

## ADVISORY OPINION NO. 86-2

The Commission received a request for an advisory opinion from a state official on the question of whether he could serve in his official capacity as one of the members of the board of directors of a private, nonprofit corporation.

In his letter to the Commission, the official pointed out that this question had been brought to the Commission in 1976. In response to the question at that time, the Commission issued Advisory Opinion No. 280, which allowed a state employee holding the official's position to serve in an official capacity as a board member of the private corporation even though the employee's department occasionally entered into contracts with the corporation for services and the employee was responsible for approving and monitoring those contracts. Because almost ten years had elapsed since the Commission issued Advisory Opinion No. 280, the official asked the Commission to review the situation to ensure that his department's policy of having one of its employees serve as a board member of the corporation did not violate any provisions of the State Ethics Code, chapter 84, Hawaii Revised Statutes (HRS). The official stated that the facts relating to his question had not changed substantially since the Commission issued Advisory Opinion No. 280 in 1976.

For the purposes of this opinion, the Commission restated the pertinent facts of the case. A nonprofit corporation funded by the federal government was formed to do research and assist states in a certain geographical area. Hawaii fell within the area and, like other area members, was entitled to a share of the corporation's services. To ensure that each area received its share of services, the federal government strongly recommended that an official of each state in the area be offered membership on the corporation's board of directors. The corporation thus offered a board position to the official's department, and, in response, the official's department passed a resolution requiring one of its officials to serve as one of the members of the corporation's board of directors.

The question before the Commission was whether state employees could 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 reaffirmed the advice given in Advisory Opinion No. 280. The Commission believed that the official could serve as a board member of the corporation so long as he did so in his capacity as a state official, received no compensation from the corporation, and had no personal financial interest in the corporation. In reaffirming Advisory Opinion No. 280, the Commission also took into consideration the corporation's mission and the fact that it was a nonprofit corporation funded by the federal government. Finally, the Commission noted that the official's service on the board of the corporation had been authorized by a resolution adopted by his department.

Because the Commission found that the official 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 his situation. The Commission pointed out, 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. The Commission stated that those who competed with the corporation for the department's contracts might believe that the corporation received preferential treatment because the official served as a corporation board member. To prevent any appearance of impropriety from arising, the Commission advised that the department take measures to demonstrate that its contracts were awarded fairly.

Although the Commission believed that HRS §84-14(b) did not prohibit the official from serving as a board member 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 noted 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 submitting this matter to it for review and commended the official for his sensitivity to the ethical considerations involved in the case.

Dated: Honolulu, Hawaii, January 31, 1986.

STATE ETHICS COMMISSION  
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