ADVISORY OPINION NO. 87-4

The Commission received a request for advice from a state employee regarding the application of the State Ethics Code to certain private business activities in which the employee was engaged. The employee had been employed contemporaneously in two separate positions by two different state agencies. During the previous year, she retired from her position with one agency, but had continued her employment with the other state agency.

The employee inquired whether the State Ethics Code prohibited her from offering consulting services to state agencies (including both her former agency and the agency that presently employed her) through a consulting business that she owned and operated as a sole proprietorship. The employee had also inquired whether the State Ethics Code prohibited her from selling publications that she had authored to state agencies (including both her former agency and the agency that currently employed her) through another business that she owned and operated as a sole proprietorship.

The employee had been previously advised by the Commission's staff that subject to certain restrictions, the ethics code did not prohibit her from providing consulting services or from selling her publications to state agencies. The Commission's staff had also advised the employee about the applicable restrictions that the ethics code required her to observe in connection with her private business activities. However, the employee's situation required the Commission's consideration by way of advisory opinion of two additional issues:

(1) Whether HRS section 84-14(d) prohibited her from providing consulting services, through her consulting business, to the state agency that currently employed her.

(2) Whether the post-employment restrictions of the State Ethics Code applied to her private business dealings with the state agency from which she had retired.

Applicability of HRS section 84-14(d)

Because the employee was currently employed by a state agency, the Commission concluded that she was a state "employee" for purposes of the ethics code, including HRS section 84-14(d), which provides as follows:

> No legislator or employee shall assist any person or business or act in a representative capacity for a fee or other compensation to secure passage of a bill or to obtain a contract, claim, or other transaction or proposal in which he has participated or will participate as a legislator or employee, nor shall he assist any person or business or act in a representative capacity for a fee or other transaction or proposal before the legislature or agency of which he is an employee or legislator.

Section 84-14(d) prohibits an employee from assisting or representing any person or business for compensation on a contract before the employee's agency. A "business" is defined by the ethics code to include a corporation, partnership, sole proprietorship, trust or foundation, or any other individual or organization carrying on a business, whether or not operated for profit. Thus, the Commission held that the employee's consulting business, which she owned and operated as a sole proprietorship, constituted a "business" for purposes of the ethics code.

The question before the Commission in this case was whether section 84-14(d) prohibited the employee from contracting to provide personal services through her consulting business to the state agency that currently employed her. The Commission held that it did not. The Commission noted that the employee was the sole owner and operator of her consulting business. The Commission was informed that this business had no other employees. It was also the Commission's understanding that the employee would personally perform all work in connection with any consulting contract between her agency and her business. Further, it did not appear that the employee would be assisting or representing any person or business other than herself in contracting with her state agency.

Given these circumstances, the Commission believed that a consulting contract between the employee's agency and the employee's business would in essence be a contract for the employee's personal services. The Commission did not believe that HRS section 84-14(d) was intended to prohibit personal service contracts between a state agency and its employees. Accordingly, the Commission held that HRS section 84-14(d) did not prohibit a consulting contract between the employee's agency and the employee's sole proprietorship which was, in essence, a contract for the employee's personal services.

The Commission stressed that the determination as to whether a contract between a state agency and an employee's business is in essence a personal service contract must be made on a case-by-case basis. In determining whether a contract between a state agency and a business should be treated as a personal service contract, the Commission stated that it would consider the following factors:

(1) The nature of the services to be provided under the contract;

(2) The type of business entity involved (i.e., sole proprietorship, partnership, corporation, etc.) and whether the business has other owners, partners, officers or employees who will benefit from the contract;

(3) Whether the contract involves the services of only one individual or whether other owners or employees of the business will also participate in the contract; and,

(4) Whether the business plans to sub-contract with another person or business.

Although the Commission concluded that HRS section 84-14(d) did not prohibit a personal service contract between the employee's agency and her consulting business, the employee was advised by the Commission of other sections of the ethics code that were applicable to her and to her business:

HRS section 84-12 prohibited the employee from disclosing, or using to benefit her private business, information that by law or practice was not available to the public and that the employee acquired in the course of her state duties.

HRS section 84-13 prohibited the employee from using her state position to secure unwarranted advantages or contracts for her business. This section also prohibited the employee from using state time, equipment or other facilities for private business purposes. The Commission also informed the employee that this section also prohibited her from accepting any compensation as a private business to perform her official duties or responsibilities as a state employee. The

employee could only receive the compensation that was provided by law for performing her state responsibilities.

HRS section 84-14(a) prohibited the employee from taking official action as a state employee directly affecting her private business. HRS section 84-14(b) prohibited the employee from acquiring financial interests in any other businesses or undertakings that she had reason to believe might be directly involved in official action to be taken by her as a state employee.

HRS section 84-15(a) prohibited any state agency, including the agency that employed the employee, from entering into a contract with her or with her consulting business involving services of a value in excess of $1,000 unless the contract had been awarded through an open, public process, or unless written justification for the non-competitive award of such a contract was filed with the Commission.

Finally, HRS section 84-15(b) prohibited a state agency from contracting with a business that the employee represented or assisted if she had been an employee of the agency within the preceding two years and if she participated while in state employment in the matter with which the contract was directly concerned.

The Commission informed the employee that if she had any questions regarding the application or interpretation of any of these sections of the ethics code, she should contact the Commission for further advice.

Applicability of post-employment restrictions

HRS section 84-18 is the post-employment section of the ethics code, and provides as follows:

> **§84-18 Restrictions on post employment.** (a) No former legislator or employee shall disclose any information which by law or practice is not available to the public and which the former legislator or employee acquired in the course of the former legislator's or employee's official duties or use the information for the former legislator's or employee's personal gain or the benefit of anyone.
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> (b) No former legislator or employee shall, within twelve months after termination of the former legislator's or employee's employment, assist any person or business or act in a representative capacity for a fee or other consideration, on matters in which the former legislator or employee participated as an employee.
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> (c) No former legislator or employee shall, within twelve months after termination of the former legislator's or employee's 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 the former legislator or employee had actually served.
>
> (d) This section shall not prohibit any agency from contracting with a former legislator or employee to act on a matter on behalf of the State within the period of limitations stated herein, and shall not prevent such legislator or employee from appearing before any agency in relation to such employment.

The Commission noted that the post-employment restrictions of HRS section 84-18 apply to a "former employee." In Advisory Opinion No. 286, the Commission held that this section of the ethics code applies only to an employee who has terminated state employment and does *not* apply to an employee who simply transfers from one state department or position to another. The Commission repeated this holding in Advisory Opinion No. 380.

In this case, the Commission stated that it had previously recognized that sections 84-18(b) and (c) of the post-employment provisions of the State Ethics Code were intended to provide a "cooling off" period so that the relationships made and influence gained as an employee are not used to advantage one's self or others. The Commission noted that an additional intent of these sections was to eliminate the appearance of impropriety created when a former employee, shortly after leaving the state agency that he or she has served, assists or represents others on matters before that agency.

The Commission believed that these policy considerations apply with equal force to employees who transfer from one state agency to another as well as to employees who terminate state employment. The Commission further believed that these policy considerations apply to employees, such as the employee in this case, who contemporaneously hold two state positions and terminate one of those positions but continue to serve in the other position. The Commission held that the post-employment provisions apply to all such "former employees." To the extent that Advisory Opinion Nos. 286 and 380 were inconsistent with this holding, those opinions were overruled by the Commission.

The Commission held that as a former employee of the state agency from which she had retired, the employee in this case was prohibited by HRS section 84-18, for twelve months following termination of her employment, from assisting or representing any of her businesses or anyone else for compensation on matters in which she participated as an employee and on matters involving official action by the state agency or subdivision thereof with which she had actually served. The Commission explained that "official action" is defined under the ethics code to mean a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.

The Commission realized that its holding in this opinion would restrict some of the employee's business dealings with her former state agency. However, the Commission noted that the employee's twelve-month period of restricted activity under section 84-18 would expire shortly. The Commission further noted that HRS section 84-18(d) permitted the employee's former agency to contract with her to act on a matter on behalf of the State without waiting for any time period to lapse.

The Commission informed the employee that it appreciated her bringing this matter to its attention and commended the employee's interest in state ethics.

Dated: Honolulu, Hawaii, August 14 1987.

STATE ETHICS COMMISSION
Laurie A. Loomis, Chairperson
K. Koki Akamine, Commissioner
Rev. David K. Kaupu. Commissioner

Note: Commissioner Cynthia T. Alm participated in the Commission's decision but was unable to be present at the signing of this opinion.

DISSENT

I respectfully dissent from the Commission's holding that HRS section 84-14(d) does not prohibit a contract for personal services between a state agency and a sole proprietorship owned by an employee of that agency. Section 84-14(d) prohibits an employee from assisting or representing any business on a contract before the employee's agency. For purposes of this section, I would make no distinction between a sole proprietorship and any other business entity.

Rabbi Arnold J. Magid, Vice Chairperson