaking to include "an activity, concern, pursuit, or other matter." (Opinion No. 177.) His participation as a researcher or, particularly, as the principal investigator of the division's portion of the project would be an undertaking of his. Therefore, cognizant of our earlier explanation of the term "official action," he might not participate as the principal investigator or as a researcher with the project if there was a strong probability that this project would be involved in official action he would take as head of the division.

From the discussions he had had with the Commission staff, it appeared to us that that probability would not exist. The project would be administered by another division of the department; the research fees and the overhead costs would already be determined in the grant from the company; and the researchers would work on their own time separate from their division duties. We did state that if these procedures should be altered such that he would be required to take official action involving the project that he might not serve as a researcher or as the principal investigator.

In addition, we cautioned him that he should be aware that the use of state time to carry out the duties required in the project would be prohibited by HRS §84-13(3). Also, we advised him that he might not use any state facilities unless their use was contemplated as part of the 40 per cent overhead payment of the department. These regulations, of course, applied not only to him but to all state employees who might participate in this project.

In summary, we found that the listing of the division as a participant in this project would not violate the ethics code. Also, his action in soliciting this association had not been done in violation of the code. If the funding organization granted the company the funds for the project and responsibility for administration of the project in the Pacific Basin was given to another division of the department, he would not be using his position by participating in the project as a researcher or as the principal investigator. We stated that he should be careful as head of the division to give no unwarranted advantages to himself and/or the other participants in the project.

We commended his concern for the department and for his attention to the ethical issues involved in this project.

Dated: Honolulu, Hawaii, April 7, 1977.

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

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