

OPINION NO. 394

We received a request for an advisory opinion from a supervisor in a state agency who was also a member and an officer of the board of directors of a nonprofit corporation. He had also advised us that he would soon transfer to a lower level position in the same state agency.

Because his responsibilities had in the past and would in the future involve the corporation, he wished to know if his service on the board was in violation of the ethics code. The relevant section of the ethics code was found in HRS §84-14(a) which provides:

No employee shall take any official action directly affecting:

- (1) A business or other undertaking in which he has a substantial financial interest; or
- (2) A private undertaking in which he is engaged as legal counsel, advisor consultant, representative, or other agency capacity.

He appeared at a meeting of the Commission to discuss this matter with us. At that time he indicated that his involvement with the corporation arose through a previous association with another organization that was concerned with assisting persons with problems similar to those of persons the employee assisted in his state position. In his state position he had referred persons under his jurisdiction to this organization. An individual associated with that organization ultimately left and established the facility that was the subject of this opinion. At that time, certain of the residents of the former organization, including two of the employee's clients, transferred to the new facility. The employee became a member of its board of directors. He had continued to work, for a time, with persons requiring the kind of attention provided by this facility but eventually moved to his present position as a supervisor. He was no longer in a position to refer persons to such facilities but was responsible for supervising such persons after they had been referred to particular programs, including those of this organization.

Because he had continued supervising persons who had been referred to this organization and had become a member of its board of directors, he became concerned that a conflict might exist. Accordingly, he had contacted his supervisor to ask if his continued dual role would be acceptable.

In his discussions with us, he pointed out that because there were no professionals on its staff, there was considerable concern about the organization among members of the professional community that dealt with the same kind of problems. He indicated that this concern still persisted to some extent. Therefore, his supervisor had favored his continuing as a member of the board of directors so that the state agency, through him, would have insights into the operation of this facility.

In his career with the state agency, he had at times been in a position to recommend the placement of persons in this organization and other facilities as well; when a person was placed in a facility, an appropriate state agency would pay the facility's fee. In the case of this organization, the fee was \$595 per month. In his present position he no longer made recommendations on placement but did supervise those persons who had been placed in the facilities. In the position to which he hoped to transfer he would again be called upon to make placement recommendations.

He also pointed out in his testimony that of the approximately 117 residents who were presently participating in the organization's program, only six came under the jurisdiction of his agency. Further, while \$595 per month was paid to the organization for each person referred there, other programs were more expensive.

He also advised us that the organization, at the time of this request, was not primarily geared to the treatment of the age groups he generally dealt with and that those persons who were referred there from his agency were generally severe cases. The majority of persons who came under the supervision of his agency were referred to other agencies. Also, the monies paid to the organization by state agencies for the treatment of state clients formed only a very small part of its operating budget.

In his present position with the agency, he exercised a certain limited degree of supervision over the organization. Since he did have a supervisory role with respect to the persons who were placed in the agency, of necessity, he was in a position to pass judgment upon the quality of its program. In addition, the director of the agency evaluated the programs that persons were referred to by the agency and, in the course of making such evaluations, this employee could be called upon to give input. He pointed out that in his new position it was not likely that he would be called upon to make recommendations concerning the evaluation of such programs but would be restricted to making referrals.

It was our view that his dual role as a member of the board of directors of the organization and supervisor at the state agency created a conflict of interest. We believed that, while the nature of the conflict would change if he should transfer to the contemplated position, a conflict would still exist under the statute.

First of all, as an employee of a state agency, he was subject to the restrictions of the ethics code. Then, his position with the organization, though it was unpaid and though the organization was nonprofit, was, nevertheless, a substantial financial interest for the purposes of the ethics code (HRS §84-3(6)(F)). Further, it appeared that, in his present position, he did take official action that directly affected the organization and, in his future position, he would also be likely to take such action. Official action was defined to mean a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority. In other words, official action included all action which was of more than a ministerial nature. As we had previously stated, his role as a supervisor called upon him to make judgments concerning persons referred to facilities. Such judgment directly affected the facilities. In his future role he would be making recommendations as to the placement of persons in facilities. Such recommendations would call for the exercise of his professional judgment and discretion. We believed that these recommendations directly affected the facilities to which the referrals were ultimately made. We recognized that the sums of money and the numbers of persons that had been placed in the organization by his agency were not substantial in comparison to the total population and budget of the facility. However, these referrals did lend credibility to the program, and that sense of credibility might be of far more value and importance to the organization than the actual funds or persons referred to it. For this reason, we believed that the action he took in his state position affected the organization in a substantial as well as a direct manner.

We pointed out that, generally, the conflicts section merely called for abstention and did not require divestment of interests. However, in his particular situation, it appeared that abstention was impossible because the organization was an appropriate facility for certain of the persons he would

be counseling in his future role just as it had been an important resource for the persons he had supervised in his present position. Therefore, it was our holding that he should resign his position as a member of the board of directors.

We were most impressed with the candid nature of his presentation to this Commission and his obvious concern for the welfare of the persons he supervised. We saw no evidence of any kind that he had used his position to intentionally advantage the organization in an inappropriate way, and we commended him for his concern about the issues that we discussed in the opinion.

Finally, we added that while the statute would prohibit him from serving on the board of directors of the organization or from accepting a fee for any services provided to the organization, he might still retain his interest in and serve the organization in a voluntary capacity. As he was aware, the fair treatment section of the ethics code, HRS §84-13, would prohibit him from granting any unwarranted or unfair advantages to the organization. However, he had already indicated his sensitivity on this point.

In discussing this matter with him, we had learned that a number of other individuals employed by the agency might also be holding positions on the boards of directors of businesses and organizations that served the agency as resources. We noted that our holding and discussion here could have equal application to those situations, and accordingly, we would forward a copy of this opinion with a covering letter to the director of the agency.

Dated: Honolulu, Hawaii, October 2, 1979.

STATE ETHICS COMMISSION
Paul C.T. Loo, Vice 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. Chairman Gary B.K.T. Lee was not present during the discussion and consideration of this opinion.