

ADVISORY OPINION NO. 87-8

The State Ethics Commission ("Commission") received a request for an advisory opinion from a state legislator who asked whether the State Ethics Code, chapter 84, Hawaii Revised Statutes ("HRS"), would prohibit him from accepting employment with a nonprofit corporation to serve as the corporation's "legislation supervisor." The legislator was to be compensated by the corporation for his services. After reviewing the relevant facts and law, and after considering the legislator's written arguments and the testimony the legislator presented when he appeared at the Commission's 23 September 1987 meeting, the Commission concluded that the legislator's employment with the corporation would be prohibited by sections 84-13, 84-13(2), and 84-14(d) of the State Ethics Code for the reasons discussed in the following paragraphs of this opinion.

I. Relevant Facts

The corporation had been formed by certain government officials for the purpose of furthering the common interests and objectives of the government agencies of the State of Hawaii the government officials respectively served. Those objectives included the coordination of their agencies' administrative programs; the creation of practical and efficient legislation, administration, and procedures; and the creation of a single source of information about the agencies that would be available to the Legislature and other interested officials or individuals.

To carry out these objectives, the corporation employed a "legislation supervisor" whose duty it was to assist the corporation with its legislation by formulating the legislation and facilitating adoption by the Legislature of the corporation's legislative package. The duties of the corporation's legislation supervisor included the following:

1. Drafting bills for the corporation's legislative package.
2. Drafting resolutions for the corporation's legislative package.
3. Providing legal and technical research for the corporation's legislative package.
4. Preparing testimony for presentation at the Legislature for bills that were part of the corporation's legislative package.
5. Preparing all staff reports pertaining to the corporation's legislative package.
6. Monitoring and reporting on the progress of the corporation's legislation.
7. Monitoring other bills affecting the government agencies with which the corporation was aligned.

In short, the legislation supervisor assisted the corporation in monitoring its legislation and in facilitating passage of its legislation. This duty was clearly set forth by the corporation in a letter soliciting applicants for the position of legislation supervisor. The letter stated that the legislation supervisor's duty would be "to assist" the corporation "in monitoring the state legislative process and in facilitating the passage of ... [the corporation's] legislative priorities."

In order to learn more about the structure and functioning of the corporation, the Commission's staff also contacted a government official who helped manage the corporation. The

official stated that most of the corporation's budget was provided by the government agencies the corporation assisted. However, the official also stated that the corporation raised a portion of its own budget itself by holding conferences and charging registration fees. The official also stated that the corporation wished to be construed solely as a nonprofit corporation, and not as a government or quasi-government agency, so that it would clearly be entitled to all the advantages of a nonprofit corporation, including tax advantages. The official stated that the corporation might in the future wish to engage in other business dealings, aside from holding conferences, if doing so benefitted the corporation. In short, the official stated that the corporation did not wish to place any limitations on itself as a nonprofit corporation and wished to be able to engage in any activity available to a nonprofit corporation if in the future it determined that doing so was in the best interest of the corporation.

II. Application of Chapter 84, the State Ethics Code.

A. Application of Section 84-14(d).

Section 84-14(d), a part of the conflicts-of-interests section of the State Ethics Code, is applicable to state legislators and provides as follows:

(d) 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 compensation on such bill, contract, claim, or other transaction or proposal before the legislature or agency of which he is an employee or legislator.

This section of the ethics code contains two prohibitions applicable to state legislators. The first prohibition bars a state legislator from assisting or representing, for compensation, a person or business to secure passage of a bill in which the legislator has participated or will participate as a legislator. The second prohibition bars a state legislator from assisting or representing, for compensation, a person or business on matters before the Legislature, including any bill before the Legislature.

Whether section 84-14(d) was applicable in this case depended on whether the corporation would be construed as a "business" for purposes of the ethics code. Section 84-3(1) of the ethics code defines a business for purposes of the ethics code as follows:

"Business" includes a corporation, a partnership, a sole proprietorship, a trust or foundation, or any other individual or organization carrying on a business, whether or not operated for profit.

Because the corporation (1) was a nonprofit corporation, (2) engaged in normal business activities, and (3) wished to keep its identity distinct from the government agencies it served, the Commission concluded that it was indeed a "business" for purposes of the ethics code. The legislator argued that the corporation should not be considered a business, because its purpose was to further the interests of certain government agencies of the State of Hawaii. Although this argument was quite compelling to the Commission, the corporation itself had indicated that it did not wish to be construed as a government or quasi-government agency and had also indicated that it involved itself in the business of holding conferences and might wish to engage in other

business. Furthermore, the Commission noted that section 84-3(1) could have, but does not, concern itself with the purpose of a nonprofit corporation. The Commission observed that there were many nonprofit corporations in the State that operated in the public interest, or for the benefit of government agencies. While the Commission might in the application of other provisions of the ethics code consider the purpose of a nonprofit business as significant or dispositive, the Commission believed that in this case, for purposes of section 84-14(d), the term "business" should encompass the nonprofit corporation. The Commission thus believed that section 84-14(d) prohibited the legislator from receiving compensation to assist or represent the corporation on any bill the legislator participated in or would participate in as a legislator or on any matter or bill before the Legislature. Although the legislator suggested disqualification in his capacity as a legislator in order to comply with section 84-14(d), the Commission noted that it had often held that disqualification cannot be used to circumvent the requirements of the first part of section 84-14(d).

In support of its position, the Commission referred to Advisory Opinion No. 298. In that opinion, the Commission applied section 84-14(d) to bar a legislator from accepting compensation for assisting or representing an organization of state employees on matters before the Legislature:

For example, HRS section 84-14(d) would prohibit a legislator from representing a person or business for a fee or other compensation to secure passage of a bill in which the legislator had participated or would participate as a legislator; further, a legislator might not represent a person or business for a fee on a bill before the Legislature of which he was a member. In this legislator's own case, this meant that *he might not represent either his interests or those of his fellow state employees if an organization of these employees should compensate him for taking such action before the Legislature.* [Emphasis Added.]

The state employees involved in Advisory Opinion No. 298 all worked for one state department; yet the Commission concluded that such a group was a person or business for purposes of the ethics code. The Commission believed that the logic of Advisory Opinion No. 298 also applied to the corporation in the instant case, and thus held that the nonprofit corporation was a business for purposes of section 84-14(d).

B. Application of Sections 84-13 and 84-13(2).

Sections 84-13 and 84-13(2), part of the fair treatment section of the State Ethics Code, are also applicable to state legislators and provide as follows:

§84-13 Fair treatment. No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others; including but not limited to the following:

....

- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of the legislator's or employee's official duties or responsibilities except as provided by law.

The initial paragraph of section 84-13 bars legislators from using their official positions to give themselves or others any unwarranted advantages. Section 84-13(2) prohibits legislators from receiving compensation, other than that already provided by the State, for the performance of a

legislator's official duties or responsibilities. The Commission discussed the applicability of section 84-13(2) first.

The Commission believed that it was the responsibility or duty of a legislator to support the passage of legislation the legislator believed would be good law. In promoting the passage of legislation, the Commission noted that a legislator might argue the legislation's merits, argue amendments to the legislation, perhaps draft legislation, and perhaps draft testimony or other commentary. The legislator might also seek the assistance of his or her staff or other staff support within the Legislature--be it within the Houses themselves or within the Legislative Reference Bureau--to have appropriate legislation drafted, to have testimony drafted, or to have research done on legislation. Similarly, a legislator might ask a state or city agency to draft or research legislation the legislator believed would be good law for the State. Since the State paid legislators to support legislation they believed in and to oppose legislation they believed to be detrimental to the interests of the State, and since the State provided a legislator with resources to carry out these duties, the Commission believed that a legislator was additionally compensated, in violation of section 84-13(2), if he or she received money other than his or her state salary to assist or defeat the passage of legislation.

Because legislation was a legislator's responsibility and because a legislator received a state salary to support or oppose legislation and had resources provided by the State to aid in the support of, or opposition to, legislation, the Commission also believed that section 84-13 would be violated if a legislator accepted additional pay to support or oppose legislation. The unwarranted advantage to a legislator consisted of accepting additional compensation from another source for doing work the legislator was already paid to do or could have done with state resources available to him or her. The Commission believed its interpretation of sections 84-13 and 84-13(2) in this case was supported by the following excerpt from Advisory Opinion No. 59, issued in 1970:

Legislative Action

May a legislator hire himself out to a private group to effect legislation in its favor?

We hold that he may not.

In Opinions Nos. 26, 27 and 28, we noted that Section 13 "governs the use of official position within the Legislature to obtain unwarranted treatment" We continued that:

using one's position as a Senator or Representative to effect legislation for the benefit of one's client, which legislation is unwarranted, would constitute a violation of Section 84-13. "Unwarranted," in this instance, has reference to a result for a client which would not have been achieved without the use of his position by the legislator involved. This coincides with the intent of Section 84-13 that the criteria for legislative action should be the merits of the issue and not the power of the man backing the legislation for private reasons.

However, in Opinions Nos. 26, 27 and 28, we did not deal with the question of a legislator's being hired for the purpose of effecting legislation for his

employer. We hold that action taken by a legislator, who has been hired to effect specific legislation, toward effecting such legislation is, per se, use of official position to obtain unwarranted treatment and in violation of Section 13.

A member of the Legislature is a servant and representative of the public which chose him. This trust, which he sought and was granted, imposes upon him the duty to act in his legislative capacity to his best ability to forward the public interest. *When he takes any action on legislation which a private group has paid him to work for, he is using his official position to obtain unwarranted treatment, the compensation he receives. Whether or not the bill he works for is indeed in the public interest is not here relevant. He is being paid by the public to fulfill his trust by enacting the legislation with the highest public good, and receiving payment from another group for this work is, per se, "unwarranted" treatment.*

Thus, we hold that a legislator may not receive compensation from any group for his efforts in the Legislature. [Emphasis Added.]

In Advisory Opinion No. 59, the Commission ruled that receiving further payment from another employer to enact legislation was unwarranted. Although Advisory Opinion No. 59 may have dealt with a "private" employer, the issue was not whether the employer was public or private, but that the compensation was further payment. Section 84-13(2) does not limit itself to additional compensation from a "private" source; hence, the Commission believed that additional compensation from any source--be it public or private--was prohibited by section 84-13(2).

The holding in Advisory Opinion No. 59 explicitly states: "Thus, we hold that a legislator may not receive compensation from *any group* for his efforts in the Legislature." [Emphasis Added.] "Any group," of course, encompassed a group such as the corporation in this case. Although the corporation was aligned to a considerable degree with certain government agencies of the State, Advisory Opinion No. 59 also dealt with a similar body. In Advisory Opinion No. 59, a group of state officials with common goals in the public interest had formed an association to accomplish their common goals; nevertheless, the Commission held that a legislator could not receive compensation from the group to assist it with its legislation. The Commission believed that Advisory Opinion No. 59, then, was quite on point. The Commission noted that the material quoted above from Advisory Opinion No. 59 was from the original opinion, not the "deleted" version that is publicly available.

In applying sections 84-13, 84-13(2), and 84-14(d), the Commission kept in mind the fact that the Legislature has intended that ethics code provisions be *liberally construed*:

§84-1 Construction. This chapter shall be liberally construed to promote high standards of ethical conduct in state government.

The Preamble to the State Ethics Code provides that the purpose of the State Ethics Code is to preserve the public's confidence in its public servants. The Commission believed that public confidence in public servants would be maintained by application and interpretation of sections 84-13, 84-13(2), and 84-14(d) in keeping with both the letter and spirit of the ethics law.

In conclusion, the Commission believed that sections 84-13, 84-13(2), and 84-14(d) prohibited the legislator from accepting the position as the corporation's legislation supervisor. The

Commission informed the legislator that it appreciated his seeking the Commission's advice in this matter and appreciated his patience and cooperation.

Dated: Honolulu, Hawaii, October 28, 1987.

STATE ETHICS COMMISSION
Rabbi Arnold J. Magid, Vice Chairperson
K. Koki Akamine, Commissioner
Cynthia T. Alm, Commissioner
Rev. David K. Kaupu, Commissioner

Note: Chairperson Laurie A. Loomis was not present during the discussion and consideration of this opinion.