

OPINION NO. 532

The Commission received a request for an advisory opinion from a state employee who asked the Commission to determine whether his private company and state position were in conflict. The employee stated that his company was a sole proprietorship under his name. The employee also stated that his private company had contracts with various state agencies.

A number of sections of the ethics code were relevant to the question the employee raised. The first of these, HRS §84-14(a), states that employees shall not take official action directly affecting businesses in which they have substantial financial interests. Since the employee stated that in his state position he did not take any official action affecting his private company, the Commission determined that this section of the ethics code was inapplicable to his situation. However, the Commission informed the employee that HRS §84-14(a) would require him to disqualify himself if at a later time he was required to take official action affecting his private company.

Because the employee stated that his company had contracts with other state agencies and that these contracts were renewed upon expiration, the contracts section of the ethics code, HRS §84-15(a), was also applicable to his case. HRS §84-15(a) requires a state agency to go through a competitive bidding process when awarding contracts over \$1,000 to companies in which a state employee has a controlling interest. A state agency, however, may enter into such a contract without resort to a competitive bidding process when, in the judgment of the agency, the services should not, in the public interest, be acquired through competitive bidding. However, a written justification for the non-competitive award of the contract must be made a matter of public record and must be filed with the State Ethics Commission at least ten days before the contract is entered into. Even in cases where a written justification is submitted to the Commission, HRS §84-15(a) requires the state agency to go through an "open, public process" before awarding contracts to a company in which a state employee or official has a controlling interest. The "open, public process" does not have to be as rigorous as the competitive bidding process, but must ensure that the contract is awarded in a fair manner.

Although the employee received his state contracts before becoming a state employee, the Commission informed him that HRS §84-15(a) applies to any contract between a state agency and the employee's private company while he is employed by the State. The Commission told the employee that if state agencies were to renew contracts with the employee's private company, they would have to utilize a competitive bidding process or, in the alternative, an open, public process if a letter of justification was filed with the Commission. Since what constitutes an "open, public process" differs from case to case, the Commission told the employee that he might wish to refer state agencies to the Commission if they desired to enter into contracts with the employee's private company while he was employed by the State. The Commission informed the employee that generally an "open, public process" would be any process that offers all those interested in competing for the contract an opportunity to do so. The purpose of HRS §84-15(a) is to ensure that state employees do not have a special advantage in competing for contracts because of their status as state employees.

Although the Commission found that there was no conflict between the employee's state position and his private financial interests, the Commission briefly discussed for the employee's information the restrictions found in HRS §§84-13(3), 84-12, and 84-14(b). HRS §84-13(3) prohibits state employees from using state time, state equipment, or state facilities for private business purposes. This provision of the code, for example, prohibits state employees from using state telephones or state offices for private business purposes. HRS §84-12 prohibits state employees from using confidential information for personal purposes. Confidential information is defined as any information that by law or practice is not available to the public and that is acquired in the course of a state employee's official duties. Finally, HRS §84-14(b) prohibits state employees from acquiring new financial interests if there is reason to believe that those financial interests may be directly involved in official action to be taken by the employees in the course of performing their official duties.

The Commission told the employee that it understood that his supervisor first raised the question of a possible conflict of interest between the employee's state position and his private company. The Commission commended the employee for quickly seeking its advice in regard to the question posed by the supervisor and also commended the employee for his candor in discussing the facts of his case.

Dated: Honolulu, Hawaii, July 6, 1984.

STATE ETHICS COMMISSION

Allen K. Hoe, Chairperson

Tim S. Farr, Commissioner

Mildred D. Kosaki, Commissioner

Rabbi Arnold J. Magid, Commissioner

Note: Vice Chairperson Edith K. Kleinjans was excused from the meeting at which this opinion was considered.