

INFORMAL ADVISORY OPINION NO. 92-1

A member of the public filed a charge with the State Ethics Commission ("Commission") against a state career coordinator/counselor. Career coordinators and career counselors are state employees who are assigned to public schools. Coordinators and counselors facilitate the transition of students from school into the world of work or into further career or educational training. In this case, because the high school to which he was assigned was a small one, the involved employee served in the positions of both career coordinator and career counselor. The career coordinator/counselor also owned a private business that provided career training. A number of clients of this business were students at the coordinator/counselor's high school.

The charge filed with the Commission alleged several violations of the State Ethics Code. In particular, the charge alleged that the coordinator/counselor had used his state position to promote his business and to solicit clients from the population of his high school. The charge also alleged that the coordinator/counselor had used state time, equipment and facilities for private business purposes. Pursuant to Hawaii Revised Statutes (HRS) section 84-31 (b), the Commission investigated these allegations. The Commission did not find sufficient evidence to warrant further charge proceedings.

Despite the fact that the allegations in the charge were not substantiated, the Commission was concerned about the larger issue of whether career coordinators or career counselors could engage in substantial financial transactions with students at their schools. Career coordinators and counselors appeared to be in a position of authority over the students. If they were transacting private business with these students, then this raised the issue of whether their activities violated section 84-13(4) of the HRS.

Section 84-13(4) is part of the fair treatment section of the State Ethics Code. In relevant part, this section reads as follows:

§84-13 Fair treatment. No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others; including but not limited to the following:

....

- (4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom the legislator or employee inspects or supervises in the legislator's or employee's official capacity.

In the past, the Commission held that section 84-13(4) applied in a per se fashion. In Advisory Opinion 290, the Commission stated:

HRS §84-13 of the ethics code states that an employee may not use his position to secure an unwarranted advantage for himself or others. We explained that because the drafters of that section were aware that it was sometimes difficult to determine if one had used his State position for unwarranted advantages, they listed four representative types of activities which if engaged in would be per se violations of this section. One of those, stated in part (4), is "[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."

Similarly, in Advisory Opinion 88-2, the Commission analyzed section 84-13(4) and said:

Whether there is actual wrongdoing is not an issue; rather, certain activities have been prohibited by the ethics code because they are more likely to result in unethical activity or are likely to raise serious questions of propriety.

Thus, for the purposes of this section, whether the coordinator actually misused his position was not an issue. The issue instead was whether section 84-13(4) should apply to financial transactions between career coordinators and counselors and the students at the schools to which they were assigned.

The Commission has consistently applied section 84-13(4) to transactions between teachers and students. In Advisory Opinion 313, the Commission applied section 84-13(4) to an instructor at a community college. In that opinion, the instructor used his own catering company to cater a student party. The Commission felt that the students were placed in an untenable situation. They added that the students were just beginning to learn about business and could not have understood the instructor's actions.

In Advisory Opinion 450, the Commission also applied section 84-13(4) to a relationship between a student and a teacher. In this case, the teacher taught a class on a certain subject and did private work in this same subject area for one of the classes at his school. The Commission noted that there was a dependent relationship between students and teachers. The Commission stated that, because of this relationship, students could not deal effectively with a teacher at their school. Thus, there was unequal bargaining power between teachers and students. Section 84-13(4) was enacted to prevent employees from taking advantage of this kind of unequal bargaining power.

The Commission noted that career coordinators and career counselors were not teachers, but they were members of the staff of their high schools. The Commission, through its staff, interviewed both the career coordinator/counselor who was alleged to have violated the code and his supervisor in order to ascertain the duties of career coordinators and counselors. The coordinator/counselor and his supervisor also appeared before the Commission in order to discuss the application of section 84-13(4).

The Commission first interviewed the supervisor. The supervisor was in charge of the career coordinators and the career counselors who worked at the various schools. He said that coordinators supervised the office and counselors worked under coordinators. Career counselors performed career counseling and planning services. Career coordinators had more administrative and supervisory duties than did career counselors. However, career coordinators also performed the same counseling work that counselors did. For this reason, the Commission believed that coordinators should be treated as counselors were treated.

The supervisor said that career coordinators and counselors planned career workshops and made presentations to grades nine through twelve. They also coordinated career related campus activities such as career day. He said that he stressed programmatic counseling, but his counselors still did one-to-one counseling. The counselor might also establish a mentoring program

for the student. In such a program, the counselor would find an adult in the workplace to act as a mentor to the student. The counselor also kept a job board. Employers in the community who wanted student workers would send in requests for student workers to the counselor. These requests went on the job board. The students applied for these jobs and the counselor decided which student to recommend for the job. Counselors did not teach academic subjects. However, they did administer a basic skills test to the students. During his appearance before the Commission, the supervisor said that students tended to treat career counselors and coordinators as if they were teachers. He also added that he felt that having a student as a client tended to color the counselor's judgement with respect to that student.

The Commission also spoke with the involved career coordinator/counselor. He said that about seventy-five percent of his duties centered on the grade level workshops. Each grade level had a goal; for example, the goal of the ninth grade was self esteem. He developed his workshops in order to help the student achieve these goals. He then was booked into the Language Arts class for two to five days of workshop presentations.

Aside from the workshops, he said he did individual counseling, managed the computer counseling software, coordinated speakers, and put on career fairs. With respect to individual counseling, he said that juniors and seniors were the ones who generally came in to see him. They asked about college, or about what classes they should have been taking, or about what tests they needed to take. At the beginning of the students' senior year, they all filled out a questionnaire about what they planned on doing after high school. The ones who were undecided were called in to see him at the start of the second semester. If they were still undecided, then his job was to help them focus on a goal. During his appearance before the Commission, he said that he typically saw about five to six students a day for individual counseling.

The coordinator/counselor also mentioned the job board. He said that he had given two recommendations to employers in the past two years. He said that he was rarely asked for recommendations because the students were screened before they were sent to an employer. This screening entailed making sure that the student could work the hours that the employer wanted, determining that the student's grades wouldn't suffer, checking the parents' feelings, and making sure that the student could fit the work into his schedule.

The issue before the Commission was whether a career coordinator's or a career counselor's relationship with the students at his school was such that section 84-13(4) should have been applied. If it should have been applied, then it would have forbidden the involved coordinator/counselor from acquiring students of his high school as clients of his private business.

It appeared to the Commission that a career coordinator or counselor was in a position to take action affecting the students. Part of a coordinator's or counselor's job was to perform individual counseling. In such a situation, a student would have been as dependent on the counselor as he would have been on a teacher. The student would have relied upon the counselor for neutral advice. It would seem necessary for the counselor to have been unbiased in order to have effectively counseled the student. The Commission believed that if a student were a client of the counselor, or if the student were otherwise involved in a financial transaction with the counselor, then it would have been entirely possible for this relationship to have colored the advice that counselor gave to the student.

The Commission noted that coordinators and counselors also aided students in obtaining part-time or summer employment. In this process, the counselor took a supervisory role over the student. The counselor had to ensure that the student adhered to certain procedures in order to apply for employment. The counselor investigated the student's situation and determined whether the student met the prospective employer's criteria. To some extent, students were dependent on counselors for recommendations to employers. In administering the job board, counselors appeared to be taking supervisory action affecting the students.

Section 84-13(4) was enacted, in part, in order to prevent employees from using their positions to gain unwarranted advantages. The Commission concluded that a career coordinator or counselor could obtain such an advantage if he entered into a financial transaction with a student. The student would likely have impaired bargaining power. This diminished bargaining power would result from the student's dependence on the counselor for advice about career opportunities and the student's knowledge that the counselor could take action affecting the student. Thus, the counselor would have the upper hand in all of the negotiations and would have an unwarranted benefit.

The Commission also stated that a financial transaction might result in more than the counselor gaining an unwarranted benefit. It might also result in a tainted relationship between the counselor and the student. The Commission believed that if a career coordinator or counselor were to enter into a financial transaction with a student, then this transaction would tend to color the advice given by the counselor and impair the relationship between the counselor and the student.

The Commission believed that section 84-13(4) should be applied not only to teachers, but also to career coordinators and career counselors. The Commission concluded that the relationship between counselors and students contained the same element of dependency that was found in the relationship between teachers and students. Just as a student depended on a teacher for unbiased grading, he depended on a career counselor for unbiased advice. The Commission also believed that the counselor would gain an unwarranted benefit if he were to enter into a financial transaction with a student. The counselor could take action affecting the student. The student's knowledge of the counselor's power would tend to diminish the student's bargaining power.

The supervisor mentioned that the students did not have to see a coordinator or counselor if they did not wish to have personal career counseling. Nevertheless, the Commission pointed out that the State had chosen to give students the disinterested services of career counselors. This service must be equally available to all of the students whether or not they choose to avail themselves of it. The Commission believed that if a career counselor entered into a financial transaction with a student, then the counselor denied that student services to which the student was entitled.

It was the Commission's decision that HRS section 84-13(4) prohibited the coordinator/counselor from acquiring students of his high school as clients of his private business. The Commission understood that the coordinator/counselor had current contracts with these students. The coordinator/counselor had said that none of these contracts would run for longer than one year. The Commission decided that these contracts could continue until the date of their termination. The Commission stated that the ethics code prohibited the coordinator/counselor from renewing these contracts or acquiring any new contracts with students at his high school.

The Commission was aware that its decision worked a hardship on the coordinator. This result, however, was unfortunately not unique. One of the functions of the Commission is to regulate some of the activities of State employees. This may entail limiting the outside employment options of these employees. The Commission explained that while this may hamper the employees, it was necessary in order to preserve the public's confidence in State officials and employees.

The Commission commended the coordinator/counselor for his cooperation in this matter. The Commission recognized that it could be very unsettling for a person to have a charge filed against him. The Commission appreciated the honesty and candor that the coordinator/counselor had shown throughout these proceedings.

Dated: Honolulu, Hawaii, January 29, 1992.

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