

OPINION NO. 334

A legislator (Legislator A) requested an opinion concerning the application of the ethics statute to actions taken by another legislator (Legislator B) in his securing a state lease to certain property. Legislator A was aware that the Commission had already responded in its Opinion No. 303 to a question concerning this matter raised by Legislator B himself. However, the questions raised by Legislator A focused on issues that were not considered in that opinion.

Legislator B was seeking to develop a business on a piece of property that adjoined and was actually part of a parcel of property leased by a state agency for a specific research program. In Opinion No. 303, Legislator B had asked the Commission to determine if the ethics law would prohibit a state legislator from bidding on a lease for state lands. The Commission had advised him that the statute did not prohibit such action by a legislator in his or her private capacity so long as usual procedures were followed and the legislator did not use his or her position to gain an unwarranted advantage.

Legislator A pointed out to us that the parcel in question was a part of a state agency's lease which the agency had given back to the department responsible for the disposition of the land at Legislator B's request. He was concerned that Legislator B's contact with the state agencies in this matter might have been improper, and he asked us to determine if the ethics code spoke to this issue.

We explained that the ethics code does have application to this kind of matter in that while it permits employees and elected officials to act in their own behalf before state agencies, it does prohibit the use of position to gain an unwarranted advantage, an advantage that a private citizen in a similar position could not obtain. We noted that HRS §84-13 establishes this standard and this opinion considered its application to this matter. Legislator A also asked us to determine the possible application of HRS §84-13(4) which prohibits a legislator or employee from "engaging in a substantial financial transaction with a subordinate or a person or business whom he inspects or supervises in his official capacity."

Documents that Legislator A forwarded to us and our own investigation indicated that when Legislator B first broached this subject with the state agency that held the lease to this land, it had been referred to a panel of interested employees of this agency. Their initial recommendation had been that the property should be retained. A short time after this initial recommendation, however, the state agency had stated that if the expansion of its program in this area was not feasible, then it would have no objection to returning this land for future disposition. The agency had conceded that the parcel was not actually being used for research purposes but was utilized as a public parking lot which provided access to recreational areas. The head of the department responsible for the parcel's disposition indicated it was not likely that the agency would be able to expand its program operations any further and that the land in this area would instead be used for other purposes. The agency had then withdrawn its objections and had offered to return the property to the department for its disposition. The department then advertised for bids in the usual manner; Legislator B was the only bidder and the lease was granted to him at the upset price.

An executive administrator of the state agency indicated that the first position against return of the parcel was made by people interested in expansion of the research facilities. He indicated that he did not accept this recommendation because in his view the agency could not expect to expand its facilities in the area. It was his view that the property was far more valuable to the State

for commercial purposes and could never be given to the agency for research activities. He stated that since the parcel could provide revenue to the State now and the agency could not feasibly expect to develop its operations further, it would have been unreasonable for them to have refused a request to return the property. He noted further that officials at his level in the agency had a much different point of view about matters such as this than did the persons who made the initial recommendation to retain the parcel.

Appearing before the Commission on this question were representatives of the research facilities themselves. They stated that while they initially objected to giving back these lands on principle, it was now their view that the administration's decision was the correct one and that they could neither expect nor did they really desire to use the property adjoining the subject parcel for future research purposes.

At a subsequent meeting, the head of the department responsible for disposing of the land gave his views. He stated that the request by Legislator B was handled according to statute and department rules and regulations and that Legislator B had not received any consideration because of his position as a legislator. He noted further that it was not unusual for an individual to come to the department to ask if it would put up a piece of state land for auction. He indicated that he had been surprised that there had been no other bidders for this parcel and could not explain this unusual circumstance. However, he did further comment that no business had objected to the bidding process nor had any other business asked for the bidding to be reopened. There had been no other commercial interest in this particular parcel. He also stated that, in his view, the lease rental being paid under the agreement with Legislator B was quite high for that piece of property.

He also stated that his parcel was more suitable for commercial development than for use as either a park or a research facility. Further, he anticipated that the present commercial use of the adjoining parcels would continue in the future even if the actual tenants of that property ceased their specific operations.

Accordingly, Legislator B's construction of a business on the parcel was consistent with the department's view of the preferred uses of this site. It was not for the Commission to decide whether that judgment was a correct one. Our responsibility was to determine if Legislator B had abided by the ethics statute and had followed the usual procedures in obtaining his lease.

In reviewing this matter we considered the applicability of HRS §§84-13 and 84-13(4). HRS §84-13(4) prohibits soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business one inspects or supervises in an official capacity. Legislator B had dealt here with two state agencies. Neither of these state agencies were considered to be "persons or businesses" for the purposes of this statute. We pointed out that the statute is aimed at prohibiting an employee or legislator from intimidating a person over whom such employee or legislator exercises some kind of supervisory or inspection authority. However, this section did not prohibit a state employee or a legislator from acting in a private capacity before state agencies. We noted that there were other sections of the statute that did regulate this kind of activity. For example, Legislator B could not have been granted this lease contract if it had not been put out to bid. But, we did not find it to be a per se violation of the statute for legislators or employees to represent themselves on matters before state agencies.

We found the general language of HRS §84-13 to be most directly applicable to the facts of this matter. The section provides:

No legislator or 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....

Legislator B's dealings here had been of an open and public nature. His contacts with the agencies involved a number of people so that individuals in disagreement with the agencies' decisions had had the opportunity to object and make different recommendations. While such recommendations originally differed with the agency's final decision, it appeared that these individuals ultimately agreed with the final position. Nor did we see any evidence that these individuals had been intimidated into coming to this agreement. On the contrary, they seemed quite willing to express dissatisfaction with the agencies' decisions in other related areas that we had discussed in the course of investigating this particular matter. While one may, of course, disagree with the final decision to return this land, it did not appear to us that that decision was made because of Legislator B's position in the State Legislature. Nor did we see any hint of evidence that he had used his position to persuade the state agencies to his position.

In reviewing the matter, it was our view that Legislator B did follow the usual bid procedures and that another individual who had desired the use of this property for a similar purpose would probably have secured the same result. As noted above, no other business had shown an interest in this parcel. It appeared to us that if such interest had been shown, the bid proceedings could have been delayed to permit a person or business an opportunity to gather information and present a bid.

Accordingly, it was our conclusion that Legislator B did not violate the ethics code in his pursuit of this business venture. We again stated that the statute does not generally prohibit legislators and employees from representing themselves in private business matters before state agencies though there are restrictions that apply to legislators and employees acting in such matters. Legislator B had abided by those restrictions.

We were aware of the continuing controversy concerning this land and believed that the expression of interest by people holding different points of view as to its disposition was a proper way for this matter to be finally decided. It was not the role of this Commission to comment upon the merits of the arguments. The issues that underlay this controversy ran through the many decisions being made concerning the use of the State's land. Our role, however, was to determine that the question was decided fairly with regard to the rules we were charged with enforcing. We noted that at the same time that we were considering this matter other agencies had also considered the question and some had taken a position that Legislator B's plan conflicted with policies of a specific ordinance. It appeared that this matter would be subject to further discussion and review by independent bodies of the city and state governments. We only noted that our review indicated that Legislator B had not used his position as a state legislator to advance the cause of his project.

We acknowledged the excellent cooperation we received from all of the individuals involved who recognized their responsibility to have this question properly decided. Further, we stressed to Legislator A that while this opinion might differ from his own judgment, there should be no implication drawn from the opinion of any criticism of his bringing this matter to our attention. This was the proper forum for the discussion of these questions which were of such vital importance to the community. We recognized his cooperation and appreciated the interest he had shown in the Commission's work during this period. We also commended him for bringing this matter to the

attention of the Commission for a decision rather than commenting on the application of the ethics statute prior to our determination. We stated that we hoped that all employees and legislators who were concerned about these important questions would bring them to our attention at an early time.

Dated: Honolulu, Hawaii, March 22, 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.