

## ADVISORY OPINION NO. 86-1

The Commission received a request for an advisory opinion from a state official on the question of whether an employee in his department could serve in her state capacity as an officer of a nonprofit corporation without violating any provisions of the State Ethics Code, chapter 84, Hawaii Revised Statutes (HRS). The corporation, which was funded by the State, was established as an educational and research institution designed to assist the State in the development of technology in a certain area. It had been stated that the employee would be taking official action that would directly involve the corporation.

The question before the Commission was whether state employees might serve in their state capacities as directors or officers of private corporations that are subject to official action taken by them. Normally, HRS §84-14(b) prohibits state employees from joining private corporations as directors or officers if the corporations are subject to their official action:

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.

Under HRS §84-3(1), nonprofit organizations are included as "businesses" for purposes of the ethics code, and, under HRS §84-3(6)(F), a financial interest is defined to include a directorship or officership in a business.

The Legislature included HRS §84-14(b) in the ethics code to prohibit state employees from acquiring financial interests in businesses subject to their official action so that conflicts between their duties to the State and their own financial interests would not arise.

It is not clear, however, whether when drafting HRS §84-14(b) the Legislature had envisioned the situation in which state employees serve as directors or officers of private corporations as part of their state duties. Because state employees who serve in their official capacities as directors or officers of private corporations have no "personal" financial interests in the corporations, the Commission believes that HRS §84-14(b) does not necessarily prohibit them from accepting directorships or officerships with the private corporations. The Commission believes, however, that in allowing state employees to accept positions as directors or officers of private corporations certain conditions must normally be met, and the Commission has set forth these conditions in the list of guidelines found below. The Commission would like to emphasize that these guidelines are meant to serve only as general principles, and are not meant to suggest that any particular case would be subject to either automatic rejection or approval. Although the Commission believes that each case must be presented to the Commission for its approval, the Commission issues these guidelines to inform state employees of the various factors involved. In determining whether a state employee may serve in a state capacity as a director or officer of a private corporation, the Commission will consider the following:

- (1) There is a valid state purpose that justifies a state agency's having one of its employees serve in a state capacity as a director or officer of a private corporation.
- (2) The state agency authorizes in writing that serving as a director or officer of a private corporation is one of the official responsibilities of the state employee.

- (3) The state employee who serves in an official capacity as a director or officer of a private corporation serves or acts solely on behalf of the State's interests.
- (4) The state employee receives no compensation from the private corporation.
- (5) The state employee has no financial interest in the private corporation.
- (6) The state employee's service as a director or officer of the private corporation does not violate any of the provisions of the State Ethics Code.
- (7) The question of whether a state employee may serve in a state capacity as a director or officer of a private corporation has been presented to the Commission, and the Commission has granted its approval.

In determining with respect to item 6 whether ethics problems are likely to arise if a state employee serves as a director or officer of a private corporation, the Commission will consider the following factors:

- (a) **The purpose of the corporation.** The Commission believes that ethical problems are less likely to arise in situations where the private corporation has been created to further the public's interests as a whole or the interests of the State of Hawaii, rather than individual or private interests.
- (b) **The funding source.** The Commission believes that ethical problems are less likely to arise in situations where the federal or state government, charities, or foundations fund the private corporation.
- (c) **Whether the corporation is a profit or nonprofit corporation.** The Commission believes that ethical problems are less likely to arise when state employees serve as directors or officers of nonprofit corporations.

The Commission would like to reiterate that these guidelines do not provide for either automatic rejection or approval. Because the particular facts of a case may affect the applicability of HRS §84-14(b), the Commission requires that all cases in which state employees may serve in their official capacities as directors or officers of private corporations be cleared with the Commission.

In accordance with the guidelines set forth above, the Commission believed that the employee could serve in her state capacity as an officer of the nonprofit corporation so long as she acted solely on behalf of the State's interests, was not compensated by the corporation, had no financial interest in the corporation, and had received written authorization from her department to the effect that she served as an officer of the corporation in her state capacity. In making its determination, the Commission also took into consideration the corporation's mission and the fact that it was a nonprofit corporation funded by the State.

Because the Commission found that the employee would have no personal financial interest in the corporation, the Commission also believed that HRS §84-14(a), which prohibits state employees from taking official action that directly affects their private financial interests, would not apply to the employee's situation. The Commission stated, however, that other provisions of the

ethics code might have general application. In particular, the Commission noted that HRS §84-13 prohibits state employees from granting favorable treatment to themselves or others.

Although the Commission believed that HRS §84-14(b) would not prohibit the employee from serving as an officer of the corporation, the Commission asked that the situation be closely monitored and that the Commission be informed of any questions pertaining to ethics that arose. The Commission stated that its decision in the case did not preclude it from examining ethical problems that might develop in the future.

The Commission told the official that it appreciated his seeking the Commission's advice at an early time and commended the official for his sensitivity to the ethical considerations involved in the matter.

Dated: Honolulu, Hawaii, January 31, 1986.

STATE ETHICS COMMISSION  
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