

ADVISORY OPINION NO. 445

The administrator of a state program who served as an officer of a private nonprofit organization and also as a member of the board of directors of a second private nonprofit organization wished to know if, under the State Ethics Code, a conflict of interest existed between his state employment and those private interests.

Because the administrator had acquired both positions subsequent to becoming a state employee, the relevant section of the 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 maybe directly involved in official action to be taken by him.

The employee's positions with both organizations, though they were unpaid and though both organizations were nonprofit corporations, were nevertheless substantial financial interests for purposes of the ethics code because of the fiduciary responsibilities which accompanied the positions. Further, "official action" was defined to mean a decision, recommendation, approval, disapproval, or other action, including inaction, which involved the use of discretionary authority. In other words, official action included all action which was of more than a ministerial nature.

As an administrator, the employee was responsible for managing a program which coordinated the activities of people who volunteered their time and services to a certain community. The volunteers also provided assistance where necessary in other state programs. At an earlier time, it had become apparent to the employee and others that the program did not have the ability to fulfill all of its responsibilities as coordinator of volunteers to the community. For example, although the program had wished to send its volunteers to seminars to increase their awareness and skills, it had been unable to do so since funds allocated for that purpose by the department it served were so limited that even full-time department employees were not always able to attend. It was decided that an alternative method of financing was required, and, to meet this need as well as others, a private nonprofit organization was created.

The charter of incorporation of the organization stated that its purpose was to "[s]upport and assist the volunteer services program, a state and federally funded volunteer organization of the State of Hawaii, in lessening the burdens of the State of Hawaii in the operations of a particular system" Its objectives included recruiting volunteers to perform public service within the facilities of the State, assisting agencies in the State in reuniting individuals with the community through citizen participation, providing funds for additional volunteer programs within the state system, and engaging in activities designed to lessen the burden of the State of Hawaii in the operation of the system. It was clear, then, that the organization existed solely to support the state program and other state programs in the system.

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 agency, so much so, in fact, that the distinction between the two was more blurred than clear. For example, the organization was housed within the offices of the state program and used the program's return address as its own. Further, the organization's meetings were usually held at the state office during state hours.

By allowing the organization the use of a state facility, it appeared that the employee did take official action which affected the organization, and accordingly, the employee would normally have been required to divest himself of the interest. However, because the primary goal of the organization was to support the program in its objectives as a state agency, it was our view that it played a significant role in assisting the program in meeting the State's objectives through the organization and development of volunteers to the state department. We found, therefore, that a real benefit accrued to the State of Hawaii from the interrelationship of the program and the organization, and that the organization was, in a sense, a state organization. As a consequence, it was our belief that an exception to the conflicts-of-interests section could be made so that the employee was not required to resign his position as an officer. The Commission advised the employee to consult with the Commission if the relationship between the state agency and private organization changed. In addition, the Commission noted that the fair treatment section of the ethics code, HRS §84-13, prohibits the employee from using his state position to grant any unwarranted or unfair advantage to the organization. Nevertheless, we wished to emphasize that we saw no evidence of any kind that the employee had used his position to intentionally advantage the organization in an inappropriate way.

The employee had also asked if it was permissible for him to continue his membership on the board of directors of the second association. While the department did contract for services provided to certain individuals by the association, such contracts and transactions were not a part of the employee's responsibilities. As an administrator of a single state program, the employee was not in a position to take official action with respect to the association, except in instances of cooperation between the two agencies. For example, in keeping with the program's responsibility of placing volunteers where they could have been of the most assistance, the program did, on occasion, publish in its newsletter a notice for the association soliciting a particular kind of volunteer. The association performed a reciprocal service for the program. The employee did not, however, pass judgment on the quality or sufficiency of the association's programs or participate in contract negotiations, and therefore, the Commission found that the employee could continue as a member of the board of directors of the association. Again, the Commission cautioned the employee to be aware that HRS §84-13, the fair treatment section, also applied and would prohibit him from granting any unwarranted advantages to the association. We commended the employee for his concern about the ethical considerations pertaining to his positions.

Date: Honolulu, Hawaii, September 9, 1981.

STATE ETHICS COMMISSION
Edith K. Kleinjans, Chairman
Paul C.T. Loo, Vice Chairman
Gary B.K.T. Lee, Commissioner

Note: Commissioners Dorothy K. Ching and Commissioner Robert N. Mitcham were excused from the meeting at which this opinion was considered.