

OPINION NO. 536

The Commission received from an employee in the section of a department that was responsible for certain projects in state facilities a request for an advisory opinion on whether the department might enter into a contract for accounting services with a member of an advisory board that served the section. This board was not mandated by statute, regulation, or resolution but was similar to other ad hoc committees set up on a departmental basis. The employee wished to know if a contract between the department and the board member would be permissible under the State Ethics Code.

The section only undertook one project; the employee explained that department officials had always felt that more projects should be added. However, the department's administration decided that before proceeding further it would be best to seek community input regarding additions to the section's projects, and the director therefore contacted a number of individuals in the community to serve as volunteer board members to give guidance and support to the section.

The first board meeting was held in the spring of 1984. At that meeting, it was pointed out that the section needed to develop its own business accounting system because the section actually operated much like a private business entity. The employee pointed out that most state agencies operated on a cost basis; however, his section not only expended funds but also received income for its services. Because of this difference, the department's accounting office agreed that the section should acquire its own accounting services. In his letter to the Commission, the employee had stated that after the first board meeting, a board member had advised him that he believed he could satisfy the section's accounting consulting needs at a minimal price. Thereafter, information about the board member and his company was presented to the board at its next meeting. The board member attended the meeting to answer any questions about his business, but no formal board action was taken. The employee noted that the other board members did discuss the possibility that a conflict of interest might exist but did not believe that there would be a problem. Nevertheless, the employee took the precaution of seeking the Commission's advice on the application of the ethics code to this situation.

The Commission first discussed whether the board member was an employee for purposes of the ethics code. The Commission believed that individuals who serve on ad hoc committees were also bound by the standards of conduct in the ethics code because they had discretionary input into the State's decision-making process. The Commission came to this conclusion after noting that even individuals who serve under contract to the State are included in the definition of "employee," pursuant to HRS §84-3(4), and are thereby subject to the ethics code provisions. The Commission determined that if individuals who contract to perform services for the State must follow the ethics code guidelines, members of ad hoc committees also should be held to the same standard of conduct. The Commission commented that to conclude otherwise would not be in keeping with the HRS §84-1 mandate to liberally construe the ethics law to promote high standards of ethical conduct in state government.

The conflicts-of-interests section, HRS §84-14, was most applicable to the question of whether the department might enter into a contract with the board member. The first subsection, HRS §84-14(a), prohibits employees from taking official action directly affecting their financial interests. "Official action" includes a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority. The Commission found that the board member, then, would be precluded from participating in any discussions, reviews, or decisions of the board regarding the accounting services required by the section.

The Commission also noted the application of another provision of the conflicts-of-interests section, HRS §84-14(d), which prohibits employees from assisting any person or business or acting in a representative capacity for compensation on any contract before the agency of which they are employees. The Commission stated that HRS §84-14(d) would restrict the board member from representing his business before the section's advisory board; thus it would be impossible for the board member to present his proposals or his work product for review by the board without contravening this portion of the ethics law. Accordingly, the Commission decided that the board member must first resign his position on the advisory board before the department could consider hiring him on a personal service contract.

The Commission commented that it had reached its decision based upon a number of factors. First, the Commission recognized that the purpose and role of the advisory board was as yet largely undefined. Although the employee had explained that he believed the role of the board was to provide community input, and that the director had included representatives of all the disciplines that might contribute to the support of the section's work, there were no formal guidelines or policy statements that clarified the board's role. Additionally, the Commission knew that the board, in its few meetings, had not followed a formal decision-making process but had conducted its business in informal discussion. Finally, in reviewing the facts, the Commission recognized that the board member, a volunteer for eighteen years to the department, had proposed a fee that was not a true reflection of the amount that might be charged for the task. The Commission believed that the board member had made an offer that was at least in part a public service.

In order to preserve the credibility of the department in the transaction, the Commission stated that if the department decided to enter into a contract with the board member for accounting services, a copy of the contract together with a request for a waiver from the competitive bid provisions of HRS §84-15(a), the contracts section, should be submitted to the Commission for its review. The Commission recognized that the employee had already submitted information outlining the open, public process that had been initiated on this contract. Furthermore, the Commission had also received information explaining why the service required by the section should not be subject to a competitive bid process. The Commission believed, however, that this information should be made available for public review as a part of the Commission's public records.

The Commission commended the employee for his initiative in seeking its advice on this contractual matter and appreciated his candid discussion of the situation.

Dated: Honolulu, Hawaii, August 3, 1984.

STATE ETHICS COMMISSION
Allen K. Hoe, Chairperson
Edith K. Kleinjans, Vice Chairperson
Tim S. Farr, Commissioner
Mildred D. Kosaki, Commissioner

Note: Commissioner Arnold J. Magid was excused from the meeting at which this opinion was considered.