

OPINION NO. 526

We received a request for an advisory opinion from the head of an institution who had been considering leaving state service. The employee wished to know if it was permissible, under the State Ethics Code, for him to become a state consultant contractor, a private practitioner who provided services at a state site on a private basis. If the employee were permitted to fill the position, his clients would be individuals who would be referred to him for treatment by the state institution. In return for the use of the state office space, the employee would provide professional services to the institution. The employee explained, and this had been confirmed by the division's chief, that the plan adopted by the community advisory board implemented the division's policy of moving services from the State to the private sector. Furthermore, the employee also outlined the procedure followed by the institution to secure applicants for the position. Although the institution had actively solicited private practitioners in two communities and had published an advertisement in a national newspaper, the institution had only received a few inquiries about the position and had not received any official applications. Accordingly, the employee had considered applying for the position.

As the head of the institution, the employee performed in a dual capacity: in an administrative role and as a direct provider of services to clients. He had performed both functions on a temporary basis for over a year and had anticipated performing only the administrative functions once the consultant contractor position was filled. In the employee's view, if he left state service and filled the consultant contractor position, the division would then have the option of filling the administrator's position at a reduced salary. In its review of the situation, the Commission considered the application of a number of sections of the ethics code (the fair treatment section, the contracts section, and the post-employment section) but found the application of HRS §84-14(a), a portion of the conflicts-of-interests section, to be the most relevant. This section states as follows:

No employee shall take any official action directly affecting:

- (1) A business or other undertaking in which he has a substantial financial interest; or
- (2) A private undertaking in which he is engaged as legal counsel, advisor, consultant, representative, or other agency capacity.

"Official action" as defined by the statute includes a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority. Although the employee had not yet started his private practice, the Commission believed that his private interest in possible employment with the State as a consultant contractor for which negotiations might have begun constituted a financial interest under the ethics code.

It was clear to the Commission that, as the head of the institution, the employee was responsible for overseeing all administrative matters, including the search for a practitioner interested in becoming the consultant for the institution. The Commission was aware that the

employee had taken an active part in this matter. Specifically, the employee had served on the advisory committee that drew up the plan for the county's system. In addition, as the institution's administrative head, the employee had been responsible for implementing this plan. Furthermore, not only did the employee send out the letters soliciting individuals to apply for the position but he also had served as the contact person for follow-up information.

The Commission understood that the advisory board's plan to hire an individual as a consultant contractor for the institution followed the general guidelines and policy of the division. The Commission also recognized that it was the employee's responsibility as the administrator of the institution to participate in formulating the plan and to oversee and carry out the search tasks. Thus, because the employee had been involved in the entire process, the Commission in its discussion considered that the circumstances might be clouded such that it would be inappropriate for the employee to be considered as an applicant for the position.

In its search for a solution, the Commission discussed advising the division chief that if the employee wished to be considered as an applicant, the entire process would have to be redone. Specifically, the Commission contemplated requiring an independent review and evaluation of the situation at the institution. And, if the review and evaluation determined that the current plan remained the best plan for the institution, the Commission considered advising that an independent search be subsequently conducted.

However, before coming to a conclusion, the Commission also weighed the application of HRS §84-13, the fair treatment section, which prohibits employees from using their official positions to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment for themselves or others. The Commission recognized that the impression of unfairness created by the employee's active participation in this matter could serve to call into question the credibility of the institution. Nevertheless, the Commission saw no evidence that indicated any attempt on the employee's part to use his position to unfairly advantage himself. First of all, the Commission believed that the wording of the solicitation letters was straightforward and illustrated a good faith attempt to attract applicants to the position. Secondly, the Commission noted that the letters were mailed to a large population of practitioners. In the Commission's opinion, these mailings, together with an advertisement in a professional newspaper, constituted a competitive, open, public process. The Commission also noted that members of the community had been active participants in this project and that, once the guidelines were explained, the private practitioners in the area did not object when the employee announced his proposed intention to seek the position at a meeting held in mid-August, 1983. In summary, the Commission was convinced that the employee was the only individual who was willing to apply for and accept the position. Given these circumstances, the Commission concluded that it would not preclude the employee from pursuing this position.

In reaching this conclusion, the Commission was cognizant of the practical effect on the institution if it were required to redo the whole process. In the Commission's opinion, an independent review and a new search conducted in an open, public manner without the benefit of the employee's input would be the most satisfactory solution under the ethical

guidelines. The Commission, however, recognized that this would be cumbersome and would unduly postpone the implementation of the institution's program. The Commission believed that, despite the employee's participation in the process, the search was in fact conducted in a manner that would satisfy the provisions of the ethics code. Therefore, the Commission decided that if the employee and the division chief agreed to allow the contract and the circumstances surrounding the employee's application to become a matter of public record, the Commission would permit the employee to apply for the position without requiring the division to undertake another search. If this alternative was agreeable, the documents would become available for public review as a part of the Commission's public [HRS §84-15(a) contract] files.

The Commission appreciated the cooperation of the employee and the division chief and commended the employee for his interest in preserving ethics in government.

Dated: Honolulu, Hawaii, March 19, 1984.

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