OPINION NO. 416

We received a request for an advisory opinion from the deputy director of a state agency who had responsibility for a critical state program. His request concerned the position of an individual employed as a control officer in the branch to which the program had been assigned. He had received a number of complaints claiming that the incumbent in the position was in a conflict of interest; he asked that the Commission resolve this question of alleged conflict.

As a result of this request, the Commission held a hearing at which the deputy, the employee, and one of the complaining parties appeared and gave testimony. The Commission determined that there might well be conflicts of interests on the part of both the employee and other individuals involved in the program and directed the staff to make further inquiries.

The Commission's jurisdiction in this matter derived from two sections of the ethics code, HRS §84-13, the fair treatment section, and HRS §84-14, the conflicts-of-interests section.

HRS §84-13 provides:

> No legislator or employee shall use or attempt to use his official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment for himself or others ....

An individual who exercises state authority to the unfair advantage of any person, business or organization violates this provision. An employee may be found in violation of this section even if he or she had not personally benefitted from the action taken. We noted that members of state boards and commissions were employees for the purposes of the ethics code.

HRS §84-14 provides, in pertinent part:

> (a) No employee shall take any official action directly affecting:
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> (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 ....
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> (b) No employee shall acquire financial interests in any business or other undertaking which he has reason to believe may be directly involved in official action to be taken by him.

As our inquiries progressed, the Commission learned that problems existed in the operation of the program. One of the problems was a breakdown in communication between specialists

in the field and the principal organizers and administrators of the program, including officers and employees of a private organization and officials within the department. Because the complaints concerning the administration of the program were numerous and represented a broad cross-section of the people involved, the Commission became concerned about the program itself. For that reason, the Commission, instead of following the usual course of issuing an advisory opinion in response to the deputy's request, proceeded to discuss these problems with the people involved in the hope that the different points of view might be accommodated.

As a result of these activities, the Commission issued a list of recommendations which it and the staff had discussed with most of the persons having supervisory responsibility for the program. The Commission's view was that, if these recommendations were implemented, many of the problems in the program could be resolved so that the individuals involved in its operation and development could proceed more positively in the future. The Commission's expectations were not met, and so it was decided that a written opinion should be issued, the Commission's rules and regulations followed, and its statutory authority asserted in the normal fashion.

The employee who had been the original subject of the opinion had resigned, his function taken over by a newly appointed branch chief. Because, unlike the former incumbent, the branch chief was a full-time state employee with no continuing private interest, his appointment to this position did not create a conflict of interest. However, the Commission's concerns were not fully resolved by this action. We stated that further steps needed to be taken to assure that interests which might have been affected negatively by past actions were now fully represented in the department's decision-making process. However, before proceeding to specific findings and orders, we discussed the problems that we had identified in the course of investigating this matter.

The private organization had been instrumental in establishing the program. It had been assisted by other individuals in the community who had also contributed to the program's development. The organization had been successful in obtaining federal funds and had established a program to train technicians to provide service in the field. Under a state statute, however, the department had been named the lead agency in the program. The private organization, through that statute, had been specifically mandated to have a significant role in the program and, as a result, the department had contracted with it to continue to provide technical training and other services.

Because certain state employees had been terminated from their state positions, the department had for some time lacked the needed expertise to run the program fully. As a result, the department had had to rely upon the private organization to perform a broad range of services. This turn of events had given the organization a more prominent role in the administration of the program than would ordinarily have been appropriate for a private agency receiving substantial government monies. Accordingly, the degree of direction and control exercised by the department had been limited and, therefore, while the private organization and its critics differed on important issues, the organization's point of view on many of these questions had prevailed. While there had been considerable discussion concerning the amount

of input received from specialists in the field, it was fair to say that the input had been limited. While personalities and historical factors were part of the difficulty, it seemed that these individuals had had less to say about the direction the program should be taking than appeared appropriate under the structure created by the legislature.

Many of the principal decision makers in the program had close ties to the private organization. The deputy who had requested the opinion had himself been a long-time member of the organization and was also a member of the executive board that administered the training program. The former state employee, the original subject of the opinion, was also a member of the organization and of the same executive board. Another organization member, generally recognized to be one of the foremost leaders in the development of the program, had been the chairman of the executive board, and, although he had left that position, our observations indicated that his influence in the program remained very strong. He was also a member and the chairman of a state committee which had been given substantial responsibilities in the program.

We felt certain that most of the individuals who had been substantially involved in the program were dedicated to its excellence and to its development. Because of personal biases toward institutions and individuals, many of these people had, however, adopted positions which, in our view, did not benefit the overall program and were inconsistent with the requirements of the ethics code.

First, with respect to the position of control officer, we noted that the responsibilities of that position had not been well defined. We also noted that the original incumbent had not been hired in an open, public way.

We concluded that the actions taken by the control officer would directly and significantly affect the private organization as well as other individuals and organizations in the private sector. Accordingly, it was our opinion that the control officer should not be an officer in the organization and should not maintain a financial interest in a business that was engaged in the industry he supervised in his state capacity.

Secondly, because the positions of control officer and branch chief could significantly influence the development of this program, we recommended that the department formally establish an advisory committee to the control officer so that the specialists and technicians working directly in the field would have a voice in the decisions that affected the system.

It was our observation that the private organization had very direct access to employees and officers in the department. While officials in the department and in the private organization had strong feelings about the specialists working in the field, we pointed out that it was the specialists who had direct contact with the persons most affected by the program. Furthermore, because the specialists were the only persons who directly and continuously supervised the trained persons, the program could not be completely developed without significant input from them. Accordingly, a formal decision-making body needed to be established under the control officer. While the department could exercise discretion in constituting this panel, it needed to include these specialists.

Thirdly, under the legislative act, the state committee had powers far more extensive than those usually delegated to advisory boards and commissions. While the advisory committee was quite active before it was reconstituted in July of 1979, it had now become passive, providing very little guidance to the department. While formerly a number of task forces created by the committee had actively studied problems in the program and had accepted input from a broad range of persons and organizations, that practice had been discontinued by the present committee.

Those persons and organizations most likely to be subjects of study by task forces could well benefit from the declining role of the committee. Because this committee could have significant influence in setting program policies and standards, we concluded that its chairmanship should not reside in individuals with a very strong interest in the development of the program. We saw that both the private organization, which held a large contract with the State, and the specialists might be significantly affected by the actions of an active state committee. Accordingly, we recommended that the chairmanship be held by someone who was neither a specialist nor a member of the private organization. We noted that a person who served as chairman of a large committee had a great deal of influence over its conduct. For the chairman to be either a member of the private organization or a specialist would create an atmosphere in which the granting of unwarranted advantages could be avoided only with great difficulty.

Fourth, the legislature, in establishing the state committee, stated that four members should be appointed who were experienced in the conduct and delivery of the services that were the subject of the program. We recognized that the statutory phrase was vague, but we also noted that not one of the persons appointed pursuant to the legislative mandate practiced that specialty on a daily basis. While almost all of these practitioners performed the specialty at one time or another, it appeared that the legislation had reference to the delivery of a specialized kind of service. The appointment of people who did not have that specialized experience was not consistent with the requirements of the act. It was an inconsistency that required correction if the committee was to maintain its credibility.

The Commission indicated its awareness that present problems in the program were not the fault of one party. We recognized that the specialty practitioners themselves may have contributed to the breakdown in communications that we believed might be severely affecting the quality of services being provided. However, the Commission had heard evidence that the level of monitoring and training was not what it could and should be. While we made no specific findings in this area, we stated that it was incumbent upon those persons having most direct control over the program to recognize the potentially severe detriment to the community if this allegation was well-founded. We also pointed out to those persons having control of the program that the criticisms identified in this opinion were widespread and were not restricted to persons who had been left out of the decision-making role assigned to the department.

We also noted that this opinion was limited to the specific issues we had identified. Its issuance did not prevent this Commission from proceeding with further investigations of alleged misconduct.

The Commission had been told that the present system was undergoing growing pains and that, inevitably, some people would gain while others would lose power and advantage as the program developed. Although the Commission recognized the difficulties inherent in developing an innovative program, we noted that decision-making should be objective, not favoring one side over another. The Commission was not persuaded that the decision-making process assured the public of such objective decision-making.

It was our conclusion that changes were needed and that the primary responsibility for such changes lay with the persons and agencies who exercised administrative authority.

Dated: Honolulu, Hawaii, October 2, 1980.

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

Note: Vice Chairman Paul C.T. Loo disqualified himself from consideration and preparation of this opinion.