

OPINION NO. 403

We received a request for an advisory opinion from an employee who worked in a state facility. He was also a member and officer of the board of directors of an independent nonprofit corporation located on the grounds of the state facility, whose purpose was to assist the individuals at the facility. Because of the close relations between the organization and the state facility, the concern that a conflict of interest could arise was expressed. Accordingly, he requested an opinion from this Commission as to whether his service on the board of directors was a violation of the ethics code.

The relevant section of the ethics code was 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 informed us that his responsibilities included planning a comprehensive program for each person assigned to him. This required him to find suitable placement in a residential setting which was complemented by an activity program. The organization was one source of activity programs available to his clients.

He advised us that in his position as an officer, in actuality, he was more concerned with public relations and the coordination of fund-raising activities. It was the board's function to ensure the smooth running of the organization's programs. The executive director reported to the board at its meetings each month, since much of the organization's action required board approval. Generally, the board approved the programs as presented by its executive director.

Two different programs, each with its own source of funding, were administered. Each program supported its own teaching staff. The salaries for the central staff were split between the two programs. Programs were directed toward teaching individuals at the facility very basic skills.

In his state position his responsibilities included planning for the future placement of individuals in residential communities. Placement was complemented by an appropriate activity program, which had been worked out for each person. In this position, he had and would continue to have occasion to refer individuals to the organization. Since he had to evaluate the progress of each person whom he placed at the organization, he was in a position to pass judgment upon the quality of its programs. He pointed out that he was not in a position to make recommendations concerning the evaluation of programs in which individuals were placed and that his evaluation function was limited to those individuals for whom he was responsible for planning. This was confirmed by his superior in his department and by an

auditor in another state department. However, it was our view that his dual role as a member of the board of directors of the organization and as an employee at a state facility created a conflict of interest.

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 a nonprofit corporation, was nevertheless a substantial financial interest for the purpose of the ethics code (HRS §84-3(6)(F)). Further, it appeared that in his present position he took official action that directly affected the organization and that it was unlikely that he would be able to avoid taking such action in the future. "Official action" is 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 includes all action which is of more than a ministerial nature. In his role he made recommendations as to the placement of individuals in facilities with appropriate programs. Such recommendations called 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. In addition, the sums of money received by the organization were tied directly to the number of individuals from the state facility who were actually placed in one of the organization's programs. We were advised that the organization existed solely for the assistance of individuals at the facility and, generally, only these individuals were accepted into its programs. For this reason we believed the actions he took at the facility directly and substantially affected the organization's budget.

We noted that normally, when such a situation arose, the conflicts section called for divestment of the conflicting interest and, therefore, he would be required to resign from his position as a member of the board of directors. However, it was the Commission's feeling that an exception to this rule could be made in his case.

This decision was based upon the nature of the relationship between the organization and the state facility. Since its inception, the organization had performed services which were not provided by the state facility. Such services included collection and distribution of donated items, fundraising activities, and organization and placement of volunteers.

Later, the state facility started some activities in response to a concern that the needs of the individuals at the facility should be better met. It was hoped that they would be able to expand their experience. The state facility contracted with a private corporation to service some of its equipment. The money from this contract was deposited into a special fund and not put into the regular budget. However, a state policy prohibits a state agency from receiving funds from an outside source and depositing them in a special fund rather than the general fund. So that the program could continue to operate, the contract and responsibility were transferred to the organization four years later. This program, one of two administered by the organization, was a self-supporting program which continued to receive its funds by contracting with various private corporations to service equipment. The program received no other monies except by donation.

The organization was also closely tied to the State by its budget, since monies it received for a second program were earmarked for the organization in the facility's budget. This program was federally funded and was supplemented by state matching funds on a 75-25 ratio. A state department provided the facility with the State's 25 percent share of the matching funds. The organization then assigned those funds to another state department, which administered these partially federally funded programs. This second department then paid the entire 100 percent of the funds to the organization from the facility's budget.

By contract, the organization received its funds based upon the number of individuals placed in its second program. The organization billed the second department at the end of each month, and was reimbursed \$183 per month per individual up to the maximum amount allotted in the annual budget. This was approximately \$51,000 per year.

Additionally, the organization occupied a building on the grounds of the facility and was allowed to lease this building for one dollar a year so long as it continued to provide services to the facility.

While it was true that the organization was both constituted and viewed as an independent organization, it was obvious that it did enjoy close relations with a state facility. The Commission recognized that cordial relations were beneficial to both organizations in carrying out their objectives of care for individuals.

Because the primary goal of the organization was to serve the individuals at the facility, it was our view that the organization played an important role in assisting the State of Hawaii in meeting its program objective of community placement. We found that despite the private aspects of the organization and the independence from the State of Hawaii that was evident in its charter and bylaws, it nevertheless contributed a necessary service to the facility and the individuals it assisted. We found that a real benefit accrued to the State of Hawaii from the inter-relationship of the organization and the facility, and that the programs of the organization were, in a sense, state programs. It was our belief, therefore, that an exception to the conflicts-of-interests section could be made such that he did not need to resign from his position as a member of the board of directors.

We did, however, caution him to be very aware of the conflict in his two positions as discussed in this opinion. If circumstances should change--for example, if the organization began to administer other programs, or if the organization's budget was endangered--he was asked to consult with the Commission. In addition, we pointed out that the fair treatment section of the ethics code, HRS §84-13, prohibited him from granting any unwarranted or unfair advantage to the organization. We wished to emphasize that 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 and his superiors for their concern about the issues that we discussed in the opinion.

In his request for an advisory opinion he noted that there was another individual employed at the facility who also held a position on the board of directors of the

organization. Our holding and discussion in the opinion, of course, had equal application to him and accordingly we forwarded a copy of the opinion, with a covering letter, to his supervisor.

In addition, we learned that the auditor in one of the state departments intended to run a check on other employees working in similar capacities who might also be holding positions on the boards of directors of businesses and organizations that serve the department as resources. A copy of this opinion was forwarded to him with a covering letter which advised him that the situation discussed in the opinion was unusual, and that the exception granted to the subject employee was based on unique circumstances. The auditor was therefore advised that if he became aware of other similar situations, he should consult with the Commission and not assume that such situations would be covered by the opinion.

Dated: Honolulu, Hawaii, February 26, 1980.

STATE ETHICS COMMISSION

Gary B.K.T. Lee, Chairman

Dorothy K. Ching, Commissioner

Edith K. Kleinjans, Commissioner

Note: Vice Chairman Paul C.T. Loo and Commissioner Robert N. Mitcham were excused from the meeting at which this opinion was considered.