

## OPINION NO. 339

During the educational seminars conducted by our staff for the employees of a department a number of questions arose from the employees and management of one of the department's facilities. Staff suggested that the manager of the facility submit some of those questions to the Commission in the form of a request for an advisory opinion. Such a request for an opinion was subsequently forwarded by the head of the department.

While all of the questions dealt with some situation at or aspect of the facility, the questions themselves were not related.

1. In the first question, the Commission held that a spouse for the purposes of the ethics code, meant a person who was recognized and protected as such by the laws of Hawaii. Because the individual involved in this question did not have a spouse we found no conflict in the facts of the situation presented to us.

2. Could employees at the facility own or care for property being held at the facility; and

3. Could employees of the facility be members of clubs established for owners of this kind of property or be involved in the production of this kind of property?

With regard to the ownership of such property while it was kept at the facility, we stated that the ethics code as a whole dealt with those actions state employees take which directly affect or involve businesses or undertakings in which they hold financial interests. The statute defines a financial interest to include the ownership of real or personal property. (See HRS §84-3(6)(D)). Since the articles kept at the facility were personal property, we indicated that they would be considered by the code to be financial interests. We pointed out that the conflict of interest sections which were applicable to this question related that financial interest, as indicated, to a business or other undertaking. HRS §84-14(a) states that "[n]o employee shall take any official action directly affecting ... [a] *business* or other *undertaking* in which he has a substantial financial interest." And, HRS §84-14(b) states that "[n]o employee shall acquire financial interests in any *business* or other *undertaking* which he has reason to believe may be involved in official action to be taken by him." [Emphasis supplied.]

We stated that the production of this property would be a business or other undertaking. It was our view then that the conflicts section would only apply if the property which was in or would have to come into the facility were eventually to be used as part of a production process. An article which was owned by any employee of the facility and which was imported solely for personal use would not qualify as a financial interest in a business or undertaking. Accordingly, such ownership would not be prohibited by the conflicts section. We stated that the use of position section, HRS §84-13, would apply, however, and we discussed that provision later in this opinion.

It was our assumption that the property that the department head was concerned about was that which was imported for use in a production process. As we had stated, this property would be part of a business. We pointed out to him that the conflicts sections quoted above required that the employee abstain from taking official action which had a *direct affect* on that business or undertaking or that the employee not acquire a business or undertaking which might be *directly involved* in official action to be taken by him. While we believed that the day-to-day care of this property at the facility did constitute official action, it was our view that this action would neither

*directly* affect nor *directly* involve the production business itself but merely the particular piece of property. While the care of the article given by employees of the facility might be important it was not related to the *final* disposition of that property. And it was only the final disposition of the property that was significant.

We noted that the decision as to whether the property would have to be kept at the facility and when it would be released might well have a direct affect on the business that owned it. And, likewise, the permission to allow the property to be used in a production process while it was still at the facility would have a direct affect on the business. However, the determination of whether the property would have to be held at the facility was controlled by regulation and did not require discretionary judgment or official action by any employee of the facility. As for the production process, the manager of the facility stated that formal permission was given by the division director with the practical recommendation coming from him. Therefore, we found that the conflicts section would not prohibit any employee of the facility with the possible exception of the manager from owning *any* article which must be held at the facility because the action taken by one of those employees would not directly affect the business that owned the article.

In addition, we noted that since the action the employees took would not directly affect *any* production process, those employees who had their own businesses need not be prohibited from caring for property owned by their competitors. We pointed out that this meant, for instance, that an employee who owned a business that produced only a certain type of this property could care for the same type of property brought into the facility by another business without violating the statute.

We stated that while ownership of an article was not prohibited, HRS §84-13 did prohibit an employee from using his position to grant unwarranted advantages to himself or to others. To avoid even the appearance of this possibility, we suggested that whenever possible an employee at the facility who had property at the facility should not be assigned to care for that property. We understood that this might not be possible if the property had to be assigned to a certain area because of its condition and the employee was or would be in the normal rotation of employees assigned to that section while the property was at the facility. In our view, that set of circumstances would sufficiently dilute the appearance of use of position. This had already been the policy of the facility and we commended the management for having instituted it.

As for the care of this property at the facility by the employees, we understood that an owner who might be on the Mainland or reside on a neighbor island might ask an individual on Oahu to act as a caretaker for the property while it was held at the facility. This meant the individual would have the same care privileges as the owner and would also be the person contacted by the facility to make significant decisions about its disposition in the event of damage.

We indicated that if the employee were paid by the owner to serve as the property's caretaker, the employee was gaining a financial interest through his employment by the owner. HRS §84-14(b) prohibits the acquisition of a financial interest in a business which may be involved in official action taken by the employee. This question was somewhat analogous to that answered in Opinion No. 139. In that opinion the Commission stated that employees at this same facility could not be hired by owners of property at the facility to provide additional services. Since some of the services requested by the owners were a minimal part of an employee's job, the Commission stated that the "extent of such state services clearly affected the nature and extent of

the outside additional service. " Therefore, that employment could have a direct correlation to the amount of service provided by the employee in his state capacity.

Checking on the property's general condition was a part of a facility employee's duties. And, such duties were also to a different degree a part of being a caretaker. Therefore, we found that an employee would violate HRS §84-14(b) if he or she became a caretaker for a fee or other compensation for property which would be involved in his or her duties at the facility. If the property would not be involved in an employee's duties then the employee might receive such compensation. We stated that the employee could not solicit the employment or use any state time in carrying out private caretaker duties. The employee would also be prohibited from using any state facilities or equipment that was not available to other caretakers or owners on an equal basis.

If an employee served as a caretaker *voluntarily* then there would be no financial interest involved and such activity would not be prohibited by the conflicts section. We indicated that employees who acted as voluntary caretakers, however, could not use state time, facilities and equipment, except when such items were equally available to owners and other caretakers of articles at the facility. We indicated that to avoid any possible use of position, the management of the facility might consider instituting a policy that an employee could not voluntarily act as a caretaker for property directly under his or her care.

We found no violation of the ethics code in an employee of the facility belonging to a club for owners of this property. While an officership of a club is considered a financial interest, an employee who was an officer would not be taking official action in his or her state position which would directly affect that club. Therefore, the conflicts section would not apply. As the letter of request mentioned, however, the close association between an employee and other members could cause the employee to conceivably grant advantages to those owners. If those advantages were unwarranted, then of course the employee would have violated HRS §84-13. We did not think, however, that the possibility of wrongful use of position was strong enough to warrant our finding that such memberships should be prohibited by the ethics code. We indicated that the department might feel as a matter of policy that employees holding certain types of positions should not be involved, but, again, we saw that as being a management decision.

4. Were the records of property held at the facility to be treated as confidential information or were they public records that must be released upon request?

We noted that the section of the ethics code which prohibits the disclosure or use of confidential information, HRS §84-12, defines as confidential "information which by law or practice is not available to the public." We understood that the department had asked the Attorney General for a formal ruling on this question. We stated that if that office determined that those records were public, then the release of the records would not be a violation of the code. However, until the department received such a ruling, it was our view that, in conformance with the "practice" test in the code, the records should be treated as confidential information.

5. Owners of property held at the facility frequently gave token gifts to employees in appreciation of their services. What types of gifts were acceptable, if any?

We stated that the gifts provision of the code, HRS §84-11, states that no employee should solicit or accept a gift "under circumstances in which it can reasonably be inferred that the gift is intended to influence him in the performance of his official duties or is intended as a reward for any

official action on his part." We explained that the Commission has recognized and accepted the tradition of giving gifts as tokens of aloha. We have stated that small gifts which may be shared by a whole office such as candy, pastries, or fruits may be acceptable. The manager of the facility indicated that the type of gifts received at the station were pastries or candy brought by an owner when visiting or a bottle of liquor given by an owner at the time property was released from the facility. The "edibles" were placed in the business office and any employee on duty that day was welcome to share in them. Liquor was locked up and saved until the employees' Christmas party. It had been the facility's policy that employees should not accept any individual gifts.

We saw no reason to prohibit the acceptance of these types of edibles or the one bottle of liquor as long as there was no solicitation on any employee's part or the donor did not bring such gifts to the facility on a regular basis. However, an individual who brought pastries at each visit should be asked by the management to refrain from doing so. While each individual box of pastries might not be a large gift, the mounting cost to the donor did become significant if given on a regular basis and could create an inference that the donor was attempting to influence the employees. The fact that only certain employees could benefit from these gifts because of shift schedules was not of concern.

6. Some of the facility's employees had expressed a desire to purchase supplies for the maintenance of their own property from supply houses through the facility's procurement procedures. Items requested on a government purchase order were filled at a reduced rate. Would this practice violate the ethics code?

HRS §84-13 prohibits employees from using their positions to secure unwarranted advantages. Purchasing supplies for private use from supply houses through the facility's procurement procedures at special government rates violated this section of the code. We stated that employees should purchase their supplies in the same manner as other private citizens.

Finally, to enable the management of this facility to apply the holdings in this opinion, we briefly summarized our answers to the questions.

1. There was no violation of the conflicts section of the code in this unique situation. The management should ensure that the state employee involved should not use his position to grant any other person an unwarranted advantage.

2 and 3. All employees of the facility could (with the possible exception of the manager) own property of the kind which was held at the facility and could be engaged in a production business. While these employees took official action in carrying out their duties, that action did not *directly* affect either their own or any other person's business or undertaking. To avoid the actual or apparent use of position we suggested that property owned by an employee of the facility not be assigned to the employee for care unless it was unavoidable for reasons of the property's condition or because of the employee's regular work rotation schedule.

Employees could be paid to serve as caretakers of property which was not under their care or jurisdiction at the facility. They could serve as voluntary caretakers for any property but we suggested that to avoid an actual or apparent use of position, the management should consider prohibiting an employee from serving as a caretaker of property under his or her care or jurisdiction.

In all cases of ownership or caretaking, we stated that the employee should not use state time, facilities or equipment or care for property unless such facilities and equipment were available to owners or other caretakers on an equal basis.

Finally, employees could belong to owners' clubs without violating the ethics code but they must not give their fellow members any advantages or special treatment at the facility.

4. Because of the nature of the information on the records in question, and because the records as a practice had been kept confidential, we suggested that they be treated as confidential until a formal determination by the Attorney General was received which stated that they were in fact public information.

5. Small token gifts such as pastries, candy or fruits or a bottle of liquor could be accepted if they were given to and could be shared by the employees generally. The management of the facility must use its discretion in accepting these gifts given the guidelines set forth in this opinion and past Commission memos concerning gifts.

6. Employees of the facility could not purchase supplies for their private use at special government prices using the state procurement process.

The staff indicated that the employees of the facility participated actively in the educational seminars and were genuinely concerned that their activities conform to the requirements of the code. This request was evidence of that concern and we commended them for it. We also thanked the employees of the facility for their cooperation with the staff in providing the necessary information required to render this opinion.

Dated: Honolulu, Hawaii, June 15, 1978.

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

Note: Vice Chairman I.B. Peterson was excused from the meeting at which this opinion was considered. Commissioner Gary B.K.T. Lee was not present during the discussion and consideration of this opinion.