

## ADVISORY OPINION NO. 554

A part-time researcher with a state institution requested the Commission's advice on an appropriate procedure to follow so that he would be able to avoid ethical problems if a piece of equipment owned by the institution became available for sale. The employee noted that his company, which provided a number of clinical services to the community, would be interested in acquiring the equipment. In the employee's position with the institution, he not only performed research but also served as the manager of the project that used the piece of equipment. The employee had administrative responsibilities that included budget planning, overseeing maintenance of the equipment, technician training, and scheduling the use of the piece of equipment. Over the years, the project had required the services of the employee's company for technician training and accessory design work for the equipment. However, when it had been noted in the employee's discussion with the Commission's staff that there might be a problem under the ethics law, the employee's company had immediately discontinued billing for the design and training services. Before proceeding to answer the employee's initial question regarding a recommended procedure in the event that the institution decided to release the piece of equipment to the private sector either by lease or sale, the Commission decided to first consider whether it was appropriate under the ethics code for the employee's company to provide services to the project.

The most applicable section of the ethics code was HRS §84-14(a), which 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.

The Commission stated that this section, which requires employees to disqualify themselves from taking any discretionary action that directly affects their private financial interests, placed the employee in a difficult position. In the Commission's opinion, HRS §84-14(a) precluded the employee from performing his responsibilities as the project's manager when his decisions involved the company. The Commission noted that a number of the employee's responsibilities as the project's manager ultimately had a direct effect on the company. For example, the employee was required to approve the design of accessories for the equipment as well as to recommend payment by the institution for any of the design work or training services provided by his company. Additionally, when the employee determined a recommended budget figure for the project, he had to consider a sum that might be used for design work or training, and those funds might flow to his company. In the Commission's view, the employee's two positions as the project's manager and as a partner in the company placed him in a position of conflict of interest.

The Commission recognized, however, that the company was the sole source of maintenance and accessory design services required by the project. The employee had explained that although the institution had a contract with a mainland firm to provide periodic maintenance checks of the equipment, minor problems sometimes arose between the periodic

maintenance checks that did not justify the cost of transporting the mainland contractor to Honolulu.

The Commission's staff had explored ways to alleviate the conflicts problems in discussions with the employee and the former director of the institution. The Commission believed that the best solution would be for the employee to discontinue his responsibilities as the project's manager and to shift his workload solely to research activities. The Commission believed that the administrative responsibilities relating to the project should be handled by another employee at the institution or contracted wholly to the private sector and reviewed by the institution. If familiarity or expertise regarding the equipment was necessary and the institution believed that the employee was the only person who possessed that expertise, the Commission recommended transferring all budgetary and fiscal decisions to another employee in the institution's office, with the employee retaining responsibility for overseeing the maintenance of the equipment and the authority to determine the necessity of acquiring or designing accessories for the equipment. The employee had noted that because the project was no longer new, it was less likely that additional accessories would be required. The Commission believed that so long as the institution provided for an independent review of the employee's actions regarding those responsibilities, the ethical considerations of the conflicts-of-interests section would be satisfied. The Commission wished to emphasize that it had seen no evidence that the employee had used his position to intentionally advantage his company in an inappropriate way and recognized his continued sensitivity to the ethical considerations of his situation.

The employee had asked whether the company might bid on, lease, or buy the equipment in the event that it became available, and if so, what restrictions would exist under the ethics law. The employee noted that this availability was speculative but he wished to take the necessary precautions should the possibility later arise. As discussed above, the Commission stated that HRS §84-14(a) prohibited the employee from participating in any decision that might have a direct effect on his private business interest. As a consequence, the employee could not in his capacity as either a researcher for the institution or as the project's manager participate in the matter. For example, the employee could not participate or assist in any way in the initial discussion or decision on whether the equipment should be sold.

Although the ethics law prohibited the employee's participation in the matter in his state position, it did not prohibit the company from either bidding on the equipment or buying it so long as the requirements of HRS §84-14(d) and HRS §84-15(a) were satisfied. HRS §84-14(d), another portion of the conflicts-of-interests section, states as follows:

No legislator or employee shall assist any person or business or act in a representative capacity for a fee or other compensation to secure passage of a bill or to obtain a contract, claim, or other transaction or proposal in which he has participated or will participate as a legislator or employee, nor shall he assist any person or business or act in a representative capacity for a fee or other compensation on such bill, contract, claim, or other transaction or proposal before the legislature or agency of which he is an employee or legislator.

This subsection precluded the employee from participating in the matter of the sale in either his state or private capacity; however, the company would be permitted to either bid on the equipment or to buy it, so long as the employee disassociated himself entirely from the procedure. The employee had already stated in a letter to the Commission that he and his spouse would completely disassociate themselves from the matter and allow another partner to conduct any negotiations on behalf of the company. The former director also had represented to the Commission that it would not be necessary for the employee to participate in any of the decisions. Accordingly, the Commission concluded that under those circumstances, the requirements of HRS §84-14(d) would be met.

HRS §84-15(a), a portion of the contracts section, was also applicable. This section provides as follows:

A state agency shall not enter into any contract with a legislator or an employee or with a business in which a legislator or 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 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 such contract shall be made a matter of public record and shall be filed with the state ethics commission at least ten days before such contract is entered into.

The Commission noted that while the employee might discontinue his responsibilities as the project manager, he intended to continue his employment with the institution as a part-time researcher. The employee's interest in the company was a controlling interest; thus the institution was precluded from entering into a contract in excess of \$1,000 with the company unless the contract was awarded through an open, public process. In the Commission's view, although the employee would neither assist nor participate in the sale in his state or private capacity, an appearance that the company might receive an unfair advantage was almost unavoidable. The Commission, therefore, recommended that the institution take steps to reassure potential competitors for the equipment by adhering to a strictly open, public process. The Commission recommended a formal competitive bid process.

The Commission determined that copies of this opinion should be forwarded to the acting director of the institution and to the institution's administrative officer.

The Commission appreciated the employee's candid discussion of his situation and commended him for his initiative in bringing this matter to the Commission's attention.

Dated: Honolulu, Hawaii, April 24, 1985.

STATE ETHICS COMMISSION  
Tim S. Farr, Vice Chairperson  
Edith K. Kleinjans, Commissioner  
Rabbi Arnold J. Magid, Commissioner

Note: Chairperson Allen K. Hoe was not present during the consideration of this opinion. There was a vacancy on the Commission.