

ADVISORY OPINION NO. 89-6

A state legislator requested an advisory opinion from the State Ethics Commission (the "Commission") regarding a possible conflict of interest between the legislator's position as a member of the state Legislature and her private employment with a particular company.

During the 1988-89 legislative session, the state Legislature approved, as part of the state budget, a capitol improvement project ("CIP") appropriation for a specific project. The appropriation funded the plans, design, construction and equipment for a technological facility.

The appropriated funds for the project were to be administered by a state department. Proposals for the utilization of the project funds would be accepted and reviewed by an advisory board which was attached for administrative purposes to the department. Recommendations by the advisory board regarding project proposals would be made to the department which, in turn, would determine how the project funds were to be disbursed.

In her private capacity, the legislator was employed by a company ("Company A") which specialized in the design and engineering of a particular apparatus. The apparatus was a necessary component of the technological facility which was the subject of the CIP appropriation. The legislator received a salary from Company A for her services to the company. Company A was interested in utilizing a portion of the CIP funds appropriated by the Legislature for the technological facility. Towards this end, Company A was working to develop a consortium with two other private companies ("Company B" and "Company C"). The purpose of the consortium was to develop and submit to the State a joint proposal for the commercial development of a technological facility utilizing a portion of the appropriated project funds. The legislator indicated to the Commission that Company A planned to apply for a portion of the appropriated CIP funds for the design and installation of an apparatus for the facility.

As an employee of Company A, the legislator would be involved in discussions with officials from the advisory board and the state department that were administering the appropriated project funds. These discussions would relate to the joint project proposal by Companies A, B, and C. The legislator was sensitive to the fact that if the joint project proposal was approved by the State, questions might be raised as to whether her position as a state legislator unfairly influenced the State's decision.

The legislator asked the Commission for advice as to whether or not she had a conflict of interest in this situation. The legislator stated that if the Commission advised her that a conflict of interest indeed existed, she would immediately terminate her employment with Company A. The legislator appeared before the Commission at one of its regularly scheduled meetings to provide additional information about her situation.

The sections of the State Ethics Code, chapter 84, Hawaii Revised Statutes ("HRS"), that were considered by the Commission in this case were sections 84-14(d) and 84-13. Section 84-14(d), HRS, 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 compensation on such bill, contract, claim, or other transaction or proposal before the legislature or agency of which he is an employee or legislator.

Section 84-14(d) prohibits a state legislator from assisting or representing a person or business for compensation to obtain a contract, claim, or other transaction or proposal in which he has participated or will participate as a legislator.

The Commission had to determine whether this section of the ethics code prohibited the legislator from assisting or representing her employer, Company A, or any other company for compensation in obtaining CIP funds that were appropriated during the preceding session by the Legislature for the technological facility project. The Commission noted that such assistance or representation by the legislator would be prohibited by section 84-14(d) if she participated or would participate in the CIP appropriation as a legislator.

The legislator informed the Commission that her only involvement as a legislator in the CIP appropriation for the project was that she voted on the state budget. The project appropriation appeared as a line item in the budget bill. The legislator related that another legislator had placed the appropriation for the project in the budget bill. The legislator further stated that she was not even initially aware of the appropriation's inclusion in the budget until the other legislator later informed her of this fact. The legislator also stated that the appropriation for the project was not the subject of any hearings by the legislative committees on which she served. And the legislator stated that she did not lobby other legislators to support the appropriation. The legislator informed the Commission that in the preceding legislative session she introduced a bill to create a development fund for another technological project. However, the legislator explained that the concept for the project that she sponsored was completely different from the CIP appropriation which was approved by the Legislature. The legislator further stated that the bill that she introduced was not passed by the Legislature.

Based upon the information that the legislator provided, the Commission did not believe that the legislator "participated" in the CIP appropriation within the meaning of section 84-14(d), HRS. The Commission concluded that for purposes of section 84-14(d), participation in a contract, claim, or other transaction or proposal meant having some significant contact with that contract, claim, transaction, or proposal. The Commission stated that whether or not a legislator or employee has had significant contact with a particular contract, claim, transaction, or proposal must be determined on a case-by-case basis.

The legislator stated that her only legislative contact with the subject CIP appropriation occurred when she voted on the state budget and the appropriation was included as a line item in the budget bill. The Commission did not believe that the mere act of voting on a budget bill constituted significant contact by a legislator with a contract, project, or proposal that was included as a budget item in the bill. The Commission stated that some additional direct involvement by a legislator with that particular contract, project, or proposal was required. In determining whether or not a legislator has participated or will participate in a particular contract, project, or proposal for purposes of section 84-14(d), the Commission stated that it would consider a number of factors, including whether the legislator has participated or will participate in any committee hearings or discussions regarding the contract, project, or proposal (and if so, what the nature of that participation was or will be); whether the legislator has lobbied others to support the contract, project, or proposal; whether the legislator has participated or will participate in any other bills

relating to the contract, project, or proposal; whether the legislator has communicated, in an official capacity, with the administering agency regarding the contract, project, or proposal; whether the legislator has received any inside information that might provide an unfair advantage to an applicant for the contract, project, or proposal; and whether the legislator otherwise has played or will play a significant role in the funding or approval of the contract, project, or proposal. The Commission stated that voting on the budget bill appropriating funds for the contract, project, or proposal was a factor to be considered by the Commission but would not be dispositive on the issue of whether a legislator has participated or will participate in the specific contract, project, or proposal.

The Commission concluded that the legislator's actions in voting on the state budget did not constitute participation in the CIP appropriation for this particular project for purposes of section 84-14(d), HRS. The legislator informed the Commission that she did not know whether additional funding for the project would be required from the Legislature. Therefore, at this point, it could not be determined that the legislator would participate or that she was likely to participate, as a legislator, in the same project in the future. In any event, the Commission noted, the legislator had stated that if additional funding for the project was required, it would probably be obtained through a similar CIP appropriation rather than through a subject matter bill that might come before one of the legislator's legislative committees. Because the Commission did not believe that the legislator had participated or was likely to participate in this particular project as a legislator, the Commission concluded that section 84-14(d) did not prohibit her from assisting or representing Company A before the advisory board or the state department in applying for the CIP funds that were appropriated by the Legislature for the project.

During her appearance at the Commission's meeting, the legislator indicated that various state agencies would need to request legislative funding for additional supplies of a particular apparatus in the future. Company A specialized in the design of this apparatus. The legislator also stated that because of its unique expertise in this field, Company A currently provided all of the technical services related to the use of this particular apparatus in Hawaii. The Commission stated that its advice was predicated upon the legislator's limited legislative involvement in the CIP appropriation for the project which was the subject of this opinion. The Commission advised the legislator to seek additional advice from the Commission with respect to any future projects involving Company A if those projects were the subject of any legislation or legislative action in which the legislator had participated or would participate in her legislative capacity.

The legislator stated that her role with respect to Company A's project proposal would be to provide technical expertise. The legislator would not participate in any financial negotiations with the State in connection with the project proposal to be submitted by Companies A, B, and C. The legislator stated that all financial negotiations for the proposal would be conducted by Companies B and C. The legislator anticipated, however, that she would be meeting with officials from the advisory board and state department that were administering the project funds to discuss the project proposal and to act as a resource person.

Because of her public position, the legislator was concerned that persons might question the propriety of her representation of Company A in discussions with state officials regarding the company's project proposal. To minimize any possible undue influence from her legislative position, the legislator stated that in her business dealings with state officials, she had stressed that she was acting in her capacity as a private citizen and that her state office should not be a consideration.

The Commission called to the legislator's attention section 84-13, HRS, which is the fair treatment section of the ethics code and which provides 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:

- (1) Seeking other employment or contract for services for oneself by the use or attempted use of the legislator's or employee's office or position.
- (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.
- (3) Using state time, equipment or other facilities for private business purposes.
- (4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom the legislator or employee inspects or supervises in the legislator's or employee's official capacity.

Nothing herein shall be construed to prohibit a legislator from introducing bills and resolutions, serving on committees or from making statements or taking action in the exercise of the legislator's legislative functions. Every legislator shall file a full and complete public disclosure of the nature and extent of the interest or transaction which the legislator believes may be affected by legislative action.

Section 84-13 prohibits a legislator from using or attempting to use the legislator's official position to obtain unwarranted privileges or advantages for oneself or others.

The Commission noted that at one time, it interpreted section 84-13 to prohibit a legislator from representing private clients before a state agency if the legislator served on a legislative committee that had jurisdiction over the agency. However, the Commission explained that it subsequently modified this interpretation of section 84-13 and has since held that section 84-13 prohibits only the actual misuse of official position by a legislator in representing a client before a state agency. The Commission therefore concluded in this case that section 84-13 did not prohibit the legislator from assisting or representing Company A in discussions about the project proposal with officials from the advisory board or state department that were administering the project funds. However, the Commission stated that section 84-13 prohibited the legislator from using or attempting to use her official position as a legislator to obtain unwarranted privileges or advantages for herself, her employer, or any of the other companies working with Company A on the project proposal.

To avoid any possible misuse of her state office, the Commission advised the legislator to take steps to minimize or neutralize the influence of her state position when assisting or representing Company A in private business transactions with state officials. The Commission

noted that the legislator's efforts to emphasize that she was acting strictly in her private capacity when discussing Company A's project proposal with state officials was one way to minimize the influence of her state position. The Commission stated that the legislator should otherwise refrain from referring to her legislative office when transacting private business with state agencies. Likewise, the Commission stated, when conducting legislative business, the legislator should refrain from referring to private business matters in which she was involved as an employee of Company A.

The Commission also reminded the legislator that pursuant to section 84-13(3), HRS, she was prohibited from using state time, equipment, or facilities for her private business activities. The Commission explained that this prohibition extended to the use of the legislator's state office and state telephone for private business purposes.

The Commission commended the legislator for her sensitivity to the ethical issues in this case and thanked her for seeking the Commission's advice in this matter.

Dated: Honolulu, Hawaii, August 11, 1989.

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

Note: There was a vacancy on the Commission when this opinion was considered.

Opinion Concurring in Part and Dissenting in Part:

I concur in the result reached by the Commission but must respectfully dissent as to its reasoning with respect to the applicability of section 84-13, Hawaii Revised Statutes ("HRS").

Not all change is for the good and there are occasions when it is clear that the wisdom of the past exceeds the wisdom of the present. The Commission at one time had a rule which preserved a firm ethical standard and yet was flexible enough to prevent that standard from working an undue hardship on an individual legislator. In our efforts to prevent hardships on legislators, we have sacrificed too much and I would return to our earlier more reasoned line of cases.

The rule was enunciated in Advisory Opinion Nos. 26, 27, and 28¹ issued in 1969. In interpreting section 7² of the Ethics Act, the predecessor to the present section 84-13, HRS, the Commission stated:

¹These advisory opinions were requested together but were issued separately because of the different facts in each case and because one commissioner had disqualified herself from the consideration of Advisory Opinion Nos. 26 and 28.

²Section 7 of the Ethics Act read as follows: "**Fair Treatment.** No legislator or employee shall use or attempt to use his official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for himself or others."

"Unfortunately, there is here no litmus-paper test of whether the appearance of a particular member of the legislature before some state agency in itself constitutes a violation of section 7. As indicia of whether the appearance will constitute a violation, this Commission will consider amongst other things: (1) the position occupied by the person within the Legislature (i.e., party and position within the party, the committees he occupies or chairs, his seniority); (2) whether the appearance is to effect discretionary or ministerial action; (3) the level within State government of the person with whom he deals (how far removed the person or agency is from the direct power to exert legislative control); (4) the magnitude of the interest he represents; (5) the importance to his client of the State action he is requesting; (6) the public significance of the requested action; and (7) disclosures made and rulings by the respective houses of the legislative body of which he is a member. These criteria must be applied on a case-by-case basis to arrive at a reasonable regulation under section 7."

This was the rule that applied until 1983, when the Commission was asked whether an attorney-legislator could represent one of his clients before a state agency. The legislator was a member of a legislative committee that had subject matter jurisdiction over the state agency. The Commission initially issued an advisory opinion prohibiting the legislator from representing his clients on non-ministerial matters before the state agency.

After the advisory opinion was issued, the legislator asked the Commission whether its holding would bar a member of one of the legislature's finance committees from representing private clients before any state agency since the finance committees pass on the budgets of all state agencies.

Upon reconsideration, the Commission held that the only restriction meant to apply in representation cases is the prohibition against the receipt of contingent compensation under section 84-14(c), HRS. The Commission held that section 84-13, HRS, applies only in situations where there has been actual misuse of position.

The Commission's decision, issued as Advisory Opinion No. 505, turned on two rules of statutory construction:

"It is a well established rule of statutory construction that specific provisions of the law take precedence over general provisions. It is also well recognized that restrictions explicitly set forth in a statute on a specific matter imply that other restrictions not set forth have been purposefully avoided by the legislature."

The rule that more specific provisions take precedence over general provisions should be applied *only* if there is an inescapable conflict between the general and specific provisions. The overriding rule is that the general purpose of the whole statute controls, and all the parts of the statute should be interpreted as subsidiary and harmonious. If the language of the statute can be construed in two ways, one which would carry out and one which would defeat the purpose of the statute, the statute should be construed so as to carry out its purpose.³

³2A J. Sutherland, Statutes and Statutory Construction, Section 46.05 (4th ed, 1984).

There is no direct conflict between sections 84-14(c), HRS, and section 84-13, HRS. One provision prohibits the receipt of contingent compensation when representing others in transactions involving the State. The other provision prohibits the use or attempted use of official position to secure or grant unwarranted treatment. Even if a legislator does not receive contingent compensation, the representation might still involve the use of official position to secure unwarranted treatment.

To read these provisions as in direct conflict would mean that the only time unwarranted treatment is obtained is when the legislator is compensated on a contingent fee basis, and that is clearly not how the ethics code should be read. The purpose of the ethics code is to promote high standards of ethical conduct in state government and thereby preserve public confidence in public servants.⁴

The Commission's second basis for its decision in Advisory Opinion No. 505 was another rule of statutory construction: when there are restrictions explicitly set forth in a statute on a specific matter, no other restrictions apply. Before this rule is employed, however, there must be some evidence that the legislature intended that all omissions be understood as exclusions and this rule should not be employed if a different interpretation will serve the purpose of the statute.⁵

There is no specific statutory language in the ethics code stating that section 84-14(c), HRS, is the only restriction that applies in representation cases. And there is no evidence to that effect in the legislative history.

The two committee reports⁶ which specifically discuss the representation restrictions contained in section 84-14, HRS, state only that the proposed restrictions were written so as to avoid the use of a standard which was the basis for the veto of an earlier measure.

The two committee reports⁷ which specifically discuss section 84-13, HRS, address conflicts of interest in the exercise of legislative duties and the proposed language describing examples of proscribed activities. There is no discussion indicating that the representation restrictions in section 84-14, HRS, were meant to supersede the provisions of section 84-13, HRS.

The floor speeches and debates⁸ do not deal with the restrictions on representation before state agencies. They are focused instead on matters such as the enforcement of the ethics code, the disclosure of financial interests, the receipt of gifts, and the question whether legislators and public employees are required to be covered under a single ethics code.

⁴Section 84-1, HRS; preamble to chapter 84, HRS.

⁵2A J. Sutherland, *supra*, Section 47.25.

⁶House Standing Committee Report No. 211 (1971); Senate Standing Committee Report No. 718 (1971).

⁷Senate Standing Committee Report No. 670 (1972); Conference Committee Report No. 17 (1972).

⁸House Journal, pp. 593-595 (Regular Session, 1972) (statements by Rep. O'Connor, Yim, Kato, Wasai); Senate Journal, p. 483 (Regular Session, 1972) (statements by Senators Kawasaki, Takahashi).

As noted earlier, the purpose of the ethics code is to promote high standards of ethical conduct in state government and thereby preserve public confidence in public servants. The purpose of the ethics code would be better served if sections 84-13 and 84-14(c), HRS, were both applicable to representation cases.

In Advisory Opinion No. 505, the Commission held that section 84-13, HRS, applies only if there is an actual misuse of position. Section 84-1, HRS, provides that the ethics code is to be liberally construed to promote high standards of ethical conduct in state government. As the Commission noted in Advisory Opinion Nos. 26 and 27:

[T]he "aura of power" surrounding some members of the legislature under certain circumstances is so overwhelming as to effectively preclude objective treatment of his client's cause. The appearance before a public body of a legislator who is certain that the public body will accord his client unwarranted treatment because of the power of his position is such use of official position.

Similar language appears in Advisory Opinion No. 28.

As noted earlier, section 7 of the Ethics Act is the predecessor to the current section 84-13, HRS. I believe that the Commission's holding with respect to section 7 of the Ethics Act is equally applicable to section 84-13, HRS, and is in keeping with the spirit and intent of the law. It is also in keeping with the rule of statutory construction that an interpretation made at or soon after the time a statute is enacted is to be given special consideration since it was made at a time when the circumstances leading up to the enactment were well known.⁹ The Ethics Act was enacted in 1967. This interpretation was made in 1969 and stood for approximately 14 years.

For the foregoing reasons, I would hold that section 84-13, HRS, is applicable to representation cases and would apply the standard contained in Advisory Opinion Nos. 26, 27, and 28 to determine whether under the facts of the particular case, there would be a violation of section 84-13, HRS.

Under the standard in Advisory Opinion Nos. 26, 27, and 28, I would hold that the proposed representation would not violate section 84-13, HRS.

Cynthia T. Alm, Chairperson

⁹2A J. Sutherland, *supra*, Section 49.08.