

OPINION NO. 72

The Commission has been asked to advise an employee of the effect on him of H.B. No. 111, C. D. 1,[†] which is presently before the Governor for signature.

The employee's duties include the supervision of subordinates who serve other state officials and employees, and agencies. He plans to leave government service on or about July 1, 1970, and would like to know how he will be affected by H.B. No. 111, C. D. 1, subsection (d), which states:

No former employee or legislator shall, within one year after termination of his service, appear on behalf of a private interest for a fee or other consideration before that particular state agency or subdivision thereof with which he had actually served, in any matter where it can be inferred that his status as a former employee or legislator will give him undue advantage. Any violation of this subsection shall be a misdemeanor.

The specific questions he raised are as follows:

1. Does the provision apply to an employee who leaves or has left service prior to July 1, 1970?
2. Is he still an employee if he is placed on contract to complete unfinished work?
3. Does the provision prohibit his appearance before state agencies other than his own department?
4. Does the prohibition extend to the business and professional associates of the former employee?
5. What standards or guidelines have been adopted to determine whether an ex-employee's status gives him an undue advantage?

1. Section 2 of H.B. No. 111, C.D. 1, states that "This Act shall take effect on July 1, 1970." We understand this to mean that the substantive provisions of the bill will become effective on that date. Subsection (d) of the bill does not limit its application to employees who terminate after July 1, 1970. It relates to acts done after July 1 by any individual who has terminated within a year, as of July 1.

2. It is the Commission's finding that an employee who is on contract to complete work he was involved in as a state employee is an employee within the purview of the ethics law. Upon the termination of the contract, he would then be a "former employee" and be restricted by subsection (d) of H.B. No. 111. The Commission makes no ruling at this time on the applicability of the ethics law to persons who are engaged to provide services on

[†]See Attachment A.

matters with which they had no prior connection as a state employee. It is our opinion that an important consideration will be the traditional distinction between the independent contractor and the master-servant relationship.

3. As a supervisor to subordinates who serve other state agencies, he, in effect, potentially serves all state agencies. He is not automatically precluded from appearances before all state agencies served by his department, or his department itself. However, he should refrain from any appearances in any matter where it can be inferred that his status as a former employee will give him undue advantage.

4. It is our interpretation that the prohibitions in subsection (d) of H.B. No. 111, apply to employees and former employees only, and not to their business and professional associates. However, it might be appropriate for him to review his profession's code of ethics for any contrary view.

5. As yet, we have not formulated any guidelines for "ex" employees. We do have guidelines for employees as to what constitutes unwarranted treatment in violation of HRS, §84-13. [See Op. 21, 26-28, 44 and 48.]

The Commission believes that the primary purpose of subsection (d) of H.B. No. 111, C.D. 1, is similar to HRS, §84-13, to prevent the appearance of official action being affected by the power and status of an individual rather than upon the merits of an issue and to prevent the use of confidential information by a former employee. Therefore, whether a violation under this section occurs will depend upon 1) the state position held by the former employee; 2) the extent of his involvement and responsibility on the particular matter; 3) the extent and nature of his relationship to the particular agency; 4) whether the appearance is to effect discretionary action or ministerial action; 5) the magnitude of the interest he represents; and 6) the basis or method of compensation.

Dated: Honolulu, Hawaii, June 1, 1970.

STATE ETHICS COMMISSION
James F. Morgan, Jr., Chairman
S. Don Shimazu, Vice Chairman
Vernon F.L. Char, Commissioner
July Simeona, Commissioner

Note: Commissioner Margaret W. Smalley was excused from the meeting at which this opinion was considered and adopted. The Commission rendered this opinion to state its intended interpretation of H.B. No. 111, which was later vetoed, and, therefore, was not enacted into law.

ATTACHMENT A

H.B. No. 111 would have amended HRS Section 8415 to read as follows:

SECTION 1. Section 84-15, Hawaii Revised Statutes, is amended to read as follows:

"Section 84-15. *Transactions involving the State.* (a) No employee shall assist any person on matters in which he participated as an employee, nor shall he assist any person in a representative capacity for a fee or other consideration, on any matter before the state agency of which he is an employee where it can reasonably be inferred that his status as an employee will give him an undue advantage.

(b) No employee or legislator shall appear on behalf of a private interest before any state agency for compensation that is contingent upon action by a state agency.

(c) No legislator or any of his business or professional associates shall appear on behalf of a private interest before any state agency for a fee or other consideration unless he shall first disclose to the state ethics commission his intended appearance and the fee or other consideration that he will receive.

(d) No former employee or legislator shall, within one year after termination of his service, appear on behalf of a private interest for a fee or other consideration before that particular state agency or subdivision thereof with which he had actually served, in any matter where it can be inferred that his status as a former employee or legislator will give him undue advantage. Any violation of this subsection shall be a misdemeanor."

SECTION 2. is amended to read as follows:

"This Act shall take effect on July 1, 1970."