

ADVISORY OPINION NO. 87-2

A former state employee requested an advisory opinion from the State Ethics Commission concerning the application of the post-employment restrictions of the ethics code to his present private employment. The former employee had worked for a state senate committee as a permanent committee staff member. He terminated his employment with the state legislature at the end of 1986 and soon after was hired as the executive assistant to the president of a private, non-profit advocacy organization. The president acts as the lobbyist for that organization.

Both the former employee and the president of the advocacy organization asked the Commission for an advisory opinion explaining the extent to which, and the manner in which, the former employee's actions for, and on behalf of, the organization were affected by the post-employment restrictions of the ethics code, chapter 84, Hawaii Revised Statutes ("HRS"). On January 14, 1987, the former employee and the advocacy organization's president appeared at the Commission's meeting of that date to provide additional information to the Commission and to express their opinions on this matter.

As a senate committee staff member, the former employee provided technical support to the committee chairman by training and supervising staff in certain matters and by analyzing legislative requests from other state departments and from senate committee chairpersons.

As the executive assistant to the president of the advocacy organization, the former employee's duties included assisting the president in her lobbying activities and performing administrative tasks for the organization. Although it was anticipated that the former employee would, in the future, assume a more active role in the organization's operations, the current year would be primarily an orientation and training period for the former employee.

The president of the advocacy organization related that as part of the former employee's orientation, the president wanted the former employee to accompany her to legislative hearings and meetings, not as a participant, but as an observer. The president emphasized to the Commission that the former employee was not hired to lobby legislative votes for the advocacy organization. That responsibility rested with the president, or with some other individual who would act as a paid lobbyist on behalf of the organization. The former employee's role was to accompany the president to hearings and meetings, for training purposes, and to assist the president in scheduling appointments with legislators or their staff members.

The former employee and the advocacy organization's president presented the Commission with a lengthy list of questions relating to what the former employee could and could not do for, or on behalf of, the organization in light of the post-employment restrictions of the ethics code. The Commission noted that the applicable provisions of the code were sections 84-18(b) and (c), HRS.

Section 84-18(b) provides as follows:

No former legislator or employee shall, within twelve months after termination of his employment, assist any person or business or act in a representative capacity for a fee or other consideration, on matters in which he participated as an employee.

The Commission noted that section 84-18(b) prohibited the former employee from assisting or representing the advocacy organization for a period of twelve months following termination of his state employment, on a matter in which he participated as a state employee.

Section 84-18(c) provides as follows:

No former legislator or employee shall, within twelve months after termination of his employment, assist any person or business or act in a representative capacity for a fee or other consideration, on matters involving official action by the particular state agency or subdivision thereof with which he had actually served.

The Commission noted that this section of the ethics code prohibited the former employee from assisting or representing the advocacy organization, for a period of twelve months following termination of his state employment, on matters involving official action by the state agency or subdivision thereof with which he actually served.

The questions that the former employee asked the Commission to address were divided into two parts: Part "A" related to the agency or subdivisions thereof before which the former employee was allowed to assist or represent the advocacy organization; Part "B" related to the specific acts that constituted "assistance" to, or "representation" of, the advocacy organization within the meaning of sections 84-18(b) and (c). The Commission assumed for all questions that the activities would occur within twelve months following termination of the former employee's state service and that the former employee would be paid a fee or other consideration by the advocacy organization for his activities.

A. Agencies or subdivisions thereof before which the former employee could assist or represent his private employer.

For each of the questions in Part "A" the former employee asked the Commission to assume that he was "assist[ing]" the advocacy organization or "act[ing]" in a representative capacity" on behalf of the organization within the meaning of the ethics code. The former employee then presented the following questions to the Commission:

1. Whether he could so act before the *Hawaii State Senate*?
2. Whether he could so act before the *Hawaii State House of Representatives*?
3. Whether he could so act before the *Executive Branch of the Hawaii State Government*?
4. Whether he could so act before the *"Executive and Legislative Branches of the Cities and Counties of the State of Hawaii"*?
5. Whether he could so act before a *"State Agency," as defined by section 84-3(9) of the ethics code*?

Initially, the Commission noted that section 84-18(b) prohibited the former employee from assisting or representing the advocacy organization on a matter in which he participated as a state employee *regardless* of the agency or branch of government involved. Both the former employee and the organization's president had indicated to the Commission, however, that it was most unlikely that the former employee would be asked to assist or represent the organization on such a matter. Although the advocacy organization had introduced several bills to the legislature in 1986, it was the Commission's understanding that the former employee did not participate as a state employee in the review or consideration of those bills. Therefore, the Commission observed,

if the advocacy organization reintroduced those same bills in 1987 and the former employee was asked to assist or represent the organization in connection with those bills, the former employee would not be assisting or representing the organization on a matter in which he participated as a state employee.

The Commission stated that section 84-18(c), HRS, further prohibited the former employee from assisting or representing the advocacy organization on matters involving official action by the *particular state agency or subdivision* thereof with which the former employee actually served. "State agency" is defined by section 84-3(9) of the ethics code to include "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." [Emphasis added.]

Previously, the Commission had advised former state employees who were employed in a particular division within a state department that they were prohibited by section 84-18(c) from assisting anyone on a matter involving official action by that particular division, but that it was permissible for them to assist someone on a matter involving official action by a different division within that same department. The Commission stated that it had applied section 84-18(c) in this manner because that statute only prohibits post-employment assistance on matters involving official action by "*the particular state agency or subdivision thereof*" with which an employee has actually served. [Emphasis added.]

The Commission observed that the state agency that the former employee had served, as a senate committee staff member, was the legislature. The Commission stated that it would determine in this opinion whether the state senate, with which the former employee actually served, and the state house of representatives, with which the former employee did not actually serve, were "subdivision[s]" of the legislature for purposes of section 84-18(c).

The Commission noted that under the Hawaii State Constitution, the senate and the house of representatives are separate legislative houses. Article III, Section 1 of the Constitution provides that "[t]he legislative power of the state shall be vested in a legislature, which shall consist of two houses, a senate, and a house of representatives." The Commission noted that Article III, Section 12 further provides, in pertinent part, that each house shall be separately organized and run as follows:

Each house shall be the judge of the election, returns and qualifications of its own members and shall have, for misconduct, disorderly behavior or neglect of duty of any member, power to punish such member by censure or, upon a two-thirds vote of all the members to which such house is entitled, by suspension or expulsion of such member. Each house shall choose its own officers, determine the rules of its proceedings and keep a journal.

The Commission further noted that the senate is vested with legislative consent authority not accorded to the house of representatives. For example, the appointment of executive department heads, certain board and commission members, and justices and judges is subject to senate consent, but is not subject to consent by the house of representatives. See Hawaii State Constitution, Article V, Section 6, and Article VI, Section 3. Therefore, the Commission observed that the senate and the house of representatives do not always perform identical functions within the legislature.

The Commission believed that the constitutional organization of the senate and the house of representatives evidences that they are separate, autonomous subdivisions within the state legislature. The Commission therefore concluded that the senate and the house of representatives should each be considered a "subdivision" of a state agency, i.e., the legislature, for purposes of section 84-18(c).

The Commission held that as a former employee of the state senate, the former employee was prohibited by section 84-18(c) from assisting or representing the advocacy organization on a matter involving official action by the senate for a period of twelve months following termination of his state employment. The Commission further stated that in this context, the Commission's reference to the "senate" included all senators, senate committees, and senate employees, including but not limited to aides, assistants, staff members, secretaries and clerks. The Commission also found that the former employee was prohibited by section 84-18(c) from assisting or representing the organization on matters involving official action by any legislative committee or body that was composed of members from the senate, such as a conference committee. The Commission stated that the former employee could, however, assist or represent the organization on a matter involving official action by the house of representatives because that house constituted a separate subdivision of the legislature and because the former employee did not actually serve that subdivision as a state employee.

The Commission further concluded that the former employee could assist or represent the advocacy organization on matters involving official action by any state department and, with of course the exception of the state senate, by any other "state agency" as defined by section 84-3(9). Although, as a senate committee staff member, the former employee may have consulted with other state departments to analyze their legislative requests, it appeared to the Commission that the former employee did not assist those departments in preparing their requests or otherwise "serve" those departments within the meaning of section 84-18(c). Therefore, the Commission held that section 84-18(c) did not prohibit the former employee from assisting or representing the organization on matters involving official action by those departments.

The Commission also concluded that the former employee could assist or represent the advocacy organization on matters involving official action by the executive and legislative branches of the cities and counties of the State of Hawaii. The Commission observed that section 84-18(c) prohibits post-employment assistance on matters involving official action by a *state* agency and did not, therefore, prohibit him from rendering assistance or representation on a matter involving official action by a *city* agency.

B. Acts which constitute "assistance" to, or "representation" of, the former state employee's private employer.

In Part "B" of the questions that the former employee presented to the Commission, the former employee asked the Commission to assume that he would perform certain activities on behalf of the advocacy organization that employed him either on matters in which he participated as an employee or on matters involving official action by the particular state agency or subdivision thereof with which he actually served. The former employee then inquired whether the following activities constituted "assist[ing] ... or act[ing] in a representative capacity" for purposes of the ethics code, and asked the following:

1. Whether he could track legislation.
2. Whether he could draft testimony for presentation by others at a "prohibited forum" (i.e., a state agency or subdivision thereof with which he actually served).
3. Whether he could organize social functions by preparing invitations, arranging a place for the function, organizing agendas, and contacting legislators to confirm attendance.
4. Whether he could attend those social functions.
5. Whether he could obtain, arrange and schedule appointments.
6. Whether he could attend, but not participate in, the appointments.
7. Whether he could attend and participate in the appointments.

Before addressing these specific questions, the Commission noted that it had previously recognized the rationale underlying the post-employment restrictions created by sections 84-18(b) and (c), HRS:

The rationale of the two statutory provisions discussed above [sections 84-18(b) and (c)] appears to be the prevention of a former state employee from using influence derived from contacts and associations that he made while in government for his personal gain or for the benefit of others. The provisions also appear to guard against the use for personal gain of knowledge that a former state employee has of cases in which he participated. Finally, an intent of the provisions appears to be the discouraging of a state employee from using his state position to obtain a future job in the private sector It was also our belief, however, that activities of former state employees should not be so restricted that people are discouraged from public service. Moreover, any limitation on a former employee's activities should not be so severe that the general public loses the benefit of the experience and knowledge that the individual acquires while in government service once he moves into the private sector.

Advisory Opinion No. 206 at 3-4.

Thus, the Commission held, the post-employment restrictions are intended to prevent former state employees from using influence or inside knowledge derived from state employment to benefit themselves or others. At the same time, however, the Commission acknowledged that these post-employment restrictions should not be so stringently applied that people are discouraged from state service. The Commission believed that these considerations were relevant in answering the questions raised by the former employee in this case.

Both sections 84-18(b) and (c) prohibit former state employees and legislators from assisting any person or business, or acting in a representative capacity, for a fee or other consideration on certain specified matters. The Commission observed that the ethics code does not define what it means to "assist" or to "act in a representative capacity" on behalf of a person or business within the meaning of sections 84-18(b) and (c).

It appeared to the Commission, however, that the terms could encompass a broad spectrum of activities ranging from innocuous, ministerial acts, such as performing an errand or typing a letter, to more influential acts, such as lobbying, which could significantly affect the outcome of a particular matter or official action taken by a state agency.

The Commission believed that it would be unreasonable, and contrary to the post-employment considerations previously quoted, to interpret and to apply the post-employment restrictions of the ethics code in a manner that prohibited each and every act that happened to fall within this broad spectrum. The Commission believed that sections 84-18(b) and (c) should not be applied to prohibit assistance or to construe as "representation" assistance which is so minimal, or so far removed from a matter or from the official action to be taken, that it would not affect that matter or that official action. Accordingly, the Commission concluded that sections 84-18(b) and (c) should be applied to prohibit only those activities that are intended to influence, or that one can reasonably believe might influence, either a matter in which an individual previously participated as an employee or the official action to be taken by a particular state agency or subdivision thereof with which the employee had actually served. With these general guidelines in mind, the Commission then responded to the specific questions raised by the former employee.

The Commission concluded that the former employee could track legislation provided he did not initiate any lobbying responses to the legislation being tracked. The Commission noted that section 84-18(c) only prohibits former state employees from assisting or representing others on matters involving *official* action by their former agencies or subdivisions. Official action is defined in the ethics code as a decision, recommendation, approval, disapproval or other action, including inaction, which involves the use of *discretionary* authority. Therefore, section 84-18(c) does not prohibit former state employees from assisting or representing others on matters involving ministerial action by their former agencies. The Commission believed that providing information to the public about the status of proposed legislation was a ministerial act and not a discretionary one. Therefore, the Commission found that section 84-18(c) did not prohibit the former employee from seeking tracking information from the legislature that would otherwise be available to any person requesting it.

The Commission held that the former employee could not draft testimony for presentation by others to the senate and that he could not present testimony to the senate. The Commission observed that the former employee's presentation of testimony would constitute lobbying as defined by section 97-1(7), HRS:

"Lobbying" means communicating directly or through an agent, or soliciting others to communicate, with any official in the legislative or executive branch for the purpose of influencing any legislative or administrative action.

The Commission found one could reasonably believe that lobbying activities might influence official action to be taken by the state senate. Indeed, the Commission stated, lobbying is, by definition, an act undertaken for the purpose of influencing legislative action. Accordingly, the Commission concluded that the former employee could not participate in any lobbying activities on matters involving official action by the senate. The Commission further concluded that the former employee was prohibited from drafting testimony for presentation by others to the senate. The Commission found that such activity would be intended to influence official senate action and that one could reasonably believe such activity might influence official action to be taken by the senate. The Commission held that the former employee could testify and participate in other lobbying activities before the house of representatives. However, the former employee could not

draft testimony or lobbying material for presentation to the house of representatives if that same testimony or material was intended for presentation to the senate.

The Commission held that the former employee could organize social functions for the advocacy organization that employed him and could contact senate officials or their staff members to confirm attendance provided the former employee's activities did not extend to lobbying, and provided further that the former employee did not attempt to use any influence derived from contacts and associations made while employed at the senate to persuade senators or their staff to attend these social functions. The Commission assumed, for purposes of this question, that the social functions were to be hosted by the advocacy organization in order to promote that organization's legislative goals.

The Commission held that the former employee could attend the advocacy organization's social functions as long as he did not participate in lobbying activities directed towards senate officials or employees at those functions.

The Commission held that the former employee could obtain, arrange and schedule appointments with senate officials or their staff provided that, in so doing, he did not lobby and he did not use or attempt to use any influence derived from contacts and associations made while employed at the senate.

The Commission held that the former employee could attend, but not participate in, the advocacy organization's meetings with senate officials or their staff members provided his attendance was not intended to influence, and provided one could not reasonably believe that his attendance might influence, either a matter in which he previously participated as an employee (for which he was representing or assisting the advocacy organization) or any official action that might be taken. Based upon the information that the former employee and the advocacy organization's president provided to the Commission, it did not appear that the former employee's mere presence at a meeting would be likely to influence any matter in which he previously participated or any official action by the senate. However, the Commission determined that the former employee could not participate in any organization meetings with senate officials or their staff because in so doing, the former employee would be lobbying on behalf of the advocacy organization.

The Commission also held that the former employee was prohibited by section 84-18(c) from assisting the advocacy organization in planning or developing lobbying strategies on matters involving official action by the senate. The Commission determined that one could reasonably believe the former employee's participation in the formulation of senate lobbying strategies might influence official action to be taken. The Commission further determined that the former employee's participation in such activities would certainly be intended to influence official action. Therefore, the Commission held that the former employee could not use or attempt to use his attendance at meetings with senate members as a means of assisting the advocacy organization in planning or developing its lobbying activities.

The former employee also asked the Commission whether he would be required to register as a lobbyist on behalf of the advocacy organization. The Commission advised that if the former employee indeed engaged in "lobbying" on behalf of the organization (to the extent permitted by the post-employment provisions of the ethics code), as that term is defined in the lobbyists laws, chapter 97, HRS, then the former employee was required to comply with all the requirements set forth in that chapter with respect to registration and the filing of expenditure reports.

The Commission also called to the former employee's attention section 84-18(a) of the ethics code, which provides as follows:

No former legislator or employee shall disclose any information which by law or practice is not available to the public and which he acquired in the course of his official duties or use the information for his personal gain or the benefit of anyone.

The Commission noted that section 84-18(a) prohibited the former employee from disclosing, or using to benefit the advocacy organization, any information which was not available to the public and which the former employee may have acquired in the course of his official state duties.

The Commission stated that in this opinion, it had attempted to establish guidelines for the former employee to follow in carrying out his employment responsibilities to his private employer while complying with the post-employment restrictions of the ethics code. However, the Commission stated that it could not resolve every question raised by the former employee in connection with this matter because, in many instances, the answer was dependent upon facts and circumstances which, at this time, were unknown. For example, the Commission stated that the former employee had asked whether he could "assist" others who present testimony at a prohibited forum; whether he could communicate in writing or orally with aids, staff, assistants, secretaries, etc., employed at a prohibited forum; and whether he could make telephone calls on behalf of his private employer to legislators and employees. The Commission stated that its response to these questions would depend on the individuals involved, the exact nature of the "assistance" rendered, the subject matter of any communication, and the circumstances surrounding the act or communication. Therefore, the Commission stated that it was unable to provide specific answers to these questions at this time. The Commission hoped, however, the general guidelines set forth in its opinion would assist the former employee in determining whether a contemplated act was or was not prohibited by the ethics code. In addition, the Commission stated that as a particular situation arose and specific facts became known, the former employee could contact the Commission for further advice concerning the application of the ethics code to that situation.

The Commission thanked the former employee for seeking an advisory opinion from the Commission in connection with this matter. The Commission further stated that it appreciated the concern for the ethics code that the former employee and his private employer had demonstrated and appreciated their cooperation and candor.

Dated: Honolulu, Hawaii, January 28, 1987.

STATE ETHICS COMMISSION
Cynthia T. Alm, Chairperson
Laurie A. Loomis, Vice Chairperson
Rev. David K. Kaupu, Commissioner

Note: Commissioner Arnold J. Magid was not present during the discussion and consideration of this opinion. There was also a vacancy on the Commission when this opinion was signed.