

OPINION NO. 425

We received a request from an employee who had, as a part of his state duties, assisted in the establishment of a trade council formed for the purpose of aiding, encouraging, promoting and supporting the selling and exporting of Hawaiian-made products. The handling of the accounts had been the subject of an audit by another agency. That audit concluded that the department had paid funds to the council that were not justified by its contract with the council. In addition, the audit concluded that employees who had provided assistance to the council had violated HRS §84-14(a) of the Hawaii State Ethics Code. Because this employee was of the opinion that the conclusions of the auditing agency were incorrect and not justified by the facts, he had asked this Commission to determine if, indeed, employees of the agency had violated the State Ethics Code while providing services to the council.

As he had readily conceded, a motivation for his seeking this opinion was to redress the embarrassment caused by the publicity the audit had received in the press.

The auditing agency had not conferred with this Commission to determine if we agreed with its conclusion on the conflicts issue discussed in the audit. We had seen other agencies attempt to determine the application of the ethics code with unfortunate results and so had, from time to time, cautioned agencies to refer ethics questions to the Commission and not attempt to interpret or apply the code on their own.

As to our analysis of this matter, the relevant sections of the code were determined to be HRS §84-14(a), the conflicts-of-interests provision referred to in the audit, and HRS §84-13, the fair treatment section.

HRS §84-14(a) provided, in pertinent part, as follows:

No employee shall take any official action directly affecting:

...

- (2) A private undertaking in which he is engaged as legal counsel, advisor, consultant, representative, or other agency capacity;

Since the employees involved were state employees, they were, of course, subject to this section. In addition, there could be little doubt but that these employees took official action which directly affected the council. We noted here that official action was not restricted to final decision-making but included, as well, decisions, recommendations, approvals, disapprovals, or other actions, including inaction, which involve the use of discretionary authority. We noted, however, that for an employee to violate HRS §84-14(a), he must take action that affects a business by which he is *engaged*.

While it was true that the state employees had provided services to the council, they had done so in a state capacity and not in a private capacity. That is, all services provided to the council formed a part of the duties assigned to these employees in their state

capacities. They were at no time engaged by the council. For there to be a conflict of interest, there must be a loyalty to two organizations.

That loyalty is created either by an employment relationship or by an officership position of some kind. It can also result from a debtor and/or creditor relationship. No such tie existed between the employees and the council. Accordingly, our finding here was that the employees had not committed violations of the conflicts-of-interests section of the ethics code by providing services to the council.

We pointed out that violations of the ethics code could come about even when there was no financial tie to an organization if the facts indicated that an employee had granted an unwarranted advantage to it. For an advantage to be unwarranted, however, the employee had to be acting outside the scope of his state responsibility. In this case, however, no such action had been taken by the state employees. All actions were on record and had been authorized by appropriate department officials. Whatever advantage did accrue as a result of the activities of these employees was one intended by the charge to promote Hawaiian industry. While, superficially, there might appear to have been an advantage to the council, albeit a warranted one, the actual advantage was to a much broader segment of Hawaiian industry. Since such advantage was intended by state policy, it was difficult to see how it could be considered as unwarranted.

After reviewing the audit and the agency's response, we recognized that a difference of opinion existed as to what would constitute an expenditure against which the department could forward monies to the council. While we could see merit in some of the issues raised by the audit, we also understood the thrust of the arguments made by the agency in defense of its practices. Regardless of the right or wrong of the practices adopted by the agency, and we drew no conclusion on this point, it was clear that these practices had been adopted in an above-board manner with no advantage to the employees of the division or to any individual business. We could see no evidence of misconduct on the part of the state employees who had been involved in this matter.

A question was raised as to the appropriateness of the council providing meals to employees of the division and, in some cases, to their spouses at one or more gatherings that were a part of the council's product promotion. It appeared that these employees and their spouses had volunteered to work at these affairs with no compensation. In the context in which the meals had been accepted by these persons, we could see no evidence of an intent to influence the official conduct of the employees. We did recommend, however, that, in the future, the acceptability of such an offer be raised with the Commission beforehand.

We commended the employees who conducted the audit for their sensitivity to issues of ethics. However, we also commented that the appropriate procedure would have been to raise these issues with the Commission beforehand. We stated that the application of the ethics code was far more complex than appeared on the surface. Incorrect conclusions as to its application, as we had seen in this case, could cause great harm to individuals as well as to state agencies, a harm, from our experience, that was not easily remedied. We therefore took this opportunity to urge all state agencies to raise questions of ethics directly with the

Commission rather than attempt to resolve such questions on their own initiative. In order to help accomplish this purpose, we forwarded a copy of this opinion to the director of the auditing agency and a memorandum on this particular issue to all heads of state agencies.

We expressed our hope that the issuance of this opinion might repair some of the damage done in this matter. We also noted that the agency had demonstrated a particular sensitivity to questions of ethics and had been most cooperative with the Commission and most supportive of its opinions and interpretations. We had received like cooperation from the auditing agency and the employees involved in preparing the audit. And we also recognized that these employees had not been involved in the distribution of their confidential report. We noted, further, that our comments as to the ethics issue raised by the audit were not concerned with those points made in the audit that lay outside our jurisdiction. It was our impression that the employees of each agency had done their best to meet their particular responsibilities. We concluded with the thought that a discussion as to why the goals of the agencies had come into conflict could lead to a constructive resolution of the difference of opinion that existed.

Dated: Honolulu, Hawaii, October 22, 1980.

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