

### INFORMAL ADVISORY OPINION NO. 95-3

Two separate charges were filed with the State Ethics Commission against a state employee. The first charge was filed on behalf of a corporation, Corporation A. The second charge was filed on behalf of another corporation, Corporation B. Both corporations later amended their charges. The charges involved the same individuals and similar issues. For this reason, pursuant to State Ethics Commission Rule §21-1-5, the Ethics Commission consolidated the charges and addressed both sets of charges in this informal advisory opinion.

The charges arose out of two events. First, a state contract for services was going out to bid. This contract had previously been awarded to Corporation B by the State on a sole source basis. Corporation B planned to bid on the new contract. Another company, Corporation C, also planned to bid on the contract.

The second event that was taking place was the establishment of a new service. Before the new service could begin, state approval was required. A fourth company, Corporation D, submitted an application to the State to begin the new service. The main opposition to the application appeared to come from Corporation A, which already provided a similar service.

At the time that these events were occurring, the employee was employed by a state agency in one capacity. In a second capacity, the employee, along with others, provided personal services to the same state agency. These services were provided pursuant to a state contract with a private contractor. Thus, the employee filled two roles within one state department. In his first role he was a state employee. In his second role he was a subcontractor to the department.

The charges filed against the employee were principally the result of the employee's acquisition of private employment with Corporation D. According to documents on file at the Department of Commerce and Consumer Affairs, Corporation D was initially registered as a trade name of Corporation C. Corporation C and D were not separate entities at the time that the employee acquired employment with Corporation D. Corporation D did not become a separate corporation until some time later.

The charge filed by Corporation A alleged three conflicts of interests. First, that the employee testified before a state agency on behalf of Corporation D at a hearing on Corporation D's application for the new service. The charge stated that the employee's state position lent credence to his testimony concerning the application. Second, the charge stated that if Corporation D's application were approved, then the employee would be in the position of selecting services provided by either Corporation A or Corporation D. This would result in a conflict of interests. Third, the charge stated that as a state employee, the employee was responsible for the review and development of certain policies that would have a direct impact on Corporation D.

Corporation A filed an amended charge with the Commission. This document essentially requested an investigation of the alleged conflicts of interests raised in the original charge. It did not add any further allegations. Pursuant to HRS section 84-31(b), copies of both charges were sent to the employee in order to afford him an opportunity to respond. The employee was represented by a private attorney in this case.

The employee signed an affidavit that was responsive to some of the charge allegations. The affidavit stated that the employee had been asked to be a consultant for Corporation C. He was asked to provide consulting services and to direct Corporation D's new service.

The employee stated in his affidavit that his state supervisor consulted with the Ethics Commission before the employee committed to the employment. It was the employee's understanding that his supervisor was advised that there was probably no conflict until such time as Corporation D obtained state approval of its application. The employee stated that he spoke to his state supervisor; to the director of his state agency; to the private contractor that employed him; and to other personnel. All agreed that there was no conflict.

In his affidavit, the employee acknowledged that he attended the public hearing on Corporation D's application. He stated that he was questioned about his employment with Corporation D and answered truthfully. After the hearing, Corporation A sent its first charge to the Ethics Commission. Corporation A sent the employee a copy of its charge. In his affidavit, the employee stated that after receiving the charge he again checked with his state supervisor, who saw no conflict. The employee nonetheless resigned from Corporation D to avoid the appearance of impropriety.

The employee also filed an answer in response to this charge. In his answer, he stated that he did not offer testimony at the application hearing. Instead, he answered questions posed by members of the panel conducting the hearing. The employee's answers were based on his expertise in the field. He answered questions concerning his employment with Corporation D. He stated that he was in no way involved in the process of the approval of the application.

Corporation A's allegations of a conflict of interest appeared to raise concerns under Hawaii Revised Statutes section 84-14(d) and 84-13. Section 84-14(d) is part of the conflicts of interests portion of the State Ethics Code. This section reads:

§84-14 Conflicts of interests. (d) 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 section forbids a state employee from being compensated to assist or represent anyone on a matter for the employee's agency. The term "state agency" is defined in HRS section 84-3 as follows:

"State agency" includes the State, the legislature and its committees, all executive departments, boards, commissions, committees, bureaus, offices, the University of Hawaii, and all independent commissions and other establishments of the state government but excluding the courts.

For purposes of section 84-14(d), in the executive branch, the term "agency" has generally been interpreted as meaning "department." Thus, an employee generally can not be paid to represent another before the employee's department. However, in past opinions, the Commission has determined that when an office operates separately and independently from the rest of the department and is attached to the department for administrative purposes only, then the office and the department will be considered separate agencies for purposes of HRS section 84-14(d).

In this situation, the employee assisted Corporation D before a state hearing council. The council was placed within a state office for administrative purposes only. The office was placed within a state department for administrative purposes only. The employee was employed by the state department. The hearing council operated independently and advised the state office. Based on its past decisions, the Commission determined it was appropriate to treat the council as a separate agency from the department for purposes of HRS 84-14(d). For this reason, the Commission held that as an employee of department, the employee was not prohibited from being compensated to assist another before the independent council.

Corporation A's charge also raised an issue under HRS §84-13, the Fair Treatment section of the ethics code. The claim was that the employee's words at the hearing carried undue weight because of his position in the department. The Commission stated that if the employee lent his stature as a state employee to Corporation D, this might have created a concern under HRS §84-13, the Fair Treatment section. In relevant part, this section 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. . . .

The minutes of the hearing on Corporation D's application revealed that the president of Corporation D testified on behalf of the company. He brought several people with him. He introduced the state employee as an employee of Corporation D. The minutes also showed a questions and answer portion of the hearing. There were no references to the employee's state position.

The employee was initially introduced at the hearing as an employee of Corporation D. His role at Corporation D was explained in response to a question. Although the members of the hearing council undoubtedly knew of the employee's position within the state department, there was no evidence that there was any reference to the employee's state position or any attempt by the employee to intentionally misuse his state position in order to benefit Corporation D. For these reasons, it did not appear to the Commission that the employee misused his state position in violation of section 84-13.

The charge also alleged that as a subcontractor of the department, the employee would have to decide between using the services of Corporation D and those of Corporation A. This would seem to create a conflict of interests. The State Ethics Commission's noted, however, that its jurisdiction did not extend to the employee's activities in his role as a subcontractor offering services to the department. The Ethics Commission's jurisdiction is set out in HRS §84-2:

§84-2 Applicability. This chapter shall apply to every nominated, appointed, or elected officer, employee, and candidate to elective office of the State and for election to the constitutional convention, but excluding justices and judges; provided that in the case of elected delegates and employees of the constitutional convention, this chapter shall apply only to the enforcement and administration of the code of ethics adopted by the constitutional convention.

The Ethics Commission has jurisdiction over state employees and elected or appointed state officials. The subject of this opinion was not considered a state employee by virtue of his position as a subcontractor to the department. For this reason, the Ethics Commission did not have jurisdiction over his activities in this role.

Finally, the charge alleged that the employee established and reviewed procedures that would affect Corporation D. This appeared to be substantiated by language in Corporation D's application. One portion of the application stated that this employee, in his capacity as a state employee, was to develop policies in order to determine under what circumstances the service would be used. This would directly affect Corporation D. The more frequently the service was used, the more Corporation D would earn.

This situation raised issues under HRS section 84-14(b), part of the conflicts of interests section of the Ethics Code. Section 84-14(b) reads:

§84-14 Conflicts of interests. (b) No employee shall acquire financial interests in any business or other undertaking which he has reason to believe may be directly involved in official action to be taken by him.

The term "financial interest" is defined by the ethics code as including an "employment or prospective employment for which negotiations have begun." This section forbids a state employee from acquiring employment in a business if the employee had reason to believe he would be called upon to take state action affecting that business.

The Commission stated that if the employee had reason to believe he would take action affecting Corporation D, then he could not acquire the interest in Corporation D. It appeared to the Commission that there was reason to believe the employee would be taking state action affecting Corporation D. As a state employee, he would develop and review procedures that would directly involve Corporation D. In addition, Corporation D's application documents indicated that the employee would have had a role in quality improvement for Corporation D. As a state employee, he would have reviewed the remedial action taken against employees of Corporation D who had violated procedures or policies, or had provided inappropriate services.

It was evident to the Commission that the employee would be called upon to take state action involving Corporation D if the application were approved and Corporation D began operations. The employee accepted employment with Corporation D before the application was approved. By the employee's own assessment, there was substantial reason to believe the application would be approved. The employee held a meeting at his agency that was attended by employees of Corporation B. These employees provided services to the State. The meetings were regular events conducted in the employee's state capacity. At one meeting, the employee referred to Corporation D's application as a "well done document." He also stated that the idea of the service to be provided by Corporation D had tremendous community support and he could not see why the approval would not happen. In addition, Corporation D was the only company submitting an application for this service. These facts indicated to the Commission that there was indeed reason to believe that the application would be approved and thus that Corporation D would be involved in official action the employee would take. The Commission noted that the application was in fact approved.

There was an additional issue here. Initially, Corporation D and Corporation C were not separate companies. Copies of the checks that were received by the employee indicated that while he was employed by Corporation D, he was paid from Corporation C funds. Because Corporation D and Corporation C were essentially the same entity, section 84-14(b) would have forbidden the employee from acquiring employment with Corporation D if he had reason to believe that he would be taking action affecting either Corporation D or Corporation C.

The Invitation For Bids (IFB) for the service contract that Corporation C was vying for indicated that, as a state employee, the employee would have a role in the maintenance and improvement of the quality of the service under the contract. He would receive reports on the quality of care and on the conduct of the company's employees. He would also consult with the company on a quality improvement program. The Commission believed that the employee clearly would take action affecting the winner of the service contract. This would have created a problem under HRS section 84-14(b).

In the employee's affidavit, he stated that he believed he had received clearance to work for Corporation D from the Ethics Commission and from his supervisors. The Commission's records indicated that the employee's supervisor initially called the Commission's office after the employee had agreed to work for Corporation D, but before he had signed an agreement with them. The Commission's records also indicated that his supervisor did not receive advice regarding the situation until after the employee had signed an agreement with Corporation D. In his affidavit, the employee said that his understanding of the advice given to his supervisor was that he would not have a conflict of interests until Corporation D's application for the new service had been approved by the State. The Commission's records indicated that his supervisor was told that if he took state action affecting Corporation D, then he could not acquire employment with Corporation D. When later contacted by the Commission's staff, his supervisor said that she did not tell the employee that a conflict of interests would only arise after the application was approved. Apparently the employee was unclear about the advice given to him by his supervisor. The Commission's records indicated that the employee himself later called the Commission and asked for advice on this same matter. The records indicated that the employee was given the same advice that was given to his supervisor.

Corporation A's allegation that the employee's acceptance of employment with Corporation D would create a conflict of interests appeared to have merit. HRS section 84-14(b), part of the conflicts of interests section of the Ethics Code, forbids a state employee from accepting employment with a company if the employee has reason to believe that he will be taking official action involving that company. Corporation D's application and the IFB for the service contract both indicated that the employee would be called upon to take action affecting both Corporation D and Corporation C. Thus, the Commission believed that the Ethics Code would have barred the employee from acquiring employment with that company.

Corporation B, one of the companies bidding for the service contract with the State, also filed charges against the employee. Corporation B's original charge alleged that the employee was an employee of Corporation C when the employee's department took certain actions affecting the IFB for the service contract. The charge also alleged that the employee encouraged Corporation B employees to work for Corporation C. It referred to attempted recruitment at the agency meeting between the employee and the employees of Corporation B.

Corporation B later filed an amendment to the charge. This amendment made new allegations and supplemented some of the old ones. It first alleged that after the employee resigned from Corporation D, he filled out forms verifying the skills of people who wished to work for Corporation C. The names of some of these people later appeared on the personnel list for Corporation C. The amended charge also clarified the earlier references to the changes to the IFB. The charge indicated that these changes tended to benefit Corporation C.

The employee was sent copies of these charges for his response. Again, both his affidavit and his answer were responsive to the charges. In the affidavit, he stated that he did not give any information to Corporation C or Corporation D that would give them an unfair advantage. No one at either company asked him to provide any insider information and he would have refused to do so if asked. He acknowledged that, in his capacity as a subcontractor to the department, he did sign forms verifying the skills of potential employees of Corporation C. He said he spoke to his supervisor before doing this and received clearance.

In his answer to these charges, the employee stated that at no time did he have input into the development or evaluation of the IFB or any of its addenda. He also stated that he did not attempt to recruit personnel for any of the bidders. He did evaluate the skills of potential employees of Corporation C.

The charges filed by Corporation B basically contained four allegations: the employee recruited personnel for Corporation C, he signed forms verifying the skills of potential employees of Corporation C, he provided inside information to Corporation C, and he had input into the IFB and its addenda.

The first allegation was that the employee attempted to recruit personnel for Corporation C. Were this true, it would have raised issues under HRS section 84-13 and 84-14(a) of the Ethics Code. Section 84-13 forbids the use of one's state position to grant an unwarranted advantage to anyone. Section 84-14(a) is part of the conflicts of interests portion of the Ethics Code. In relevant part, it reads as follows:

§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....

This section forbids a state employee from taking any discretionary state action directly affecting a business or other undertaking in which he has a substantial financial interest. It would have forbidden the employee from taking state action affecting Corporation C while he was employed by Corporation D, which was not actually a separate corporation.

The charges alleged that the employee had attempted to recruit employees for Corporation C at a certain agency meeting with the employees of Corporation B. The Commission's staff reviewed a videotape and a transcript of that meeting. During the meeting, the employee praised Corporation D. He also spent some time discussing a conference that he had attended. One of the topics of the conference concerned the ability of the subcontractors of the department to take certain actions that could seriously affect the careers of the employees that he was addressing. The employees at the meeting asked a number of questions about this topic.

At the time of this meeting, it was common knowledge that the employees at the meeting, all of whom worked for Corporation B, harbored an antipathy towards Corporation C, Corporation B's rival for the State contract. The employee's endorsement of Corporation D, followed by a reference to his ability to damage the careers of the employees that he was addressing, was apparently viewed as threatening by some of these employees. Some of the employees apparently believed that he might harm their careers if they did not support Corporation C.

Despite this, the Commission did not believe that there was any direct recruiting at the meeting. The employee did not recommend that anyone go to work for either Corporation C or Corporation D. This evidence did not indicate that he attempted to recruit personnel for Corporation C in violation of sections 84-13 and 84-14(a).

The second allegation was that the employee signed forms verifying the abilities of potential employees of Corporation C. These forms verified that the employees were competent in the skills necessary to perform their jobs. In order to win the State contract, the low bidder had to provide the State with the names of a certain number of qualified employees. The employees had to have forms verifying their fitness for the job. If the low bidder was not able to come up with adequate personnel, the company would not win the contract.

The charge claimed that the employee signed forms for employees who wished to work for Corporation C. He did this after he resigned from Corporation D. This could have raised issues under section 84-13, which would have prohibited him from using his state position to grant Corporation C an unwarranted benefit. The Commission did not reach these issues, however, because it appeared that the Commission did not have jurisdiction over this allegation. According to the IFB, the forms could have been signed by a subcontractor to the department. As a regular employee of the department, the employee was not qualified to sign off on the forms. Thus, the Commission believed that the employee was acting in his capacity as a subcontractor when he signed these forms. The Commission did not have jurisdiction over the actions that he took in his capacity as a subcontractor.

The third claim of the charge was that the employee provided confidential information to Corporation C. If this were true, it would have violated HRS section 84-12, the confidential information section of the Ethics Code:

§84-12 Confidential information. No legislator or employee shall disclose information which by law or practice is not available to the public and which the legislator or employee acquires in the course of the legislator's or employee's official duties, or use the information for the legislator's or employee's personal gain or for the benefit of anyone.

The employee denied supplying any confidential information to Corporation C. The Commission did not see any evidence that the employee had disclosed or improperly used any confidential state information. In the absence of such evidence, the Commission could not find a violation of section 84-12, the confidential information section.

The fourth allegation was that the employee had input into the IFB and its addenda while he was working for Corporation D. This raised issues under 84-14(a) and 84-13. Again, however, the employee denied this and the Commission saw no evidence to support the allegation.

Although Corporation B made several allegations, there appeared to be insufficient evidence to substantiate their claims. There was not sufficient evidence to indicate that the employee recruited personnel for Corporation C, signed forms in his capacity as a state employee, provided inside information to Corporation C, or had input into the IFB or its addenda. Absent such evidence, it did not appear that he violated any provisions of the ethics code by engaging in the conduct alleged by the charges.

The charges filed by Corporation B referred to a certain agency meeting as a source of some problems. While it did not appear that the allegation of recruitment could be sustained, the meeting did raise an issue under section 84-14(a). As previously discussed, this section forbids a state employee from taking any official action affecting a business in which he has a substantial financial interest. HRS section 84-3 defines the term "financial interest" as including "[a]n employment, or prospective employment for which negotiations have begun." For purposes of the Ethics Code, once the employee began employment negotiations with Corporation D, he had a financial interest in the company. Section 84-14(a) would have prohibited him from taking any discretionary action directly affecting Corporation C or Corporation D once he began employment negotiations with Corporation D.

At the agency meeting, the employee mentioned that he had talked to Corporation D and had agreed to be their employee. This indicated that he was in employment negotiations with Corporation D at the time of the meeting. He then made several statements at the meeting that would have affected Corporation C and Corporation D. He advised the employees he was addressing to organize and get involved in the bid process for the contract. This directly affected Corporation C, one of the bidding companies. He also spoke favorably about Corporation D and its application. He did this at a time when Corporation D needed support of the public to win approval of its application.

Both the charges filed by Corporation A and those filed by Corporation B focused on the employee's employment with Corporation D. The Commission was provided with a copy of the employee's consulting contract with Corporation D. The contract contained a provision that allowed him a discretionary bonus if the Corporation D's application was approved. HRS section 84-14(c) discusses contingent compensation. This section reads:

§84-14 Conflicts of interests. (c) No legislator or employee shall assist any person or business or act in a representative capacity before any State or county agency for a contingent compensation in any transaction involving the State.

Section 84-14(c) forbids an employee from assisting a person or business before a State or county agency for contingent compensation in any transaction involving the State.

The employee's contract with Corporation D appeared to be an offer of contingent compensation. His compensation was contingent upon the approval of the application. He appeared at a hearing on the application and assisted Corporation D by answering questions. This appeared to be violative of HRS section 84-14(c).

The employee explained that he accepted the position with Corporation D because he wanted to ensure the quality and consistency of the service. The Commission believed that this was a reasonable explanation. No doubt his position as an employee of Corporation D would have allowed him greater control over the company's operations. Nevertheless, as a state employee, the Ethics Code did place restrictions on his outside activities. His acceptance of employment with Corporation D appeared to have created a situation that was fraught with conflicts of interests. This situation should have been thoroughly discussed with the State Ethics Commission before he began employment negotiations with Corporation D. The Commission appreciated the fact that his supervisor sought advice from our office regarding his situation. However, the supervisor later stated that she did not fully understand the advice that she had received. Unfortunately, the

supervisor did not again contact the Commission to request clarification or to explain what part of the advice was unclear to her.

The employee also requested advice from the Commission's staff. However, this was after he had already accepted employment with Corporation D. In addition, the advice given to him was predicated on information previously provided by his supervisor. The Commission noted that the original explanation of the situation that its staff received was not complete. For example, the Commission's staff was not informed about the existence of Corporation C, of the state contract then going out to bid, or of the relationship between Corporation C and Corporation D. These facts became clear only after the charges were filed.

On the other hand, the Commission noted that the employee did consult with his state supervisor about accepting employment with Corporation D. His supervisor not only approved of his private employment with Corporation D, but apparently encouraged him to accept this employment. The Commission also noted that the employee resigned from Corporation D immediately after the first charge was filed against him. This was the proper action to take. Under these circumstances, the Commission did not believe that further charge proceedings against the employee were warranted.

Section 84-31(b), HRS, authorizes the Commission to investigate charges and to render an informal advisory opinion to an alleged violator in lieu of pursuing further charge proceedings. The Commission believed that an informal advisory opinion was appropriate in this case to point out to the employee the ethical concerns raised by this situation. The Commission's review of this matter indicated that his employment with Corporation D appeared to create significant problems under the Ethics Code. In the future, such situations should be thoroughly reviewed with the Commission. The Commission believed that a complete review may have prevented some of the turbulence that accompanied the approval of Corporation D's application and the awarding of the state contract.

DATED: Honolulu, Hawaii, April 26, 1995.

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

Note: Commissioner Lawrence Koseki was not present during the discussion and consideration of this opinion. There was also a vacancy on the Commission when this opinion was considered.