

OPINION NO. 411

We received a request from an employee of a state facility who was considering the acquisition of a new business interest in his area of expertise. He presented three possibilities: starting or investing in a business enterprise, working as a consultant on the design and construction of private facilities, or engaging in a business interest in a related area. Because of his position at the state facility, the employee wished to know, prior to beginning an enterprise, if a conflict of interest could arise between his state employment and any of those proposed private business interests.

HRS §84-14(b) prohibits an employee from acquiring a financial interest in a business or other undertaking which may be involved in official action he takes. A financial interest includes an employment or an ownership interest in a business. "Official action" as defined in HRS §84-3(7) includes a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority. We discussed the application of these sections of the code to each of his proposals.

He had considered the possibility of starting a small business operation in his spare time or investing in such an operation. The application of the ethics code was the same in these two instances since both were considered financial interests as defined in HRS §84-3(6). As an employee at the state facility, he coordinated research projects and also provided complete extension services to the public and producers in the area. This included the evaluation of potential sites for starting private businesses. This responsibility was shared by him and his supervisor who informed the Commission's staff that a third person might also be trained to participate in the evaluation process in the near future. Although the employee then would have been relieved of a major portion of the evaluation work, he would have continued to have input with respect to one aspect of evaluation of potential sites.

Because the evaluation was detailed, individuals were encouraged to begin, or discouraged from beginning, an enterprise based upon the results of the evaluation. This evaluation also determined whether the site would qualify a potential producer to enter into a cooperative agreement with the state facility. Under this agreement, the producer received free products and extension assistance from the facility for a certain period in exchange for information which the facility used for its research. The agreement also provided that the producer could receive the products at cost after the initial period had passed.

Since HRS §84-14(a) prohibited the taking of official action which affects an employee's financial interests, he was precluded from participating, in his state position, in any action, including an evaluation of a potential site, concerning his own business. However, even if he had disqualified himself from action concerning his own business, his participation in the evaluation process of other businesses affected his competitors, and thereby affected his own business. Therefore, under the code, he would not have been allowed to acquire an interest in such a business.

However, in the Commission staff's discussion with both the employee and his supervisor, it had been evident that the attitude at the facility was to encourage rather than

discourage the growth of this industry in Hawaii. Further, the policy at the facility was to let the individual who contemplated entering the industry decide if the risks were worth taking. In the past, on the rare occasion that an individual had decided to pursue a course of action not recommended by the personnel at the facility, the facility's assistance nonetheless had been made available to the new enterprise. It appeared, therefore, that the possibility that he could directly affect his business interest in a significant positive manner or obtain an advantage over other producers through an exercise of his discretion was minimal.

Because it was not reasonably foreseeable that this policy of actual, unrestricted assistance would change in the near future, an exception was allowed in this case, and he was advised that he could acquire an ownership interest in such an operation. However, he was advised to notify this Commission promptly if the status of his position or assignment at the facility changed or events within the department occurred such that he would take other official action which might directly affect his business or that of competitors.

In addition, we called his attention to the fair treatment section of the code, HRS §84-13, which provides that a state employee may not use his position to grant himself an unwarranted advantage or any unwarranted treatment. As there was a possibility that an appearance of impropriety could be created by his state and private relationships with the state facility, the employee was cautioned to scrupulously guard against using his state position to advance this private business pursuit should he elect to move forward with this option.

The employee also had asked this Commission if it would be permissible for him to provide private consultant services on the design and construction of private facilities. A similar question had been posed by three other employees in Advisory Opinion No. 344. There, the Commission found that provision of such services would be prohibited under HRS §§84-13 and 84-14(b) since free advice, although not a specific part of their formal duties, was provided as a part of their state responsibilities. Since dispensing such free advice was a specific part of his duties, this employee was prohibited from working as a consultant while employed by the State.

If the employee had become engaged in such a consultant relationship, he would, on occasion, have been required to tell a producer that, while he would be able to provide certain free advice in his state capacity, there would be a point at which the producer would be required to compensate him for his private services. The employee then would be in the anomalous situation of determining for himself the line between the free advice which he was required to give as a state employee and the private advice for which he would have expected compensation. Although both he and his superior suggested that a distinction could be drawn, we saw the line between state advice and private consultation as one which was difficult to determine.

In our view, an attempt to set parameters whereby an employee at the facility would be allowed to engage in private consultant work was unwise where, as in this case, the depth and breadth of the advice and assistance given to the public and producers was based upon the availability of time which the staff chose to allot to this task. Further, the statute

specifically prohibited the employee from acquiring as private clients persons who were directly involved in his state work. Accordingly, any consultant work would have had to have been limited to those persons who were not involved with the state facility. While the majority of people who took advantage of the assistance available from the facility were local residents, people who worked on a national or international level also requested information from the facility. Consequently, it was our view that a consultant relationship between the employee and any other person created both in appearance and in fact a conflict with his state duties.

Finally, his last alternative was to engage in the production of goods in a related area. We saw no problem with that business since it would not have been involved in any official action to be taken by the employee at the facility. In his request, he noted that, in the past, he had conducted experiments with respect to the production of the goods. Since the results of the experiments were available to the public, and in fact were common knowledge, he was not in a position to give himself an unwarranted advantage through his state employment. Further, there were no plans to begin production of the goods at the facility. This being the case, there was little likelihood that this business would have conflicted with his state duties.

We commended him for recognizing the ethics questions involved and for bringing them to the attention of the Commission prior to engaging in a new business.

Dated: Honolulu, Hawaii, July 21, 1980.

STATE ETHICS COMMISSION

Gary B.K.T. Lee, Chairman

Paul C.T. Loo, Vice Chairman

Dorothy K. Ching, Commissioner

Edith K. Kleinjans, Commissioner

Note: Commissioner Robert N. Mitcham was absent from the meeting at which this opinion was considered.