

OPINION NO. 385

We received a request for an advisory opinion from the deputy director of a state department. He had been employed with the department as a deputy director for several years.

Prior to becoming associated with this agency, he had purchased a farm in a rural area of Oahu. At the time of the purchase he had been under the impression that the adjacent land owner would permit him to use a private road that would give him access to the public road. When the landowner refused him this right his property became landlocked. He had applied for and received a revocable permit from a state agency to use a dirt road over state lands that separated his property from the public road. This permit was on a month-to-month basis and could be canceled at any time. To secure his right to use this right-of-way he wished to apply to the appropriate state agency for an easement over the state land. He wished to know if he might (1) make such application and (2) purchase this interest from the State if the request were to be approved.

A complicating factor in this matter was the fact that his agency intended to ask the agency to convey to it this same land. His department had a long-standing plan to develop homes in this area. He would, of course, as deputy director, be involved in the planning and execution of this project, although the concept for it had begun before he had joined the department. While we learned that it might be a year or more before the specifics of this exchange between the two agencies would be completed, it did appear to be reasonably certain that the subject lands would be conveyed to his department as part of an exchange of lands.

HRS §§84-13 and 84-14 had most direct application to this question.

The conflicts section, HRS §84-14(b), provides:

(b) 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.

He was a state employee and subject to the requirements of the ethics code. Further, it appeared that the easement, if granted, would be involved in actions he might take as deputy director. It was likely that the department would be required to take the existence of the easement into consideration as it planned the housing project. It was not inconceivable that such an easement would interfere with such planning and that, in his position, he would be called upon to deal with such a matter. However, we noted that an easement does not constitute ownership of real property and, therefore, did not appear to constitute a financial interest under HRS §84-3(6). Accordingly, his acquisition of such an interest did not appear to constitute a conflict of interest under HRS §84-14(b).

The fair treatment section, HRS §84-13, prohibits an employee from using state position to grant him or herself an unwarranted advantage or treatment. In the circumstances he had described to us, however, it appeared that his proposed action arose out of necessity rather than from any attempt on his part to gain something to which he was not otherwise entitled.

It was our conclusion, therefore, that he might apply for an easement and acquire that interest if his request received favorable action. However, we judged this situation as being somewhat unusual and as having the potential of raising serious questions of propriety. His

position in his department was a high-ranking one. As we had indicated, we expected that he would have a significant role in certain of the stages that the proposed housing project would pass through before it was completed. If he proceeded to apply for and receive the grant of an easement, he would be acquiring an interest, albeit not a financial one, that would be involved in action he would be expected to take in a state capacity.

We suggested, therefore, that he consider using a right-of-way across the state lands in the manner that he had proceeded along to this point. This would assure that the department's planning would not be complicated by his easement. If an easement were granted to him and such a complication arose, we were mindful that both he and the department might be subjected to criticism.

We recognized that he had become involved in a circumstance that was not of his own making. Accordingly, we could not prohibit him from applying for the subject easement. However, we were aware that his brother was a co-owner of the property. Therefore, we suggested that it would be advisable for him to direct his brother to take the more active role in pursuing the easement, should he decide to proceed in this manner. In addition, we advised him to apply for a general easement rather than a specific one. Under a general easement, he would have the right to cross the state lands to gain access to the highway, but his right would not inhere in a specific area of the state land. Since the easement would run with the land when it was transferred, it would be easier for his department to deal with a general easement as it developed its housing plans than with a specific easement.

We commended him for bringing this matter to our attention at an early time.

Dated: Honolulu, Hawaii, June 25, 1979.

STATE ETHICS COMMISSION
Gary B.K.T. Lee, Chairman
Dorothy K. Ching, Commissioner
Edith K. Kleinjans, Commissioner

Note: Commissioner Robert N. Mitcham was excused from the meeting at which this opinion was considered. Vice Chairman Paul C.T. Loo was not present during the discussion and consideration of this opinion.