

OPINION NO. 375

A state employee presented the following situation to us. He was employed by the State in a position which provided support services to persons carrying on a certain service. As part of his responsibilities he transported these persons to and from the site where they performed this service. Until December 31, 1978, these persons were also state employees. However, as a result of a recently enacted statute, these positions were terminated and the individuals carrying out the service became regulated by state law. These individuals then contracted independently through a private association to obtain the transportation service this employee had been providing in his state capacity.

Since these individuals were no longer state employees, the support positions for the function they provided were also being terminated. This employee's position was in this category. Once an equivalent and acceptable position was found for him in the state system, he would transfer, and the position which he held would be terminated. At the time of this request the State was continuing to offer this employee's support services on a month-to-month contract, presumably until he was transferred to a new position.

A private company was seeking to provide these same support services to the individuals once the State totally phased out this function. This employee had been approached by the company to provide the service he had been performing in his state capacity. The employee indicated that this would be a part-time job which he would hold in addition to his new state position. He asked the Commission if he might accept this part-time position.

The conflicts of interests section of the ethics code which applied to this question was found in HRS §84-14(b). That section 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.

We explained to the employee that an employment is a financial interest for the purposes of the ethics code. And, the private company which had approached him was a business. Official action is defined as "a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." Therefore, the statute prohibited him from becoming employed by this company if it would be involved in discretionary action he would expect to take in his state position.

This discussion was, of course, directed to whether he might be employed by this company after the State terminated its support services. While we did not discuss it in depth, we did point out to this employee that another section of the code, HRS §84-13(2), would preclude him from being employed by this company to provide support services in this same area while he was still required to provide them in his state capacity.

Because this employee did not know what position he would be transferred to, we pointed out that it was difficult for us to determine if he would be taking action that would affect this company. We assumed that there would be some positions within his division that would require an employee to take such action. We stated that if he were transferred into one of those positions he could not be employed by this company.

We understood, however, that he had applied for a position in which it would be unlikely that he would take official action which would directly involve the company. We indicated that if he were ultimately transferred to this position, the ethics code would not prohibit him from accepting the private position that had been offered to him.

We pointed out to the employee that if he did become employed by the company he should be aware that HRS §84-13(3) prohibits an employee from using state time, equipment and facilities for a private business purpose. This meant that if one of these individuals needed transportation to or from his job site during the hours that the employee was required to work for the State, he must arrange with his supervisor to take vacation time to transport this individual. We stated that this arrangement had to be worked out with his supervisor to avoid disrupting his state work. He or she could deny such leave for the same reasons a supervisor might deny leave for an actual vacation.

Finally, there was an aspect to his question which fell within the overall philosophy of the fair treatment section of the code. HRS §84-13 states that an employee may not use his or her position to gain an unwarranted advantage for him or herself. This section would prohibit an employee from using his state position to secure outside employment. The appearance of such use of position could be created where one's outside employment was similar or related to one's state position. However, the fact that this employee's position was being terminated led us to the conclusion that he had not used it to gain his outside employment.

We commended him for his sensitivity to this question of ethics. We suggested that he contact us when he acquired his new position.

Dated: Honolulu, Hawaii, March 19, 1979.

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

Note: Commissioner Audrey P. Bliss was excused from the meeting at which this opinion was considered. There was one vacancy on the Commission.