

INFORMAL ADVISORY OPINION NO. 95-1

A charge was filed with the State Ethics Commission against a state employee by a member of the public. The charge was filed on behalf of a corporation, Corporation A, which, for several years, had held a state contract for services. The charge was duly sent to the employee who then filed an answer with the Commission.

At the time the charge was filed, the service contract held by Corporation A had come to the end of its term. A new contract for the same services had gone out to bid. Corporation A was among the companies in contention for the new service contract. Corporation A's chief competitor for this contract was Corporation B. Corporation B was ultimately designated the low bidder on the contract. Under the terms of the state's Invitation For Bids, Corporation B then had fifteen days to submit a personnel list. Corporation B also needed to submit skills verification forms for the personnel.

In its search for personnel to fulfill the contract, Corporation B approached an employee association whose members were employees of Corporation A. Shortly before the deadline for submitting the personnel list, the association voted to reject Corporation B's offer of employment. It was the Commission's understanding that if Corporation B was unable to supply qualified personnel, then it would not be awarded the contract. If it was able to supply the personnel and was awarded the contract, then the members of the employee association who had rejected the employment offer would likely be out of a job.

During the time that Corporation B was searching for personnel, the state employee who received the charge was acting as an instructor in a state program. This program trained people in the skills that they would need to provide the type of services covered by the contract. The employee was loaned from one state department to another to provide instruction for this program.

The charge concerned the employee's roles as both a state employee and an employee of Corporation B. The charge initially stated that the state employee was also an employee of Corporation B. It then made two allegations. First, it alleged that the employee used a state fax machine to send a memorandum on behalf of Corporation B. Second, it alleged that the employee signed skills verification forms for people who wished to work for Corporation B.

The first allegation in the charge concerned a memorandum sent by fax. The charge claimed that this memorandum was sent by the employee to various people eligible to become employees of Corporation B. In the memorandum, the state employee told people to take responsibility for their own careers and said that he had accepted a position with Corporation B. The employee also wrote that he had seen a personnel list for Corporation B and indicated that there was a sufficient number of names on the list to meet the requirement set by the State. The memorandum concluded by urging people not to give up their jobs, but to call Corporation B to salvage their careers. The employee signed the memorandum.

In answer to the charge, the state employee admitted that he had used a state fax machine to send this memorandum. He said that his reason for sending the fax was not to recruit people for Corporation B, but to make information available to his students. It was the Commission's understanding that, at the time that the memorandum was sent, the employee association had rejected the employment offer from Corporation B. It appeared to the Commission that the members of the employee association may have been gambling that, without their support, Corporation B would not be able to come up with sufficient personnel. Corporation B would then not be awarded the contract and Corporation A would again be in contention. The state employee contended that he wanted to let his students know that Corporation B did appear to have sufficient personnel so that the employee's students could evaluate their bargaining positions.

The employee's department disciplined the employee for the use of the fax machine. The employee was counseled by one of his state supervisors. A letter concerning the incident was placed in the employee's personnel file.

The charge alleged that the employee used state equipment for the purpose of recruiting for Corporation B. Use of state equipment for private business purposes is forbidden by HRS section 84-13(3), which reads:

§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:

....

- (3) Using state time, equipment or other facilities for private business purposes.

The Commission believed that use of state equipment to encourage people to work for Corporation B would violate this section.

The Commission acknowledged that the employee's purpose in sending the memorandum may have been to provide information to his students. Nevertheless, the Commission believed that the language used in the memorandum appeared to amount to a recruitment. The memorandum explicitly advised people to call Corporation B for employment. The Commission believed that the use of a state fax machine for this purpose would violate HRS section 84-13(3). The Commission acknowledged that the employee had already been counseled and disciplined about this matter by his department.

The Commission believed that the employee's actions in this instance raised another issue under the Fair Treatment law. This law generally forbids an employee from using his state position to grant himself or anyone else an unwarranted benefit. According to the answer to the charge, at the time the employee sent the memorandum, he was an employee of Corporation B. Also according to his answer, this memorandum was sent to students in the employee's class. In the past, the Commission had said that the relationship between teachers and students was a special one, characterized by a degree of dependency. Students were likely to give considerable weight to suggestions made by their teachers. The Commission believed that it was a violation of HRS section 84-13 for a teacher to use his position to recruit employees for his own company.

The second allegation in the charge concerned the employee's execution of skills verification forms. The charge alleged that the employee executed three of these forms on two different days. Copies of the executed forms were attached to the charge. The employee explained that he did not solicit these forms. He was asked to sign them and did so as part of his state job. The three whose forms he signed had agreed to serve as employees of Corporation B. The charge also alleged that at some point, the state employee became an employee of Corporation B. The charge indicated that it was a conflict of interests for the employee to execute the skills verification forms while he was an employee of Corporation B.

Section 84-14(a) forbids a state employee from taking official action affecting his company. In relevant part, this section reads:

§84-14 Conflicts of interests. (a) No employee shall take any official action directly affecting:

- (1) A business or other undertaking in which he has a substantial financial interest.

A financial interest includes "an employment, or prospective employment for which negotiations have begun."

The Commission believed that the employee's actions in filling out the skills verification forms directly benefitted Corporation B. At the time when the forms were executed, Corporation B needed personnel or it would lose the contract. The personnel needed to have skills verification forms. The employee executed three of these forms for people who had agreed to work for Corporation B. The employee's actions assisted Corporation B in its attempt to meet the personnel requirements set by the State.

It was not entirely clear to the Commission whether the employee had a financial interest in Corporation B at the time he executed the forms. The Commission was not able to determine the exact date that the state employee began employment negotiations with Corporation B. For purposes of the ethics code, once the employee began negotiations with Corporation B, he had a financial interest in Corporation B. The information provided to the Commission indicated that the employee acquired employment with Corporation B very near the time that he executed the skills verification forms.

It appeared likely to the Commission that the employee was in negotiations with Corporation B at the time that he executed the skills verification forms. The Commission believed that if the employee had executed the forms at this time, then he violated HRS §84-14(a). By executing the forms, he had taken official action directly affecting Corporation B, a business in which he had a financial interest.

The Commission believed that the employee may have violated three provisions of the ethics code. First, his use of the fax to send a memorandum telling people to sign with Corporation B seemed to be a clear violation of HRS §84-13(3). He used state equipment for a private business purpose. He was counselled about this and a letter regarding the incident was placed in his personnel file.

Second, the employee sent this memorandum to his students. This appeared to be a misuse of position under HRS §84-13. The Commission believed that a teacher may not use his state position to solicit employees for his own employer. Again, the employee's department had already disciplined the employee for his use of the fax in this manner.

Third, the employee executed skills verification forms at a time when he may have been in employment negotiations with Corporation B. The facts regarding this situation were not clear. If the employee was in negotiations with Corporation B, then the Commission believed this would be a violation of HRS §84-14(a). The employee would have taken official action directly affecting a business in which he had a financial interest.

The Commission acknowledged that the employee had already been disciplined for his use of the fax machine. His execution of the skills verification forms did not result in any actual advantage to Corporation B because Corporation B was not ultimately awarded the contract. In addition, it appeared that in signing the forms, the employee was not motivated by a desire to benefit Corporation B. Signing the forms was a part of his duties as an instructor. For these reasons, the Commission elected not to pursue this matter any further.

The State Ethics Commission thanked the employee for his patience during the Commission's review of this matter.

Dated: Honolulu, Hawaii, February 22, 1995.

STATE ETHICS COMMISSION
Carl T. Sakata, Chairperson
Cassandra J. L. Abdul, Vice Chairperson
Sharon "Shay" Bintliff, Commissioner

Note: Commissioners K. Koki Akamine and Don J. Daley were not present during the discussion and consideration of this opinion. Commissioner Daley resigned from the Commission on February 7, 1995.