

## **ADVISORY OPINION NO. 89-7**

A state legislator requested an advisory opinion from the State Ethics Commission (the "Commission") concerning his private business activities as a licensed real estate agent. In his private capacity, the legislator was employed as a realtor associate by a real estate broker. The legislator represented clients in transactions involving the lease of commercial office space.

The legislator informed the Commission that among his real estate clients were state and other governmental agencies that were seeking private sector office space to rent. The legislator solicited state agency clients by distributing flyers to state agencies to advertise his services. The legislator assisted these agencies in locating suitable office space and in negotiating lease terms with lessors. The legislator informed the Commission that state agencies do not have exclusive representation contracts with real estate agents and therefore are free to locate private office space on their own or to use other agents to locate private office space.

The legislator also acted as a listing agent for commercial lessors and assisted lessors in finding office tenants and in negotiating leases with tenants. As a listing agent, the legislator solicited state agencies to rent office space from lessors that he represented. The legislator also negotiated leases for his private clients with state agencies.

The legislator was compensated for his services by the real estate broker that employed him strictly on a commission basis. The legislator stated that in commercial lease transactions, commissions are traditionally paid by the lessor to the lessor's listing agent. The listing agent, as a cooperating real estate broker, will customarily split a commission with the lessee's agent.

The legislator asked the Commission whether his business activities as a real estate agent in commercial lease transactions involving state agencies constituted an ethical conflict with his state office. The legislator appeared before the Commission at one of its regularly scheduled meetings to provide additional information about his situation.

The Commission considered several sections of the State Ethics Code, chapter 84, Hawaii Revised Statutes ("HRS"), in this case.

### **I. Application of Section 84-14(c), HRS.**

Section 84-14(c), HRS, states as follows:

No legislator or employee shall assist any person or business or act in a representative capacity before any State or county agency for a contingent compensation in any transaction involving the State.

This section of the ethics code prohibits a legislator from assisting or representing any person or business before any state or county agency for a contingent compensation in any transaction involving the State.

With respect to the legislator's situation in this case, the Commission considered the following issues:

1. Whether section 84-14(c), HRS, prohibited the legislator from representing the real estate broker that employed him in soliciting state agency clients in commercial lease transactions where the legislator and the real estate broker were compensated on a commission basis.
2. Whether section 84-14(c), HRS, prohibited the legislator from representing private lessors on a commission basis in commercial lease transactions with state agencies.

For both of the above-stated issues, the Commission had to determine whether the real estate commissions that the legislator earned in commercial lease transactions constituted "contingent compensation" within the meaning of section 84-14(c), HRS.

The Commission noted that section 84-3, HRS, defines "compensation" as "any money, thing of value, or economic benefit conferred on or received by any person in return for services rendered or to be rendered by oneself or another." The Commission also noted that the term "contingent compensation" is not defined by the ethics code.

Webster's Third New International Dictionary defines a "contingent fee" as "a fee for services (as of a lawyer or agent) to be paid in the event of success in a particular transaction usually as a specified percentage of the sum realized for the client or principal." The Commission observed that Black's Law Dictionary contains a similar definition, and that legal decisions in court cases define the term "contingent" as being dependent for effect on something that may or may not occur.

The legislator in this case stated that there are generally three types of commissions that he earned in commercial lease transactions: Commissions that were calculated as a percentage of the total rent for the term of the lease; commissions that were equal to one or two months' rent, depending on the term of the lease; and commissions that were calculated as a dollar amount multiplied by the square foot area of the commercial property.

The legislator also informed the Commission that if he did not secure a tenant for a lessor that he represented, or if he did not successfully locate office space for a lessee that he represented, he generally did not receive any compensation for his services.

It was apparent to the Commission that the compensation that the legislator earned in commercial lease transactions was dependent or contingent upon his success in achieving a desired result for his clients. To receive a commission, the legislator either had to secure a tenant for a lessor that he represented or secure office space for a lessee that he represented. Because the commissions that the legislator earned were contingent upon the outcome of certain lease transactions, the Commission believed that these commissions were contingent compensation. However, the Commission stated that it did not believe that this was the type of contingent compensation intended to be prohibited by section 84-14(c), HRS.

The Commission believed that the rationale underlying section 84-14(c) is that when private compensation paid to a state official is contingent upon action taken by a state agency, there exists a greater danger that the official will use his or her state position in an improper manner to obtain the desired state action. The Commission stated that this is especially the case where a state

agency has jurisdiction or authority over a particular matter so that action taken by the agency will determine whether or not one is compensated for one's private involvement in that matter.

The Commission did not believe that the same dangers exist in commercial lease transactions where the parties may each be represented by real estate agents and may negotiate with each other in order to reach a mutually agreeable result. Further, the Commission noted that in lease transactions involving state agencies, the State is only one of a number of potential tenants. If an agency does not enter into a lease agreement with a lessor, the Commission noted, the lessor can do business with other prospective tenants.

The Commission stated that it had reviewed the legislative history of section 84-14(c), HRS, and had seen no evidence that in enacting this section of the ethics code, the Legislature intended to prohibit state officials from earning real estate commissions by privately engaging in real estate transactions involving state agencies. The Commission believed that if such a prohibition was desired, section 84-14(c) should be amended to expressly so provide.

In summary, the Commission did not believe that section 84-14(c) was intended to prohibit the type of real estate commissions that the legislator earned in lease transactions. Accordingly, the Commission concluded that section 84-14(c) did not prohibit the legislator's involvement as a real estate agent in commercial lease transactions involving state agencies.

## **II. Application of Section 84-14(d), HRS.**

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 legislator from assisting or representing any person or business for compensation to obtain a contract, claim, or other transaction or proposal in which the legislator has participated or will participate as a legislator.

The Commission was informed that lease rent paid by a state agency for private sector office space is subject to legislative appropriation and appears as a line item in the state budget. As a legislator, and as a member of one of the legislative finance committees, the legislator voted on the state budget.

The Commission had to determine whether section 84-14(d) prohibited the legislator's private employment as a real estate agent in lease transactions involving state agencies since, as a legislator, he voted on budget appropriations for state lease rents. More specifically, the Commission had to decide whether the act of voting on a budget bill meant that a legislator "has participated" or "will participate" in a state lease whose rent appears as a line item in the bill.

The Commission determined 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 would have to be determined on a case-by-case basis.

The legislator stated to the Commission that his participation, as a legislator, in the appropriation of state lease rents was limited to voting on the budget bill. The legislator further stated that in legislative budget hearings, lease rent for private office space was considered "too detailed" an item for discussion.

The Commission did not believe that the mere act of voting on a budget bill constituted significant contact with a state contract or lease that is included as a budget item in the bill. The Commission stated that some additional direct involvement by a legislator with that particular contract or lease was required. In determining whether or not a legislator has participated or will participate in a particular contract or lease for purposes of section 84-14(d), the Commission stated that it would consider a number of factors, including whether the legislator participated or will participate in any committee hearings or discussions regarding the contract or lease (and if so, what the nature of that participation was or will be); whether the legislator has lobbied others to support the contract or lease; whether the legislator has participated or will participate in any other bills relating to the contract or lease; whether the legislator has communicated, in an official capacity, with the administering agency regarding the contract or lease; whether the legislator has received any inside information that might provide an unfair advantage to an applicant for the contract or lease; and whether the legislator otherwise has played or will play a significant role in the funding or approval of the contract or lease. The Commission stated that voting on the budget bill appropriating funds for the contract or lease is a factor to be considered by the Commission but will not be dispositive on the issue of whether a legislator has participated or will participate in the contract or lease.

The Commission concluded in this case that where the legislator's participation with respect to a particular state lease was limited to voting on the budget bill, and where the legislator has had no other direct involvement as a legislator with that state lease, section 84-14(d) did not prohibit the legislator's private involvement as a real estate agent in negotiating the lease.

The Commission noted that section 84-14(d) also prohibited a legislator from assisting or representing any person or business for compensation on a contract, claim, transaction, or proposal before the Legislature. The Commission stated that section 84-14(d) therefore prohibited the legislator from assisting or representing any person or business for compensation in real estate transactions involving the Legislature. The legislator had informed the Commission that he was not involved in real estate transactions with any legislative offices or agencies.

### **III. Application of Sections 84-12 and 84-13, HRS.**

The Commission observed that because of the legislator's public status as a state legislator, persons might question the propriety of his solicitation of state agencies as real estate clients and his negotiation of leases with state agencies on behalf of private lessors. The Commission called to the legislator's attention the fair treatment section of the ethics code, HRS section 84-13, 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.

The Commission advised the legislator that section 84-13 prohibited him from using or attempting to use his official position as a legislator to obtain unwarranted advantages for himself, the real estate broker that employed him, or his private clients. The Commission stated that section 84-13(1) further prohibited the legislator from seeking private employment for himself as a real estate agent by the use or attempted use of his state office.

To avoid any possible misuse of his state office, the Commission advised the legislator to take steps to minimize or neutralize the influence of his state position when assisting or representing the broker that employed him or his private clients in business transactions with state agencies. The Commission stated that the legislator should refrain from referring to his legislative office when transacting private business with state agencies. Likewise, the Commission advised, when conducting legislative business, the legislator should refrain from referring to private business matters in which he was involved as a real estate agent.

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

Finally, the Commission called to the legislator's attention section 84-12, HRS, which provides as follows:

**§84-12 Confidential information.** No legislator or employee shall disclose information which by law or practice is not available to the public and which the legislator or employee acquires in the course of the legislator's or employee's official duties, or use the information for the legislator's or employee's personal gain or for the benefit of anyone.

The Commission stated that this section of the ethics code prohibited the legislator from using for private business purposes confidential information that he acquired as a legislator.

The Commission noted that its advice in this opinion was general advice only. The Commission explained that most ethical questions were resolved by the Commission based upon the specific facts of a given situation. Therefore, the Commission stated, any ethical questions or concerns that arose in the future regarding specific situations should be discussed with the Commission's staff.

The Commission thanked the legislator for seeking the Commission's advice in this matter and stated that it appreciated his cooperation.

Dated: Honolulu, Hawaii, October 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 28<sup>1</sup> issued in 1969. In interpreting section 7<sup>2</sup> of the Ethics Act, the predecessor to the present section 84-13, HRS, the Commission stated:

"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

---

<sup>1</sup>These 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.

<sup>2</sup>Section 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."

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.<sup>3</sup>

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.<sup>4</sup>

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.<sup>5</sup>

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 reports<sup>6</sup> 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 reports<sup>7</sup> which specifically discuss section 84-13, HRS, address conflicts of interest in the exercise of legislative duties and the proposed language describing examples of

---

<sup>3</sup>2A J. Sutherland, Statutes and Statutory Construction, Section 46.05 (4th ed, 1984).

<sup>4</sup>Section 84-1, HRS; preamble to chapter 84, HRS.

<sup>5</sup>2A J. Sutherland, *supra*, Section 47.25.

<sup>6</sup>House Standing Committee Report No. 211 (1971); Senate Standing Committee Report No. 718 (1971).

<sup>7</sup>Senate Standing Committee Report No. 670 (1972); Conference Committee Report No. 17 (1972).

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 debates<sup>8</sup> 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.

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.<sup>9</sup> 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

---

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

<sup>9</sup>2A J. Sutherland, *supra*, Section 49.08.