

OPINION NO. 156

A state employee requested an opinion as to whether he would be in violation of the standards of chapter 84 if he accepted an appointment to an advisory commission. The functions of the state employee involve reviewing and drafting materials for the officers he serves, and making recommendations as to the activities carried on by the officers. The commission to which he was being considered for appointment advises another state commission with regard to matters having possible effect on the officers he serves. While the officers he serves were themselves discouraged by law from accepting appointment to either commission, they had authority to designate, and had designated, those who were considering his appointment. Prior to the rendering of the State Ethics Commission's opinion, the state employee indicated that he was declining the appointment.

We initially noted that the law creating the commission to which he was being considered for appointment provided for qualifications and limitations which the appointing authority must observe when making appointments. The Ethics Commission stated that it has never been its function to tell an appointing authority whether he can or cannot appoint a prospective member to a board. Rather it is the Ethics Commission's function, if called upon, to advise an appointing authority or the contemplated nominee as to whether the appointment would give rise to potential conflicts and if so, whether such potential conflicts would preclude meaningful participation by the prospective appointee.

We further advised the employee that in the case of a request for an advisory opinion from a prospective appointee, the State Ethics Commission can call to the attention of the prospective appointee potential violations of the State ethics law or other considerations undermining public confidence of public servants which could occur and as to which the prospective employee, if he accepts appointment, should be vigilant.

The employee was advised that if he were appointed to the advisory commission and he accepted such appointment, he should bear in mind §84-12 HRS, which prohibits an employee from disclosing information which by law or practice is not available to the public and which he acquires in the course of his official duties or from using the information for his personal gain or for the benefit of anyone.

The Ethics Commission further advised that §84-13 prohibits an employee from using or attempting to use his official position to secure or grant unwarranted privileges, exemptions, advantages or treatment for himself or others. He was advised that if he were appointed to the advisory commission and he accepted such appointment, this section would be of extreme importance in view of the history of the provisions of the law relating to the creation and functions of the advisory commission. It was our opinion that even his most strenuous efforts to appear impartial may nevertheless result in undermining of public confidence in public servants which the Ethics Commission is charged with preserving.

We cited the history of the law creating the advisory commission to the employee. The history indicated that the advisory commission was to be the product of bipartisan appointments. The law contained a provision prohibiting persons from engaging in the activities as to which the recommendations of the advisory commission are addressed for a certain period after these recommendations have been considered and implemented. The history behind the law indicated that the ineligibility provision was to assure those engaged in the activities as to which the advisory commission's recommendations were made, that self interest in dealing with those activities had been minimized. Debate over the law indicated also that the enacting body was

interested in removing any taint of conflict of self interest from the commission's deliberations or the appearance of same.

The Ethics Commission advised that while we recognized that the employee may not become engaged in the activities with which the commission was concerned, his present employers were likely to be engaged in such activities. He was advised that his proximity with his employers required that he scrupulously avoid being their alter ego, doing for them at their instruction what they could not do directly. Such would be a violation of HRS, §84-13.

The Commission commended the employee for the sensitivity he demonstrated in bringing to the Commission's attention a course of action which could subject his employers to undeserved criticism. The Commission also commended him for not requesting a withdrawal of his request, although he had declined the appointment, thereby demonstrating his awareness of the importance of the ethical considerations involved.

Dated: Honolulu, Hawaii, March 6, 1973.

STATE ETHICS COMMISSION
Vernon F. L. Char, Chairman
Audrey P. Bliss, Commissioner
Walters K. Eli, Commissioner

Note: Vice Chairman Gwendolyn B. Bailey was excused from the meeting in which this opinion was considered. There was one vacancy on the Commission.

CONCURRING OPINION OF WALTERS K. ELI

I concurred with the findings of the majority, but added one further aspect for the consideration of the employee. The legislative history of the ethics law indicates that the primary objective of the law was to avoid even an appearance of unethical conduct. In SCR 367, 4th Legis., 1st Sess. (1967) p. 3, the House Judiciary Committee stated that "if public confidence in government is to be maintained and enhanced, it is not enough that public officers avoid acts of misconduct. They must scrupulously avoid acts which may create an appearance of misconduct."

I advised the employee that his proximity with officials subject to action by the advisory commission may well create in the minds of an appreciable segment of the population the impression that the officials are attempting to do what the ineligibility provision effectively prevents. I advised that the employee's participation and effort on the advisory commission, as a consequence, could give the appearance of bias, even though he had adhered strictly to the impartiality requirements of §84-13.

He was advised that I would not rule that appearance in and of itself is a violation of the ethics law. In any given case, it would be a matter of assessing circumstantial evidence indicating a violation before determining whether or not a violation has occurred. Although in any given case, the circumstantial evidence might not be sufficient to establish a violation, it still might be enough to undermine public confidence. I called this matter to the employee's attention because the Ethics Commission is charged with preserving public confidence in public servants and protecting public officials from undeserved criticism. I stated I believed that this was a matter for the employee's consideration when deciding whether to accept appointment to the advisory commission.

Walters K. Eli, Commissioner