

OPINION NO. 376

We received a request for an advisory opinion from a deputy in a state agency. His request concerned an individual who had been hired to coordinate an on-the-job training program for students who were trained by this agency. This person held a 25 percent position. In his private capacity he was an owner of one of the businesses that provided the actual training to the students in accordance with contracts between these businesses and the agency. Because his state position required that he take certain action which affected his and the other businesses providing this service a conflict of interest question was raised. The deputy asked the Commission to determine if this person could continue in his position with the agency and to specify any guidelines that would apply to his conduct if our answer was in the affirmative. The staff had discussed this matter with both the deputy and the individual who had conceived this particular program. The history of the program was helpful to an understanding of this matter. When this individual developed the basic concept for this program, he contacted the businesses that worked in the area and asked them to provide the practical training required by the students. The essence of the program was that the student would work in the actual setting so that he could receive on-the-spot training by professionals responsible for providing this service.

Initially, one of the businesses required that the agency pay a fee of approximately \$10,000 to provide the service to 20 students who would be assigned to it during the course of a year. It was at this time that the agency decided that the compensation for this service should be \$500 per student. However, at the time the program was initiated not all of the businesses charged a fee for the training. For example, the business with which the coordinator was associated was not paid for the training it provided during its first year of participation in the program. Eventually, however, all of the participants requested and received payment for the educational training they were providing.

The founder of the program indicated to the staff that it was traditional for professionals in this field to provide training to students at no charge. It was in a sense a return to the profession for what these professionals had taken from it.

During the early part of the training program the founder was not satisfied that the training was of the standard the agency had expected and it was his suggestion that it be terminated. He was particularly concerned that the agency could not coordinate and administer this kind of program. A number of the professionals in the field who had been involved in providing the training met with him to discuss the problems in the program and to hopefully reach a solution. At the time, he suggested that if the businesses involved could themselves participate more fully in the coordination and administration of the program that the results might be improved and the program continued. The industry then nominated the individual who was the subject of this opinion to be the coordinator. Because of the extensive duties involved the agency decided that he should be given a staff position.

He was responsible for developing the curriculum. His duties also included on-the-spot teaching with actual situations, teaching seminars, evaluations and examinations. He was responsible for coordinating the scheduling of the students as they satisfied their training requirement. He assigned the students to the various participating businesses as places became available in each training program. While the founder maintained over-all responsibility for the assignment of the students, the coordinator's recommendations were usually accepted.

Each business was responsible for providing an evaluation of each student's training to the agency and the coordinator was responsible for seeing that these evaluations were completed and reported to the agency. The actual testing of the students in the area of training remained the responsibility of the agency.

Each of the businesses received as many students as they could either handle or desired to teach. In one instance, the student numbers had actually declined because the business did not feel that it could justify the time and expense necessary for the training of the number of students that had been assigned to it. The agency had not received complaints that it had discriminated against any business in the assignment of students. Generally speaking, the income received from the businesses for this training formed an insignificant part of their total gross income.

The coordinator's position in this program was covered by HRS §84-14(a), a provision of the conflicts of interests section of the state ethics code. Despite the fact that he was a 25 percent time employee, he was a state employee for the purposes of the statute and was, of course, subject to the strictures of the ethics code.

The relevant provision provided that a state employee could not take action which would directly affect a business in which he held a substantial financial interest. It was agreed that the coordinator not only held a financial interest in his business but that he did, in his state position, take action which directly affected not only his own business but its competitors as well. And, for the purposes of the statute, his private interest was substantial. On the surface then it appeared that he should be prohibited from taking action which directly affected his company. However, our discussions with agency personnel indicated that it was in the nature of his position that he take action which affected all of the participating businesses. It was not feasible for him to disqualify himself in this area. Further, while the founder made all of the final decisions in the significant areas of this program, he readily conceded that the coordinator's recommendations carried great weight.

We noted in commenting on this case that the Commission had always been reluctant to grant requests for exceptions to the conflicts of interests section. However, we felt that there were mitigating circumstances here which justified the conclusion that we should refrain from imposing the full restrictions of HRS §84-14(a) in this matter. First of all, the founder took the position that the program could not operate effectively unless a person involved in the industry was actively involved in the instruction program. And, indeed, the agency had attempted to run the program without such a person holding this coordinator position. We agreed that it would be very difficult for anyone else to know what was actually going on in the training program. While another agency employee could conceivably have been assigned to observe the program, it could not be expected that the input and administration would be of nearly the same quality as that provided by the coordinator.

Secondly, the businesses' fees, while not nominal, did not provide them with a substantial profit, if any, for their participation in this program. It seemed likely that the fees paid them barely covered the time involved and the training and additional costs that they incurred. These fees clearly constituted a very small portion of the gross income earned by the participants.

Thirdly, we were concerned about placing a barrier before an innovative program whose goals and structure appeared to have been based upon the merits and the quality of the program rather than upon any attempt to favor one individual or business over another. It appeared to us

that the agency's decisions had been made in the best interests of the students rather than the best interests of either the agency employees or the businesses enlisted to provide the training.

At the same time, we did believe that a real conflict did exist here that could cause problems as the program changed and expanded. We believed that the assignment of students to each individual business was of little significance in terms of its overall impact upon the business providing instruction. However, the approval, or its withdrawal, of the participation of a business in the program was more significant. While such a decision might not have an apparent economic impact on a business, it could certainly affect its standing in the community; the elimination of a business from the program could conceivably have economic implications if the judgment had been made that its quality was not up to the agency's standard.

The coordinator had a very real interest in the evaluations of the participating businesses. Therefore, it was our opinion that the agency should independently evaluate the performance of the businesses as they trained the students. We stated that the coordinator's input into these decisions should be kept to a minimum. We believed that the agency should be able to establish procedures to enable other persons to evaluate the businesses that participated in the program. Since employees other than the coordinator were involved in the actual evaluation and testing of the students, we felt that there should be a means of achieving this result. While we did not question the coordinator's integrity and capabilities and were most impressed with his overall qualifications, we still felt that he should not be in a position to make significant judgments about his own private business or that of his competitors.

We commended the deputy for bringing this matter to the attention of the Commission. We requested that as the program changed in the future he should periodically keep us advised so that we could measure the implications of such changes for the ethics code in general and this opinion in particular.

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.