

OPINION NO. 313

We received a request for an advisory opinion from the head of a state program concerning the actions of two employees who served as instructors in the program. One of the instructors had made a claim for reimbursement of expenses he claimed to have incurred in aiding students in the program to hold a banquet. The department had withheld payment because of a concern that certain actions of the employees had been in violation of the ethics statute.

Students in the program earned monies which were placed in a special fund, one of the uses of which was to underwrite the cost of two annual parties. Students in the program elected officers who conducted the business of planning these parties. In the fall of 1976, employee A was advisor to the officers who were primarily responsible for planning the banquets with the help of the advisor. In November of 1976 the students contacted three caterers to provide the food for a banquet which was to be held on December 18, 1976. An estimate was made that 300 persons would attend. A low bid was received at \$4 a person. A requisition was signed by employee A and the student president and was received at the business office of the department on November 12, 1976.

In the early part of December 1976 the two instructors discussed whether it might be possible to provide the food for the banquet at a lower price and in greater quantity and variety than would be provided by the low bidder. Employee B was president of a private company that performed some catering services.

Sometime prior to December 10, 1976, employee A discussed the contract with some of the students and directed the student who had been responsible for soliciting the bid proposals to cancel the existing contract. The student took this action on or about December 10, 1976. The low bidder was very concerned and upset about this action as it had apparently given up other business that it might have had for that same day. The student himself was very concerned about this and did not participate further in this project. On December 8, 1976, the business office received a requisition signed by employee A for employee B's company to provide the food for the banquet at a cost of \$3.50 per plate or a total sum of \$1,050. Neither business office personnel nor the chairperson of the department was advised of employee B's interest in this company.

Because the requisition was received only a few days before the date of the banquet the money could not be disbursed to the company in advance of the event. Accordingly, one or two days before the banquet employee B took \$500 from his corporate funds to underwrite the expenses of the party. He indicated that these funds were given to the student treasurer though this student claimed he never had possession of this money. A number of students and the instructors helped in collecting the food for the party. By invoice dated December 18, 1976, employee B's company billed the department in the amount of \$1,050. The invoice was received by the business office on December 22, 1976, and a check was prepared to the order of employee B's company in the amount of \$1,050. The check was mailed to the company's listed office address but for unexplained reasons was returned to the department as being undeliverable. Upon an investigation as to where the company was actually located it was discovered that the business was owned by employee B. The program head then initiated an investigation to determine the propriety of the actions taken by the employee.

A number of sections of the ethics code were found to be applicable. HRS §84-12 provides that "[n]o legislator or employee shall disclose information which by law or practice is not available

to the public and which he acquires in the course of his official duties, or use the information for his personal gain or for the benefit of anyone." It was our view that the bid prices submitted to the students, and known to employee A as advisor to the students, constituted confidential information. It was on the basis of this bid information that employee B's bid of \$3.50 per person was made to the students and to the department's business office. As far as the business office was concerned, employee B's bid appeared to be the lowest of a series of bids submitted for the banquet and was accepted as such. In addition, the bid price of \$1,050 represented the actual costs expended for the party plus a profit in excess of \$300. It was, therefore, our conclusion that the confidential bid information was used by the employees for employee B's personal advantage. Accordingly, we found that both employees had violated this provision of the statute when they used the bid information to prepare a formal bid proposal over the name of employee B's company.

HRS §84-13 (Supp. 1975) provides:

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:

- (1) Seeking other employment or contract for services for himself by the use or attempted use of his office or position.

....

- (3) Using state time, equipment or other facilities for private business purposes.
- (4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom he inspects or supervises in his official capacity.

Employee B's company had received the contract for the party because of his position as an instructor in this state program. At the same time employee A's position as advisor to the club gave him an influence over the students that undoubtedly contributed to the cancellation of the existing contract and the awarding of the business to employee B's company. It was our opinion, therefore, that both employees had been in violation of HRS §84-13(1).

In addition, these employees, with the help of some of the students, had prepared the food with the use of the program's facilities. This action was found to be in violation of HRS §84-13(3) which prohibits the use of state facilities for private business purposes. While the instructors claimed that their actions were taken solely on behalf of the students, the facts indicated that they had led the department into believing that the students were dealing with a private company. Further, employee B had asked for reimbursement plus additional monies in the name of his company and had never indicated his ownership of the company. Accordingly, we concluded that the facilities had been used for a private business purpose.

Employee B had loaned \$500 to the students to carry on the party. He maintained that he had taken this action as a favor to the students so that the party could be held. However, we also noted that in his claim for reimbursement he had treated this item very much as a commercial loan

and had assessed the students for interest as well as accounting fees. It was our view, therefore, that in the course of granting this loan to the students he had engaged in a substantial financial transaction with persons he supervised in an official capacity, an action that was in violation of HRS §84-13(4). We noted that the statute recognized that superiors act most unwisely and unfairly when they become involved in financial transactions with the persons they supervise. The persons who are supervised are placed in an untenable position in such circumstances. It could hardly be said that these students, who were just beginning to learn the intricacies and complexities of business, could have fully understood the implications of the actions taken by employee B in lending them this sum of money. The circumstances surrounding this loan did not exculpate employee B.

HRS §84-14(a) (Supp. 1975) provides:

No employee shall take any official action directly affecting ... [a] business or other undertaking in which he has a substantial financial interest.

Employee B had given employee A reason to believe that his company could cater this party at a better rate and with a better product than was being obtained from the low bidder. The action taken by employee B in influencing the decision to cancel the contract and grant it to himself was action directly affecting his business. As an employee of the program, he was subject to the ethics code. As an instructor in the program his input into employee A's decision was official action. His ownership of his business was a financial interest as that term is defined in the statute. In addition, because it was the kind of interest that was likely to influence him in the course of making official decisions, it was a substantial financial interest as that term had been defined in a long line of Commission decisions. Accordingly, it was our view that employee B had been in violation of this section in the action he had taken toward having the contract awarded to his company. Because employee A had no financial interest in the company, he was not in violation of this section.

Finally, HRS §§84-15(a) and (b) also had application to this matter though these sections are applicable only to a state agency and not specifically to state employees. These sections provide as follows:

HRS §84-15(a) (Supp. 1975)

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.

HRS §84-15(b) (Supp. 1975)

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.

The facts indicated that the bid submitted by employee B was not valid. The bidding had already been closed and the contract awarded to the low bidder. Employee B's bid had been made only after the employees had learned of the bids of the other companies. This was in conformance with

neither the letter nor the spirit of HRS §84-15(a). The department then should not have entered into the contract. We were aware, of course, that the business office was unaware of employee B's interest in the business and we further realized that the agent for the college, employee A, was aware of the facts but had failed to make proper and timely disclosure of them.

With respect to HRS §84-15(b)'s relevance here, employee B had acted in both an official and a private capacity in the awarding of the contract to his company. By counseling employee A as to the possibility of his providing the food at a lower cost than was being obtained from the low bidder, he had acted in his official state capacity. At the same time, he had acted on behalf of his own company in forwarding the requisition and invoice to the business office. Accordingly, as in the case of HRS §84-15(a), we found that the state agency should not have entered into this contract.

In summary, we found that the actions of employee B resulted in violations of HRS §§84-12, 84-13(1), 84-13(3), 84-13(4), and 84-14(a). We found that employee A's actions had been in violation of HRS §§84-12 and 84-13(1). It was our view, therefore, that the contract entered into between the department and employee B's company was invalid.

We noted further that these violations had not been merely technical in nature. The actions of the instructors demonstrated extremely poor judgment. This conclusion was underlined by their failure to disclose to the department and the business office employee B's personal interest in his company. Such disclosure would have evidenced their good faith and would have given the department an opportunity to handle this matter in a more orderly and businesslike manner. The employees averred at a Commission hearing that they had simply acted in the best interests of the students. They noted that there had been a considerable shakeup in the officership of the students and gave this as a reason for canceling the existing contract. It was our view, however, that these circumstances should have persuaded them to adhere to the existing contract rather than to cancel it.

With regard to the contract price itself, employee B stated that it was his intention to return to the students any monies in excess of those expended on the party. He stated that the department was billed for \$1,050 because he could not estimate what the cost of the food would be for the party. We were not persuaded by his reasoning. He had had experience in the catering and restaurant business and should have been better able to estimate the food costs that would be expended for the party. We noted that when he found need to advance money for the purchase of food and supplies, he withdrew \$500 from his firm and not \$1,050.

Further, while the requisition had been submitted in advance of the party, the actual invoice was received by the business office on December 22, 1976, and was prepared on December 18, 1976. At that time, employee B should have known how much money was actually spent; he should not have submitted an invoice that was considerably in excess of that amount without revealing to the department exactly what he and employee A were doing and why. At no time had either of them claimed that an amount in excess of approximately \$700 was spent on this party, and yet on December 18, 1976, they persisted in submitting and preparing an invoice in an amount considerably in excess of that figure.

We commended certain officials for the direct and positive action they had taken in bringing this case to the Commission's attention. We regretted the implications of our findings for these employees, particularly employee B who appeared to be in the regrettable position of sustaining

a significant pecuniary loss. However, full disclosure to department officials at any time prior to the party would have prevented the loss he now stood to sustain. Failure to make such disclosure had been an exercise, in our view, of extremely poor judgment. That such judgment was made in the course of providing instruction to students of a state program made his action and that of employee A all the more regrettable.

Dated: Honolulu, Hawaii, October 5, 1977.

STATE ETHICS COMMISSION
Paul C.T. Loo, Chairman
Audrey P. Bliss, Commissioner
Dorothy K. Ching, Commissioner
Gary B.K.T. Lee, Commissioner

Note: Vice Chairman I.B. Peterson was excused from the meeting at which this opinion was considered.