

OPINION NO. 399

We received a request for an advisory opinion from a state employee who provided media and artistic services to a division of a state agency. His position description indicated that he had a broad range of duties but that his primary responsibilities concerned providing media materials production and duplication services. He also provided technical consultative services; administered an in-service training program to stimulate effective use of media by state personnel; obtained and produced educational media material; evaluated and recommended media equipment for state programs; and maintained and circulated a collection of multi-media materials. His duties included the holding of in-service workshops for state employees in a particular artistic area.

At the time of his request, his spouse was planning to open a business, the preparations for which had already begun, which would supply the type of materials used in his workshops and in his division. The spouse's goal was to make a particular artistic skill more readily available to people who were interested in this art form. Both the employee and his spouse had a background in this field and, while the primary financial interest was to be in the spouse's name, the employee was also to have an interest in the business and was to participate in its operation. He had asked the Commission to determine how the ethics code might affect his interest in the business and his position with the state department.

A number of sections of the ethics code had application to the question he had raised. Two sections were of particular concern, the fair treatment section, HRS §84-13, and the contracts section, HRS §84-15. HRS §84-13 contains a general prohibition against an employee using official position to secure or grant unwarranted privileges or contracts for him or herself or others. The section goes on to specifically prohibit using state time, equipment, or other facilities for private business purposes.

He had indicated that he would be assisting in the operation of the business. While this was an acceptable activity, we advised him to keep his business responsibilities entirely separate from his state position and office. In addition, he was instructed to avoid soliciting business from persons he had contact with or did business with in his state capacity.

We stated that he should also be aware that, because the business was related to his state duties, questions of appearance might be raised. We noted that, despite the fact that such questions might not be substantial, such an appearance, in our experience, could serve to limit the effectiveness of an employee. Accordingly, we advised him to be particularly cautious to keep his family business entirely separate from his state activities.

We found that the contracts section, HRS §84-15, would restrict, to some extent, the business that the shop would be able to do with state agencies. Subsection (a) of the provision provides as follows:

A state agency shall not enter into any contract with a legislator or an employee or with a business in which a legislator or an employee has a controlling interest, involving services or property of a value in excess of \$1,000 unless the contract has been awarded through an open, public process. A state agency may, however, enter into such contract without resort to a competitive bidding process when, in the judgment of the agency, the property or services should not, in the public interest, be acquired through competitive bidding; provided that written justification for the non-competitive award of such contract shall be made a matter of public record and shall be filed with the state ethics commission at least ten days before such contract is entered into.

Because his spouse's ownership of the business was imputed to him for the purposes of the ethics code, he had a controlling interest in the business. Accordingly, while the business could engage in contracts with state agencies, such contracts, if in excess of \$1,000 in value, might not be entered into unless awarded through an open, public process. The open, public process might simply consist of telephone or written bids, but evidence had to be shown that other businesses had had an opportunity to bid on the contract. If such a procedure were followed, then, subject to certain exceptions, a contract between his company and a state agency would be valid.

An exception to this general rule was contained in HRS §84-15(b) which provides:

A state agency shall not enter into a contract with any person or business which is represented or assisted personally in the matter by a person who has been an employee of the agency within the preceding two years and who participated while in state office or employment in the matter with which the contract is directly concerned.

The meaning of this subsection was that a state agency could not enter into a contract with his business if he, in his state capacity, had participated in the matter with which the contract was directly concerned. For example, if he were to requisition supplies, the agency that would purchase the material might not buy the goods from his business.

The conflicts of interests section also had limited application to the question he had raised. HRS §84-14(a) would restrict him from taking any official action that would directly affect the business. However, it appeared highly unlikely that he would be taking such action. He was instructed, however, that, should such a circumstance arise, he should either abstain from taking action or, in an ambiguous situation, request additional advice from the Commission.

He had also indicated that, when he gave workshops, he distributed a handout at the end of the class which listed the names of businesses that provided materials. In past opinions we had approved the distribution of such lists so long as they did not favor one business over another. Since his spouse's business would not be in either of their names, it did not appear that the inclusion of that business on the list would favor their business over the others noted on the list. We stated that he should not, of course, indicate his interest in this business to the persons he did business with and, stated further that, should it become well known in the department that he had such an interest, it might then be necessary to remove the name of the business from that list. At the time this opinion was issued, however, we did not believe that this should be necessary.

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

Dated: Honolulu, Hawaii, December 10, 1979.

STATE ETHICS COMMISSION
Dorothy K. Ching, Acting Chairman
Edith K. Kleinjans, Commissioner
Robert N. Mitcham, Commissioner

Note: Chairman Gary B.K.T. Lee and Vice Chairman Paul C.T. Loo were excused from the meeting at which this opinion was considered.