

OPINION NO. 435

We received a request for an advisory opinion from a division chief who was responsible for providing support to a number of fledgling industries in the State of Hawaii in order to develop new areas of employment. One industry had received support from a state department through the establishment of a private, nonprofit organization. It was hoped that the organization would act as a catalyst for the industry by providing a mechanism through which interested individuals in the industry could operate. The organization wished to employ a faculty member at a state institution in a part-time position as its director of technology. If he accepted the position, the faculty member would provide consultation services to the organization and evaluate its research and technical matters. Because the faculty member was the chairman of a department at the state institution, the division chief wished to know if it was permissible, under the State Ethics Code, for the faculty member to accept the position.

The most relevant section of the ethics code was HRS §84-14(b), which states:

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.

We noted that as a faculty member of a state institution the employee was subject to the provisions of the code. Further, an employment was considered a financial interest pursuant to HRS §84-3(6). Finally, official action, as defined in the code, included a "decision, recommendation, approval, disapproval, or other action, including inaction, which involved the use of discretionary authority." In applying the code, the Commission had to determine whether the faculty member would take action, as chairman of the department or as a faculty member, which would affect the organization.

As chairman of the department at the state institution, the employee exercised little discretion with respect to the rest of the department's faculty. For example, if a faculty member wished to obtain approval to participate in work outside of the institution, the proposal was submitted to another office for approval; the employee did not participate in this. Further, the employee did not have the authority to reduce the responsibilities an individual faculty member had at the institution. As a consequence, while the organization might later solicit participation in its programs by members of the department's faculty, the faculty member would not have been in a position to facilitate such participation through his state position. Finally, while the organization might have contracted for the services of individual faculty members, the institution would not be directly involved, and, therefore, discretionary action on the part of the employee as the department's chairman would not have been required. Under those circumstances, it was the Commission's opinion that the employee would not be placed in a position of conflict under the ethics code.

In addition to the conflicts-of-interests provisions, the Commission also considered the application of a portion of the fair treatment section, HRS §84-13(2), which prohibits an employee from receiving additional compensation for the performance of his official duties or

responsibilities. Because the contract agreements for the institution's faculty members provided, within certain time restrictions, for acceptance of compensation for outside research or consultative services, the Commission had determined that it was permissible for the employee to accept the position with the organization.

Nevertheless, HRS §84-13, the fair treatment section, which prohibits an employee from the use or attempted use of "[H]is official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for himself or others ..." did apply. As a consequence, the Commission determined that if the employee accepted the position with the organization, he should refrain from referring to his position with the institution when acting on behalf of the organization. Finally, the Commission stated that the employee should be aware that HRS §84-13(3) would require him to avoid using any state time, equipment, or facilities for this private business purpose.

We appreciated the division chief's sensitivity to the ethical questions involved in this matter.

Dated: Honolulu, Hawaii, April 30, 1981.

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