

## OPINION NO. 477

We received a request for an advisory opinion from a neighbor island member of a state board that directed the affairs of a state agency. One of the state agency's neighbor island offices and the board member's private business office occupied separate second-floor suites in the same building. Because the board member planned to begin construction of an office building that would be ready for occupancy sometime at the end of the year, he wished to know if it would be permissible, under the State Ethics Code, for the state agency to rent space in the new building. The board member appeared at a Commission meeting to discuss his proposal.

At that meeting, the board member noted that the state agency presently had one employee who served as the island's community information specialist. Much of her time was spent doing research and, as a consequence, she was not in the state office very often. As a courtesy, the board member had loaned his secretary to the state agency during the periods that the office was not staffed. The board member's secretary answered the phone and assisted individuals who came to the state office with filling out their forms as necessary. The board member also described the situation on the other neighbor islands, stating that those offices had arranged for calls to be taken by telephone answering machines since the board members on those islands were not self-employed. The board member also commented that he felt that because the state agency would be expanding its program, the state agency's offices would become increasingly busy. Consequently, it was the board member's opinion that telephone answering machines probably would not be sufficient to meet the agency's requirements.

The state agency had been paying \$.75 a square foot for 400 square feet of second-floor office space. The board member stated that he anticipated offering the state agency approximately 500 square feet of ground-floor space in his new office building at a rate of \$1.00 per square foot. The building, a total of 4,000 square feet of space, would be centrally air-conditioned. And, unlike the state agency's present space, there would be ample off-the-street parking for anyone doing business in the state agency's office.

Two sections of the ethics code were applicable. The Commission first looked at the question in light of a portion of the conflicts-of-interests section, HRS §84-14(b). This provision prohibits employees from acquiring a financial interest in a business or other undertaking if they have reason to believe that the business may be directly involved in official action they would normally be expected to take in their state positions. State board members are included in the definition of "employees" in the ethics code. Further, in Advisory Opinion No. 131, the Commission decided that a potential lease was a financial interest. As a part of the board member's responsibilities, he served as the chairman of the board's budget and finance committee which, among other things, set the schedule of rents and floor areas required by each of the agency's offices. Once the schedule had been adopted by the entire board, it was the agency staff's responsibility to seek out and negotiate for space for each of the offices. The board member stated, however, that because of his expertise in real estate and business, the individual staff members who were actually responsible for negotiating the contracts for space had consulted him for his opinion and advice on those matters. In this regard, the board member candidly admitted that such consultation would be likely in the future. Accordingly, the Commission found that the board member would be prohibited by HRS §84-14(b) from entering into a contract for a lease with the state agency.

In reviewing this question, the Commission also considered the application of HRS §84-13(4), which states:

**§84-13 Fair treatment.** 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; including but not limited to the following:

....

- (4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom he inspects or supervises in his official capacity.

This section is normally applied to private transactions between supervisors and subordinates or inspectors and those whom they inspect. Nevertheless, the Commission noted that if negotiations for the lease of space in the board member's new office building had been initiated, he would have been placed in the awkward position of negotiating a private business transaction with an employee whom he had authority over. Furthermore, it was the Commission's opinion that when a board member seeks to do business with a state agency over which he has authority, an appearance of impropriety is very likely to arise. As a consequence, even if the pursuit of a lease with the state agency would have been permitted by the conflicts-of-interests section, the Commission would have strongly advised the employee against placing himself in a position where such an appearance of impropriety might result.

In coming to these conclusions, the Commission did consider reasons that would favor such a contract. First of all, the board member indicated that he would offer the office space to the state agency at a reduced rate; this reduced rate would have been verifiable if the state agency solicited proposals in an open, public process. Furthermore, the Commission was aware that, because of budgetary constraints, it may have been beneficial to the state agency if the board member could continue to loan his staff to the state agency. Nevertheless, it was apparent to the Commission that the overall negative effect of potential conflicts of interest and the appearance of impropriety arising outweighed any possible benefits to the state agency.

The Commission appreciated the board member's candid presentation of his proposal. The Commission also noted the sensitivity he had exhibited to the ethical considerations of his situation by bring this matter to the Commission at an early time.

Dated: Honolulu, Hawaii, October 6, 1982.

STATE ETHICS COMMISSION  
Edith K. Kleinjans, Chairperson  
Allen K. Hoe, Commissioner  
Robert N. Mitcham, Commissioner

Note: Vice Chairperson Paul C.T. Loo and Commissioner Gary B.K.T. Lee were excused from the meeting at which this opinion was considered.