

## OPINION NO. 512

The Commission received a request for an advisory opinion from the head of a university department and his assistant. The two asked the Commission to determine whether they might form a private corporation and employ as consultants other faculty members in their department. Both stated that their consultants, in performing their work, might in turn occasionally hire graduate or undergraduate students. The department head and the assistant further informed the Commission that their corporation would restrict itself to performing classified or proprietary research. They stated that such research cannot be performed at the university because the results of research conducted at the university must be made public. They also stated that three more members of their corporation's board would be selected from university faculty.

The provision of the ethics code most pertinent to the question of whether the department head and his assistant could form a corporation together was HRS §84-13(4), which prohibits a state employee from "[s]oliciting, 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." The rationale behind HRS §84-13(4) is that subordinate employees may feel coerced or pressured into engaging in substantial financial transactions in which they do not wish to participate.

Although initially the assistant's title seemed to indicate that he was subordinate to the department head, the Commission believed that in actuality a subordinate relationship did not exist, and therefore determined that HRS §84-13(4) would not bar the two from forming a private corporation. The Commission noted that both had stated that the assistant oversaw maintenance and operations in the department, while the department head was responsible for research and the faculty. In making this determination, the Commission also took into consideration the views of two high-ranking university administrators. Both administrators stated to the Commission that corporations such as the one the department head and assistant wished to establish would attract quality faculty to the university by providing outside consulting opportunities and would also aid in the development of high-tech industries. The administrators also stated that prohibiting faculty members from working together or from employing graduate or undergraduate students would be extremely detrimental to the university. The Commission also noted that the assistant had stated that he had fully and enthusiastically participated in the formation of the corporation from the outset.

HRS §84-13(4) was also pertinent to the question of the department head and assistant employing other faculty members from their department as consultants. Since the department head and assistant had stated that, because of academic freedom, they were not involved in regulating or reviewing the work of other faculty members, the Commission believed that HRS §84-13(4) would not prohibit them from employing other faculty members as consultants. The Commission noted that both had stated that important personnel decisions, such as those involving tenure and promotion, were handled by committees, the membership of which rotated. Furthermore, the Commission recognized, in accordance with the views expressed by the two university administrators, that the university would benefit

from the availability to faculty of outside consulting opportunities. Finally, the Commission also noted the fact that, given the nature of the research the corporation wished to perform, there was a limited pool of qualified consultants in the State.

In their request for an advisory opinion, the department head and assistant stated that graduate or undergraduate students might also work for their corporation. Although HRS §84-13(4) was also relevant to this question, the Commission believed that this provision of the code would not prohibit students from working for the corporation or from working with consultants employed by the corporation, since such relationships, especially in the case of graduate students, had long been recognized by the university as part of the process of professional development. The Commission noted that the department head, his assistant, and the two university administrators had confirmed this aspect of university education, pointing out that, besides gaining valuable professional experience, students would be given an opportunity to earn income.

Aside from these questions raised in the request for an advisory opinion, the Commission was also concerned about the possibility of the corporation competing with the university for research projects. Because HRS §84-13 prohibits state employees from using their official positions to obtain unwarranted advantages, conducting research that would normally be performed at the university would constitute a violation of the ethics code. However, since the department head and the assistant stated that as a corporate policy the corporation would only engage in research that the university was prohibited from performing and would notify university administrators of the projects undertaken, the Commission was satisfied that there would be sufficient safeguards to prevent a serious question of competition with the university from arising.

Because HRS §84-13 prohibits unfair treatment, the Commission was also concerned that the university positions held by the department head and assistant might give their corporation an unfair advantage over other companies in acquiring research contracts. However, both stated that those who sought research assistance were generally aware of the scientists or companies that were capable of undertaking the projects. Furthermore, both stated that they did not intend to make referrals. In any case, the Commission informed them that they should avoid referring clients to their own company unless referrals could be made in a fair manner.

Other provisions of the ethics code that had general application to the department head and assistant forming a private corporation were other parts of the fair treatment section, the confidential information section, the contracts section, and the conflicts-of-interests section of the code. So that the department head and assistant would be aware of other ethical concerns, the Commission discussed each of these sections briefly as follows.

While the fair treatment section of the ethics code, HRS §84-13, in general prohibits a state employee from using or attempting to use his official position to secure unwarranted advantages for himself or others, other sections of HRS §84-13, besides HRS §84-13(4) discussed above, bar an employee from the following specific misuses of position:

- (1) Seeking other employment or contract for services for himself by the use or attempted use of his office or position;
- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of his official duties or responsibilities except as provided by law; or
- (3) Using state time, equipment, or other facilities for private business purposes.

This last section, HRS §84-13(3), prohibits employees, for example, from using state telephones to conduct private business or using state offices for private business purposes. The fair treatment section of the code also prohibits employees from using their positions in an inappropriate manner to obtain the services of consultants or other employees for their private businesses.

The confidential information section of the code, HRS §84-12, prohibits state employees from disclosing information they acquire in the course of their official duties if the information is by law or practice not available to the public. This section also prohibits employees from using such information for their own personal gain or for the benefit of anyone.

Part of the contracts section of the code, HRS §84-15(a), provides that state agencies shall not enter into any contract with an employee or with a business in which an employee has a controlling interest, involving services or property of a value in excess of \$1,000, unless the contract has been awarded through an open, public process. A state agency may, however, enter into such a contract without resort to a competitive bidding process when, in the judgment of the agency, the property or services should not, in the public interest, be acquired through competitive bidding, provided that written justification for the non-competitive award of the contract be made a matter of public record and be filed with the Commission at least ten days before the contract is entered into. The Commission informed the department head and assistant that the university, of course, was considered a state agency under the ethics law.

Finally, HRS §84-14(a), a part of the conflicts-of-interests section of the code, states that employees shall not take any official action that directly affects businesses in which they have substantial financial interests. The Commission informed the department head and assistant that HRS §84-14(a) would prohibit them, for example, from taking official action that would directly affect their corporation in the event that their corporation appeared before them for official action in the future.

The Commission informed the department head and assistant that, should questions arise as to the applicability of the above code provisions to a specific situation, they might wish to contact the Commission again for another opinion. The Commission also mentioned that, because opinions issued by the Commission are based on and limited to the facts set forth in the opinion, other faculty members who become involved with the corporation might

wish to request an advisory opinion from the Commission regarding their own particular circumstances.

Finally, although the Commission believed that the department head and assistant could form a corporation and employ other faculty members or students, the Commission pointed out that its decision did not preclude it from examining ethical problems that might arise in the future.

The Commission commended the department head and his assistant for their sensitivity to the ethical considerations raised in this case and told them that it appreciated their bringing this matter before the Commission at an early time. The Commission has found that this kind of attention to ethical matters furthers public confidence in state employees and thus contributes to an improved ethical climate in state government.

Dated: Honolulu, Hawaii, October 28, 1983.

STATE ETHICS COMMISSION  
Edith K. Kleinjans, Chairperson  
Allen K. Hoe, Vice Chairperson  
Mildred D. Kosaki, Commissioner  
Rabbi Arnold J. Magid, Commissioner

Note: Commissioner Gary B.K.T. Lee was excused from the meeting at which this opinion was considered.