

ADVISORY OPINION NO. 88-6

The director of a state department requested an advisory opinion from the State Ethics Commission ("Commission") as to whether certain employees who work with the department could accept employment with a particular nonprofit organization immediately after leaving the department without violating any of the sections of the State Ethics Code, which is set forth in chapter 84, Hawaii Revised Statutes ("HRS").

The Commission understood the relevant facts of the case to be as follows. The department administered a particular assistance program, funded under federal law, to provide help to various disadvantaged groups. An office within the department operated the program. The office had submitted a request for additional funds through the federal law to provide an assistance program for a particular group of disadvantaged individuals. In carrying out this program for these individuals, it was the intent of the office to utilize a particular nonprofit organization that had been previously established to help the particular disadvantaged group. The goal of the office was to have members belonging to the particular group administer their own program. Thus, the office's involvement would be to train individuals who would later become part of the nonprofit organization's staff and carry out the program. It appeared that it would have been possible for the office itself to have its own state employees run the program; however, the office apparently believed that having members of the group operate their own program would be much more beneficial.

When applying for additional federal funds, the office hired a person of the same background as members of the group to be assisted under the program to assist the office in preparing its grant application to the federal government. It occurred to officials in the director's department that after federal funds were received, the nonprofit organization might wish to hire this particular person to help carry out the program. Officials at the director's department realized that there might be a problem under the post-employment restrictions of the State Ethics Code if this employee were to leave the department and immediately accept a position with the nonprofit organization. Furthermore, the office had intended to hire others of the same background as those to be assisted to train them to carry out the program for the members of the disadvantaged group. Officials in the director's department realized that these individuals as well might later be employed by the nonprofit organization immediately after leaving the department. Hence, officials in the director's department wondered again if there might be a problem under the post-employment restrictions of the State Ethics Code.

Two sections of the post-employment section of the State Ethics Code were relevant to the question the director raised. These provisions of the State Ethics Code, sections 84-18(b) and (c), provide as follows:

(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.

(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.

Section 84-18(b) prohibits a state employee for one year after leaving state office from assisting or representing a person or business for compensation on a matter that the employee participated in as a state employee. Section 84-18(c) prohibits a state employee for one year after leaving state office from representing a person or business for compensation on matters involving official action by the particular state agency or subdivision thereof with which the former employee had actually served. Under a literal reading of these statutes, section 84-18(b) could be said to prohibit for one year the employee hired by the department to assist with the grant, or others employed by the department to be trained to implement the program, from assisting the nonprofit organization for compensation with respect to the assistance program, since the program would constitute a matter in which these former state employees participated as state employees. Further, under a literal reading of section 84-18(c), the employee hired by the department to assist with the grant, or others hired by the department to be trained to implement the program, would have been prohibited for a one-year period from assisting for compensation the nonprofit organization on any matter involving official action by the office. However, after reviewing the facts of this case and the wording of sections 84-18(b) and (c), the Commission concluded that these sections of the State Ethics Code would be inapplicable to any department employees hired to establish or implement the assistance program who wished to accept employment with the nonprofit organization immediately after leaving state employment to carry out the assistance program.

In applying sections 84-18(b) and (c), the Commission was primarily concerned with the interpretation of the word "business" as that term is used in these statutes. Under usual circumstances, the Commission would conclude that the nonprofit organization in this case constituted a "business" for purposes of sections 84-18(b) and (c). "Business" is defined in section 84-3 to include any nonprofit organization. However, in many instances nonprofit organizations are created solely for the purpose of assisting a particular state agency in its mission. In other instances, already existing nonprofit organizations may be utilized to further the mission of a state agency. The Commission noted that when a nonprofit organization is utilized by a state agency to assist it in fulfilling its mission, the state agency and the nonprofit organization often become indistinguishable. Likewise, there can be little difference between the state employees working for the state objective and the employees who work for the nonprofit organization also in furtherance of the state objective. In cases where the functions of a nonprofit organization are so closely entwined with a particular state agency that the two work hand-in-hand to further the state objective, the Commission has concluded that sections 84-18(b) and (c) should not apply, since the non-profit organization does not constitute a "business" as the Commission believes that term was meant to be interpreted by the Legislature.

Advisory Opinions Nos. 317 and 407 both supported the Commission's holding in this case. In those cases, a non-profit organization was created to assist a particular state agency in its mission. After examining how the nonprofit organization and the state agency worked together, the Commission concluded that the nonprofit organization was essentially a "program" of the State and therefore was not a "business" as the term was meant to be used in sections 84-18(b) and (c).

In this case, the Commission believed that the nonprofit organization's involvement in the assistance program for the disadvantaged group was really no more than an extension of the state office. The office would be receiving funds from the federal government and would merely be subcontracting with the nonprofit organization to carry out the assistance program. It appeared that the office could have carried out the program itself, but concluded that a program managed directly by individuals of the same background as members of the disadvantaged group would be more effective. Also, it appeared that the office would be monitoring the assistance program as carried out by the nonprofit organization. The office would also be hiring members of the disadvantaged

group specifically to train them to carry out the assistance program as staff members of the nonprofit organization. Prohibiting these individuals from accepting employment for one year with the nonprofit organization to help in the assistance program would have done nothing more than to frustrate the reasons for which these individuals were hired by the department.

The Commission noted that section 84-18(d) allows a state agency to enter into a personal services contract with a former state employee to act on a matter on behalf of the State without waiting for any specific time period to lapse. Thus, the Commission noted that the department could always enter into a contract itself with members of the disadvantaged group who were former employees of the department without waiting for any time period to lapse. The Commission believed that section 84-18(d) should also apply to a nonprofit organization hiring a former state employee if the nonprofit organization was functioning in essence as an extension of the state agency the former state employee had left. In this case, the department could contract directly with members of the disadvantaged group formerly employed by it without violation of the State Ethics Code, because of the exception contained in section 84-18(d). The fact that the nonprofit organization would itself be entering into employment contracts with these same individuals, the Commission believed, was nothing more than a technical difference in this case. For these reasons, the Commission believed that sections 84-18(b) and (c) did not apply in this case to prohibit members of the disadvantaged group who were employed with the department from accepting employment with the nonprofit organization immediately after leaving state service to carry out the assistance program for other members of the disadvantaged group.

The Commission told the director that it appreciated his seeking its advice with respect to this matter at an early time. The Commission also told the director that it appreciated the sensitivity he and an assistant of his had shown to the ethical considerations raised in this matter.

Dated: Honolulu, Hawaii, May 11, 1988.

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.