

## OPINION NO. 341

A branch chief of a department advised the Commission of the existence of an advisory committee within his department. Upon receipt of this information, the staff advised him of the likelihood that this committee was a state agency within the meaning of the state ethics law and, therefore, subject to its restrictions. The staff then met with two employees of the branch. Pursuant to those conversations, the branch chief provided additional information to us and formally requested an advisory opinion.

A federal law, enacted in 1976, provided for the means of controlling the disposition of certain materials in the United States. One aspect of this program was that individual states could take over the responsibility of establishing disposal programs and thereby avoid the federal government's establishing the control program for the particular state. Hawaii was endeavoring, through this employee's department, to establish such a program. One requirement of the federal law was that there be public participation in the enactment of rules and regulations concerning the disposal of these materials and in the general administration of the program. In order to meet this requirement and in order to provide the department's staff with access to persons vitally interested in questions concerning disposal of this material, this advisory committee was established. It was hoped that the committee would provide input to the department in the establishment of the State's program.

The question for our determination was initially whether this committee was a state agency for the purposes of the ethics code. If the committee was such an agency, then it was subject to the restrictions of the code and our task was to then advise the branch chief of the guidelines that would apply to each of the members of the committee.

HRS §84-2 of the state ethics code provides that the chapter shall apply to "every nominated, appointed, or elected officer or employee of the State, including members of boards, commissions and committees, and persons under contract to the State...."

The members of this committee were appointed by the head of the department. Therefore, we indicated that they were appointed officers or employees of the State under this section of the statute and were subject to the ethics law if the committee itself was a state agency.

HRS §84-3(9) responds to this part of the question. In that section the phrase "state agency" is very broadly defined to include "the State, the legislature and its committees, all executive departments, boards, commissions, committees, bureaus, offices, the University of Hawaii, and all independent commissions and other establishments of the state government but excluding the courts." It was our view that because the members were appointed directly by the director of the department that this committee was an establishment of the state government. Accordingly, the members were subject to the restrictions of the ethics code.

Our conclusion on this point was supported by the statements of the two employees who spoke with our staff and who would be working closely with this committee. They stated that they expected that the committee's recommendations would have great weight in decisions made by the department in the establishment of the program. This fact established that the committee was a state agency for the purpose of the ethics code and indicated further that the action of this committee was not purely advisory but did involve official action.

Official action is defined in the code as including "a decision, recommendation, approval, disapproval or other action, including inaction, which involves the use of discretionary

authority." This section makes clear that it is not the final decision alone that constitutes official action but the recommendations that go toward and are part of the input of a final decision. Since it was stated that this committee's recommendations would carry great weight with the department, it was quite clear that the action taken here was official action.

The issue remaining then was for the determination of the particular restrictions that might apply to the members of the committee. Two statutory sections had particular application, the conflicts of interests section, HRS §84-14(a), and the fair treatment section, HRS §84-13. Also having application was the confidential information provision contained in HRS §84-12. The conflicts section was of most importance and we discussed that section first.

We stated that HRS §84-14(a) basically provides that a state employee, in this case the committee members, may not take action directly affecting a business in which the employee has a substantial financial interest. That language indicates first of all that those members of the committee who represented the federal, county, and state governments were not subject to the restrictions of the code since a state agency was not a business for the purpose of the code. The other members of the committee all had substantial financial interests in the companies they were involved with. We noted that, generally, the section was interpreted as prohibiting an employee from taking action which not only directly affected his own business but the business of his competitors as well. The Commission, however, had established an exception to this provision which stated that in a case where expertise was mandated to be represented on a committee that the restrictions shall be limited. Under this approach, expert members could take action which directly affected the industry as a whole and had merely to abstain from taking action which directly and specifically affected their own businesses.

In reviewing the federal law and interim regulations which had been adopted by the federal agency responsible for implementing this law, the State, in establishing the program, was called upon to specifically attempt to involve private citizens, parties affected by activities under the federal law, and representatives of consumer, environmental and minority associations; trade, industrial, and labor organizations; public health, scientific and professional societies; public officials and governmental and educational associations. We believed, therefore, that there was a mandate in this program to provide participation by those persons who were affected by the federal law. The private representatives on this advisory committee did represent such interests and we believed that their expertise was properly called for. Accordingly, it was our view that these members could take action which directly affected industry as a whole but could not take action which specifically affected their own businesses.

As an example, we stated that a certain member, who represented an industry group, could certainly comment on the broad aspects of this type of materials disposal. However, should the committee consider matters which specifically concerned substances which were only produced or used by this industry then he would be required to abstain from taking any action. We pointed out that the same analysis would apply to all other private representatives who served on the board. Our experience in this area led us to believe that these members would generally be required to abstain in only very rare instances.

We noted that the law called for broader participation than was represented by this committee. Specifically, the regulations required that representatives of consumer and environmental groups participate in the department's decisions. Accordingly, while we believed that the members of this board were experts, justifiably appointed to this committee, we did not make

a finding that this committee met the requirement of public participation called for in the federal law. To the contrary, it appeared that the committee, in its present makeup, did not meet that requirement and we therefore stated that this opinion should in no way be used to sanction this committee's functions. Our finding was simply that only the limited caveat we described in this opinion should apply to the members of the committee.

We stated that the fair treatment and confidential information sections should also be brought to the attention of the members. We pointed out that the fair treatment section simply provided that a committee member should be careful to avoid using his or her position on the committee to advantage, in an unwarranted manner, either the business he or she was involved with or any other person or business.

Further, the committee members might, from time to time, have access to information that was not publicly available. We suggested that the branch chief and his employees should clearly identify such material so as to avoid any improper use of such information.

There was some question raised in this matter as to the jurisdiction of the Ethics Commission versus the ability of the department and its personnel to handle conflicts that might arise on the board. While we had emphasized this point in the past, it appeared that it was a point that was not readily accepted by many state employees and, therefore, merited repetition.

We stated that the ethics statute did not merely involve overt wrongdoing but concerned itself as well with subtle conflicts that might not be easily understood or perceived by state employees. Statutes are by their nature complex and are not easily applied to even fairly simple situations. We stated that the attempt by departments and their employees to make a determination of a conflict of interest in a case such as this was a hazardous undertaking. As we pointed out to this employee's staff members, if the department's judgment as to the conflicts that might appear on the board were incorrect it was possible that the work of the committee would be in jeopardy under the ethics law. Therefore, it was a far wiser course to raise these questions with the Ethics Commission at an early time, as he had wisely done, rather than to rely upon the department's own judgment in these very sensitive questions.

We stated that this employee's decision to bring this matter to our attention was a commendable one. We realized that there were often pressures within departments to keep the Ethics Commission in ignorance on these matters and we warned those who might seek such a course that they risked the imposition of greater sanctions and the revocation of any state action that might have resulted from conduct found to be in violation of the code.

Dated: Honolulu, Hawaii, June 14, 1978.

STATE ETHICS COMMISSION  
Paul C.T. Loo, Chairman  
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. Commissioner Audrey P. Bliss disqualified herself from consideration and preparation of this opinion.