

OPINION NO. 390

We received a request for an advisory opinion from the director of a state educational program. The future dissemination of the program's materials would involve the use of the communications industry so the program could reach outlying communities. Because the director owned an interest in a communications company, he had asked the Commission to determine how the ethics code would apply to these potentially conflicting interests.

He was responsible for the overall administration and direction of the state program. One particular problem that he faced as the administrator was the matter of bringing the program's resources to all of the people of the area the program was intended to serve. There were a number of areas that were quite isolated from the major population centers. In the past, people in these areas had either gone without services, or, on occasion, had been provided with instructors who were paid by the program to go out to the communities. This approach was expensive, and yet it did not reach the many people who could not travel to the areas served by these instructors.

The director advised us that by using the electronic media this problem could be solved. He had found that many institutions on the mainland were now using electronic media to reach large numbers of people with educational programs. He had found, for example, that television techniques had become sufficiently refined to make this an effective educational resource.

He had also found that highly sophisticated educational materials had been prepared by mainland institutions and would be available to the program at a rather low rental rate. He wished to explore the possibility of renting such materials and presenting them in the State so as to reach a greater number of residents than the program was able to serve within the limits of its budget.

However, he also owned a significant percentage of a company that was involved in the communications industry. While he received no compensation for his services, he was a substantial owner and served as both vice president and treasurer of the company. Accordingly, he asked us to determine if his ownership interest would conflict with his state responsibilities.

The director's private business was one of a group of small companies in the communications industry. The director had made inquiries of the larger broadcast companies, but these companies could not transmit the program's materials at the times when they could be expected to reach a large number of people. Further, the cost of using such facilities was prohibitive. The smaller companies were able to offer better hours for transmission of the materials at a lower cost. In addition, he had advised us that, should the Commission find no conflict of interest in the situation he had presented, his company would be agreeable to transmitting the materials at little or no cost to the program. The program would also use the facilities of all of his company's competitors and all of them would be treated equally. The fees charged by his company would be nominal and would, at the most, represent the cost to the company of employing an individual to monitor the airing of the program's materials.

HRS §84-14(a) was most relevant to the question he had raised. That section provides that a state employee may not take official action which directly affects the business in which the employee holds a substantial financial interest. As a state employee, he was subject to the provisions of the ethics code. HRS §84-3(6) defines a directorship or officership in a business to be a financial interest. His directorship and officership positions in his company were, therefore,

financial interests for the purposes of the ethics code. In addition, this Commission had stated in past opinions that an interest is substantial if it is of sufficient magnitude to influence an employee in his or her official judgments. This did not imply that a state employee would not attempt to be objective in carrying out his or her duties but simply recognized that a sizable financial interest in a business will have an influence which is difficult to gauge and to control objectively. His ownership of the company combined with his officership interest certainly constituted an interest that was substantial.

The more difficult question was to determine if, taken as a whole, the action he would take in presenting educational materials through the use of these facilities would be official action that would directly affect his own business. It seemed clear that any action he would take in this regard would be official action because it involved the exercise of discretionary authority. Here, the decision as to how to offer the program's materials was a significant one which involved the exercise of considerable judgment. As director, he had the responsibility to make such judgments, judgments that might have a significant impact upon both the program and the community it served. We also noted that it was highly unlikely that he could realistically delegate the decisions in this area. He was too much involved in the overall administration of the program to allow for such disqualification.

However, we also believed that the factual context within which he would make the official decisions that were to come in this area would not directly affect his business. It was our view that the impact of this decision upon his company was so negligible that it could not be said that it would have a direct effect upon it. The likelihood was that such a decision would have no effect upon the company and that it would simply be providing a service, equally along with its competitors, as a community service.

We could not say that these companies would not enjoy some benefit from providing this service. However, it seemed unlikely to us that these companies would gain many customers as a result of offering to transmit the program's materials. The number of new customers the companies would gain as a result of this service would, in all likelihood, be financially negligible.

Accordingly, it was our opinion that the juxtaposition of his employment with the state program and his ownership of his business did not constitute a conflict of interest under HRS §84-14(a) of the state ethics code. We did believe that some cautions were advisable here, however. First of all, because of his large interest in the business, we recommended that the company should provide the service at cost and that this figure should be a nominal amount. Further, we advised him that if the format he envisioned at the time of our opinion should change in any substantial respect, such that the effect upon the companies might be more than a negligible one, he should advise us promptly. He was also directed to notify us when a decision was finally made to pursue this idea. He was also to indicate to us the nature of the final format and the extent to which the program would be using media facilities.

We thanked him for bringing this matter to our attention at an early time and for his sensitivity to the ethics questions involved.

Dated: Honolulu, Hawaii, August 16, 1979.

STATE ETHICS COMMISSION
Gary B.K.T. Lee, Chairman
Edith K. Kleinjans, Commissioner
Robert N. Mitcham, Commissioner

Note: Commissioner Dorothy K. Ching 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.