

OPINION NO. 328

An employee who had served since early 1977 as a disease control and regulatory officer asked this Commission to determine whether the ethics code would prohibit him from becoming a shareholder in a corporation which processed a product which he regulated in its growing or raw state.

In seeking additional information the staff learned that in 1970 this employee had acquired an interest in an operation which raised at least one of the products which he regulated. Because this interest raised a conflicts question, we treated his disclosure of it as a request for an opinion pursuant to the Commission's Rule 3.5.

First, with regard to the corporation, the section of the statute applicable to interests one acquires after becoming a state employee, HRS §84-14(b)(Supp. 1975), 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.

The employee stated that he was interested in becoming a shareholder in this corporation. We pointed out that such an interest was a financial interest for purposes of the ethics code. Therefore, he would be prohibited from acquiring this interest if the corporation would be directly involved in action he took in an official capacity. He did not, however, appear to have any official duties with regard to the processing activities carried on by this corporation or other similar corporations or the inspection of the final product. Those responsibilities appeared to be the duty of another employee of his department. The subject employee was primarily responsible for disease control and related programs for the growing or raw product before it reached the market. Therefore, we did not see that the statute would prohibit him from acquiring this interest in a corporation which processed the product.

We pointed out that he should, however, be aware that HRS §84-13 would prohibit him from using his position to secure an unwarranted advantage for himself or the corporation. For example, he could not use state time, equipment or facilities to carry on any business for the corporation. And, he should be careful not to solicit business for the corporation from those persons whose raw product he had disease control responsibilities for.

The second question we were concerned with--that of his having an interest in a production operation which was related to his official duties--was unfortunately a more troublesome one. Because he held this interest before he was hired by the State, a different section of the statute applied. 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....

The employee indicated to the staff that while he was transferring ownership of this operation to his adult child, he still owned approximately 50% of the operation. We noted that this ownership interest was a substantial financial interest for purposes of the statute. Then, official action is defined to include "a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." This of course would include

all those actions he took in his regulatory and disease control capacity. Therefore, we stated that the statute prohibited him from taking any action in his state position that directly affected his operation.

We noted that while it was probably apparent that this restriction prohibited him from any direct inspection of or work with his production operation in his state capacity, this section of the statute also prohibited him from taking any action that would directly affect the competitors of this operation. In Opinion No. 20 we had stated that inspecting one's competitor, "while not providing as obvious a direct affect [as inspecting one's own business] still is action directly affecting...[one's own] business, because it regulates the existence and extent of competition." In Opinion No. 281, a case similar to this, we had also indicated that a competitive situation occurs "when at least two people are in the same business and are offering their products or services to the same markets." This meant that if his operation was involved in the commercial sale of any product, he could not inspect any similar operation which would compete for the same market. We noted that practically, of course, his competitors would for the most part be those similar operations located on the island where he lived.

In Opinion No. 281 we had been asked if a person who was involved in a business could be hired to inspect both his own business and all similar businesses in the surrounding geographic area. We had pointed out the inherent problems raised by an employee inspecting his private competitors and had suggested to the department involved that a person who could not inspect his own operation or those of his competitors would not be able to carry out most of the duties of his job and, would therefore, be ineffective in that position.

That case dealt with the question of a future hiring; this employee was already serving his department and had been to our knowledge performing all the duties required of him. We were not in any way suggesting in this opinion that he had been performing them improperly. In our view, however, the difficulties we had noted in Opinion No. 281 were present in this case and had to be resolved.

In Opinion No. 135, the Commission had indicated that when an employee was required by HRS §84-14(a) to abstain from taking official action in a significant instance, the department and the employee himself could pursue any one of four alternatives. We believed similar alternatives were available to this employee and his department. The first would be for the employee to disqualify himself when necessary. However, this might effectively eliminate his usefulness to the department and to the residents of his island. The second alternative would be for the department to transfer the employee to some area where he would not be required to inspect his own interests or those of his competitors. We indicated that the practicality of either of these alternatives must of necessity be determined by the employee's department.

The third alternative would be for the employee to give up his interest in his operation either by transferring it to his adult child or by selling it to a third party. We pointed out that if he agreed to this course of action, the statute would not prohibit him from taking action affecting the competitors of this operation or the operation itself. He would of course be prohibited by HRS §84-13 from giving the operation any undue advantage.

The fourth and final alternative would be for the employee to terminate his employment as a disease control and regulatory officer in this department.

We noted that if either of the first two alternatives were selected, it must be done with the advice of and consent of the employee's department head, as either course of action would have a direct bearing on the effectiveness of the services provided by the department to one particular island. The necessity for the protection of public health and safety could not be overlooked. If neither alternative were feasible, the employee and the department would be required to decide between the latter two.

Because of the department's participation in this decision, we sent a copy of this opinion to the department head and requested that he notify this office once a course of action had been chosen.

We commended the employee for requesting this opinion and for openly providing the staff with information concerning his interest in his private operation. We were aware that he had raised this matter with the department when the position was originally offered and that a department employee had advised him incorrectly as to the application of the ethics code.

Dated: Honolulu, Hawaii, January 16, 1978.

STATE ETHICS COMMISSION
Paul C.T. Loo, Chairman
I.B. Peterson, Vice Chairman
Audrey P. Bliss, Commissioner
Dorothy K. Ching, Commissioner

Note: Commissioner Gary B.K.T. Lee was excused from the meeting at which this opinion was considered.