

ADVISORY OPINION NO. 88-1

The Commission received a request for an advisory opinion from the former division head of a state department concerning the post-employment restrictions of the State Ethics Code, chapter 84, Hawaii Revised Statutes ("HRS"). On September 23, 1987, the former employee appeared before the State Ethics Commission to provide additional information in connection with this matter.

In his capacity as a department division head, the former employee's principal duties were to supervise certain private businesses. The former employee terminated his state employment in the summer of 1987 and was currently associated as an attorney with a private law firm.

The former employee raised several questions regarding the application of the post-employment restrictions of the State Ethics Code to his current activities as a private attorney. All of his questions related to his assistance or representation of others on matters involving his former department.

1. Assistance or Representation of Others on Matters in Which the Former Employee Participated as a State Employee.

The former employee asked whether HRS section 84-18(b) prohibited his involvement for compensation on any matter relating to the type of businesses he supervised while a state employee or whether this section prohibited only his involvement on specific matters in which he participated as a state employee. HRS section 84-18(b) provides as follows:

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.

The Commission noted that this section of the ethics code prohibited the former employee, for twelve months following termination of his state employment, from assisting or representing any business for compensation on matters in which he participated as an employee.

The Commission explained to the former employee that it had previously held that the restrictions of section 84-18(b) do not apply to general areas of work that occupied an employee during state employment, but instead apply to specific projects that continue after an employee leaves state employment. Accordingly, the Commission held that section 84-18(b) prohibited only the former employee's assistance to, or representation of, others for compensation on specific matters in which he participated as a state employee.

2. Assistance or Representation of Others on Matters Involving Official Action by the Agency or Subdivision with which the Former Employee Actually Served.

The former employee asked whether section 84-18(c) prohibited his involvement for compensation on matters involving official action by his former division only or on matters involving official action by any division in his former department. HRS section 84-18(c) provides as follows:

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.

The Commission noted that this section of the ethics code prohibited the former employee, for twelve months following termination of his state employment, from assisting or representing any person or business for compensation on matters involving official action by the particular state agency or subdivision thereof with which he had actually served. "Official action" is defined by the ethics code as a decision, recommendation, approval, disapproval, or other action, including inaction, that involves the use of discretionary authority.

The Commission explained that in applying section 84-18(c) in the past, it generally had tried to narrow the scope of that section's restrictions to those subdivisions affected by significant discretionary action taken by an employee, or those subdivisions that an employee has had significant discretionary input into. The Commission stated that for many, if not most, departmental employees, section 84-18(c) will only apply to the particular department division in which an employee has worked. The Commission observed that the former employee in this case, however, was employed as a department division head and that his influence on and input into other divisions in his former department may have exceeded that of his subordinate employees. With respect to this former employee's particular situation, the Commission concluded that section 84-18(c) prohibited him from assisting or representing others for compensation on matters involving official action by his former division, the office of the director of his former department, and by one other specified division in his former department.

The Commission noted that as the head of his former division, the former employee was vested with the authority to adopt, amend, or repeal rules to effectuate the purpose of all laws within the jurisdiction of that division. The former employee also related to the Commission that he had broad authority to plan and implement the programs, policies, and procedures of his former division. It was clear to the Commission that the former employee had significant discretionary input into the operations of his former division as a whole and that section 84-18(c) prohibited him from assisting or representing others on matters involving discretionary action by his former division.

The Commission also believed that the restrictions of section 84-18(c) applied to the former employee's post-employment activities before the office of the director of his former department.

The Commission noted that pursuant to statutory authority, the former employee was appointed by the department director to serve as the head of the employee's division and that he served in that capacity subject to removal by the director. The Commission further noted that state law provided for the former employee's salary to be set by the department director.

It also appeared to the Commission that the former employee had a close working relationship with the director of his former department. The former employee had related that he regularly met with the director to discuss matters pertaining to the former employee's division. The former employee had stated that he advised the director about developments affecting his division and about the activities of his division, especially in connection with the division's long-term goals. In addition, the former employee had stated that he alerted the director to matters of particular import to the administration and to the public.

The former employee had further stated that the director occasionally consulted with him for advice and assistance, and that prior to his departure from state employment he worked very closely with the director on matters pertaining to his former division.

The Commission acknowledged that the former employee was accorded a certain degree of autonomy in carrying out his duties as the head of his former division. However, given the nature of his working relationship with the director, the Commission concluded that in addition to his own division, the former employee also served the director of his former department. Accordingly, the Commission held that section 84-18(c) prohibited the former employee from assisting or representing any person or business for compensation on matters involving discretionary action by the office of the director.

The Commission also concluded that section 84-18(c) prohibited the former employee from assisting or representing persons before one other specified division in his former department. The former employee had stated that he worked with that particular division on a special project involving the transfer of cases to that division; that his staff compiled a policies and procedures manual regarding the handling of cases which now serves as a guide for that particular division; and that the former employee and his staff worked with that particular division to insure the effective resolution of cases. The Commission believed that the former employee exercised significant discretionary input into operations of that other division and that, therefore, the prohibitions of section 84-18(c) applied to the former employee in connection with matters involving official action by that other division.

The Commission also reviewed the former employee's interaction with other divisions in his former department to determine whether he exercised significant discretionary input into the policies, procedures, or programs of these other divisions. The Commission found that he did not take significant discretionary action affecting these divisions. Although the former employee regularly met with other division heads at monthly meetings presided over by the director of that department, these meetings were primarily informational in nature and concerned matters, some of which were more administrative than substantive, pertaining to the department as a whole. It did not appear to the Commission that the former employee's attendance at these meetings significantly affected the other department divisions. The former employee had also indicated to the Commission that he worked with other divisions in his former department to coordinate actions taken by his own division and these other divisions; that he coordinated legislative testimony with these other divisions; that, on occasion, he requested the expedition of certain matters by another division; and that he transmitted reports made by his staff to other divisions. Again, the Commission did not believe that such actions by the former employee constituted significant discretionary input into these other divisions. Therefore, the Commission concluded that section 84-18(c) of the ethics code did not prohibit him from assisting or representing persons before these other divisions in his former department. The Commission held that the former employee could not, however, assist or represent anyone before any division of his former department if he had reason to believe that the matter would also involve official action by his former division, the director's office, or the one other division that the former employee was deemed to have served through the exercise of significant discretionary input.

The Commission noted that in applying the post-employment restrictions of the ethics code, it had previously recognized the rationale underlying those restrictions, but had also recognized the need to temper the application of those restrictions:

We stated that the rationale of ... [sections 84-18(b) and (c)] appeared 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. We said that the provisions also appeared to guard against the use for personal gain or knowledge that a former State employee had of cases in which he participated. Finally, an intent of the provisions appeared to us 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 restricted to such an extent that people were discouraged from public service. Moreover, we stated that any limitation of 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.

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The Commission believed that the above-stated application of section 84-18(c) to the former employee's particular situation was consistent with both the rationale of the post-employment laws and the Commission's intent not to overly restrict the activities of former employees.

3. Advice on Administrative Procedure to Other Attorneys.

Finally, the former employee inquired whether section 84-18(c) prohibited him from providing other attorneys in his law firm with general advice on administrative procedure in cases involving action by his former division. The Commission noted that it had previously stated that section 84-18(c) should not be applied to prohibit action that is so minimal, or so far removed from the official action to be taken by an employee's former agency or subdivision, that it would not affect the official action. The Commission recognized that it had held that section 84-18(c) prohibits only those activities that are intended to influence, or that one can reasonably believe will influence, the official action to be taken by the agency or subdivision thereof with which a former employee has served.

The Commission stated that section 84-18(c) prohibited the former employee from advising other attorneys in his law firm about strategical or tactical matters that were intended to influence, or that one could reasonably believe would influence, official action to be taken by his former division. The Commission noted that this prohibition did not apply to matters involving only ministerial and not discretionary action by his former division. The Commission further held that section 84-18(c) did not prohibit the former employee from providing general advice to other attorneys in his law firm about administrative procedure.

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

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.

The Commission stated that section 84-18(a) prohibited the former employee from disclosing confidential information that he had acquired as an employee or from using such information for his personal gain or for anyone else's benefit. The Commission advised the former employee that in providing information or advice to other attorneys, he exercise caution not to disclose confidential information that he acquired as a state employee.

The former employee was also advised to be aware of section 84-15(b) of the ethics code, which provides as follows:

A state agency shall not enter into a contract with any person or business which is represented or assisted personally in the matter by a person who has been an employee of the agency within the preceding two years and who participated while in state office or employment in the matter with which the contract is directly concerned.

The Commission stated that this section prohibited the former employee from assisting or representing any person or business in obtaining a contract from his former department for a period of two years if he participated while in state office in the matter with which the contract was concerned.

The Commission stated that it appreciated the former employee's candor and cooperation in connection with this matter and wished the former employee well in his new endeavors.

Dated: Honolulu, Hawaii, March 29, 1988.

STATE ETHICS COMMISSION
Laurie A. Loomis, Chairperson
K. Koki Akamine, Commissioner
Cynthia T. Alm, Commissioner

Note: Vice Chairperson Arnold J. Magid was not present during the discussion and consideration of this opinion.

DISSENT

I respectfully dissent from the Commission's conclusion that section 84-18(c) only prohibits this former employee's assistance to, or representation of, others on matters involving official action by the employee's former division, the office of the director of the employee's former department, and the one other division specified by the Commission, and not by any other division in the former employee's department. I believe that this former employee also exercised significant discretionary input into one other division in the department. Therefore, I would also prohibit the former employee's assistance or representation of others on matters involving official action by that other division.

Rev. David K. Kaupu, Commissioner