

OPINION NO. 95-2

A former member of a state board requested an Advisory Opinion from the State Ethics Commission concerning his recent resignation from the board. He resigned in order to avoid entanglement between his role on the board and his role as the president of a private corporation. The board was placed within a state department for administrative purposes only. The purpose of the board was to facilitate the growth and development of a certain industry in Hawaii. The former board member's private company had special expertise in a subarea of that industry.

In the past, the board was not active in the subarea in which the private company operated. Several years ago, however, it was suggested to the board member by representatives of the federal government that the board consider promoting this subarea. With this suggestion in mind, in his state capacity the board member met with congressional staff members in Washington D.C. After meeting with these people, he submitted a proposal for a research center for this subarea to be based in Hawaii. He then met with members of a federal agency who responded with interest to the idea. He arranged meetings between staff members of Hawaii's congressional delegation and members of the federal agency. He did not attend these meetings.

Congress ultimately responded to the efforts to create the research center. Several years ago, Congress authorized funding to create the center. The center was established as a cooperative venture between the state board and the federal agency. The center was funded by federal money. The board member explained that it was placed within the state board so that the federal government could transfer funds to a state agency.

The former board member informed the Ethics Commission that the center accepts proposals from private organizations for research in the subarea. It then reviews these proposals and distributes grants to fund the research. In its review of proposals, the center acts in accordance with federal procedures. The board member's state board has no role in the review of proposals. The center is housed in a different location from the board. The center has a separate staff.

While the center was being established, the board member anticipated that there might be conflicts of interests concerns as a result of his position in his private firm. He anticipated that his firm would submit proposals for funding to the center. He consulted with the Ethics Commission and with his private attorneys in order to address these concerns.

The center has awarded grants to the private company. The former board member explained that, as a member of the board, he did not participate in the awarding of these grants. He also explained that he did not assist or represent his private company in obtaining the grants. At the time that the former board member requested this opinion, his private company was seeking another grant from the center for a new project. The company was in the midst of the selection process for this project. The former board member wanted to assist in the company's efforts in future projects that might be funded by the center, and possibly assist in the project that was then in the selection process. He resigned from the board in order to avoid the conflicts of interests problems that were earlier discussed with him. He was aware, however, that the ethics code contained post-employment restrictions that would govern his actions. He asked for an advisory opinion as to whether these restrictions would allow him to assist or represent his company in its dealings with the center.

As a member of the state board, the individual was considered a state employee for purposes of the State Ethics Code. HRS section 84-3 defines the term "employee" as including:

any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, and employees under contract to the State or of the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices and judges.

Portions of the Ethics Codes that referred to former employees of the State were applicable to him.

The Commission noted that the ethics code contains a number of post-employment restrictions. The one most pertinent in this situation was located in HRS section 84-18(c). This section reads:

§84-18 Restrictions on post employment. (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.

This section forbids a former employee, for a period of twelve months after leaving state service, from being compensated to assist or to represent anyone on a matter involving official action by the former employee's former agency or by the particular subdivision the employee served. The Ethics Code defines the term "official action" as:

a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.

The Ethics Commission discussed the purpose of section 84-18(c) in Advisory Opinion No. 236. In that opinion, the Commission stated:

the purpose of [this provision] was to prevent a former State employee from engaging in immediate "influence peddling" based upon contacts and associations made while in government service either for his own personal gain or for that of others. At the same time, it was the Commission's belief that activities of former State employees should not be so restricted that people would be discouraged from public service. In addition, limitations on 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 acquired while in government service.

The twelve month prohibition offers a "cooling off" period after leaving state service. This period prevents the former employee from immediately using influence derived from his government associations to benefit others.

The Commission explained that HRS section 84-18(c) prohibits the assistance or representation of others on matters involving official action by the particular state agency or subdivision that the former employee actually served. The term "state agency" is defined by the ethics code in HRS section 84-3 as including:

the State, the legislature and its committees, all executive departments, boards, commissions, committees, bureaus, offices, the university of Hawaii, and all independent commissions and other establishments of the state government but excluding the courts.

Section 84-18(c) only prohibits a former employee from assisting or representing anyone before the actual unit of government that the former employee served. In the past, the Commission had held that a former employee of a division within a department could assist or represent others before a separate division within the same department. Separate divisions are generally considered discrete units or "subdivisions" for purposes of section 84-18(c).

In this situation, the Commission was faced with determining whether the center could be considered a subdivision that was distinct from the former board member's state board. If it was a separate unit, then there was little danger of any influence peddling. Section 84-18(c) would not then forbid the former board member from assisting or representing his company on matters before the center.

The former board member appeared at an Ethics Commission meeting and discussed, among other things, the relationship between the board and the center. He explained that the center had evolved as a separate part of the board. The two offices were physically separated. They were also separately staffed. The center was federally funded and so had to follow procedures established by the federal government in awarding its grants. The former board member explained these procedures. The center first receives pre-proposals from interested companies. A review panel then evaluates the pre-proposals. The review panel is made up of experts from the federal government and experts based in the State. The panel does not include any members of the board. The former board member explained that the proposed projects are highly technical and members of the review panel must possess a certain level of expertise.

The review panel selects certain projects based on the pre-proposals. Companies are then asked for full proposals on these projects. The review panel will select the grant recipients from those submitting full proposals. The center then publishes a national announcement. It also reports back to the board. The former board member explained to the Commission that the center reports the grant recipients to the board so that the board can make policy decisions for the future of Hawaii's industries. For example, if the center were to report that few companies from Hawaii had been asked for final proposals, the board may choose to develop strategies to enable Hawaii companies to compete in this area. The board reviews the results only for the purpose of developing strategies to assist Hawaii companies in becoming more competitive. The former board member said that he could not imagine a situation in which the board would second guess the choice of grant recipients. Federal procedures must be followed in the selection of a grant recipient. In addition, the former board member explained, board members do not serve on the review panel and do not have the necessary expertise to make a selection.

The Commission believed that the center was sufficiently distinct from the board to be considered a separate "subdivision" for purposes of HRS section 84-18(c). The center operated independently in its selection of grant recipients. The center and the board did not share offices or staff. The board's only actions with respect to the center were to broadly direct the policy of the center and to review the selection of the grant recipients for purposes of evaluating the participation of Hawaii companies. The center and the board appeared to be distinct units which operated separately and independently. For this reason, the Commission concluded that HRS section 84-18(c) would not forbid the former board member from assisting or representing his private company on matters involving official action by the center.

Aside from section 84-18(c), other sections of the Ethics Code were also applicable to this situation. HRS section 84-18(a) reads:

§84-18 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.

This section forbids a former state employee or legislator from using or disclosing any confidential state information. As a former member of the board, this person could possess

certain confidential state information. He could not use or disclose this information for personal gain or to benefit his company or anyone else.

HRS section 84-18(b) was also relevant. This section reads:

§84-18 Restrictions on post employment. (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.

The Commission explained that if, as a member of the board, this person participated on a certain matter, then, for twelve months after he left the State, he could not be compensated to assist or represent his company or anyone else on that same matter.

The Commission also pointed out that HRS section 84-18(d) operates as a limited exception to these post employment restrictions. This section states:

§84-18 Restrictions on post employment. (d) This section shall not prohibit any agency from contracting with a former legislator or employee to act on a matter on behalf of the State within the period of limitations stated herein, and shall not prevent such legislator or employee from appearing before any agency in relation to such employment.

According to this section, the post employment restrictions would not prohibit any agency of the State from entering into a contract with the former board member to act on a matter on behalf of the State.

The final section of the Ethics Code that was applicable to this situation concerned contracts with former board member's former agency. HRS section 84-15(b) reads:

§84-15 Contracts. (b) 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 explained that, for two years after the former board member left the State, the board could not enter into a contract with him or with any person or business that he assists or represents if, while he was a board member, he participated in the matter with which the contract was directly concerned.

These were all of the post employment restrictions that would apply to the former board member. Although section 84-18(c) would not forbid him from assisting or representing his company on a proposal or project that would be reviewed by the center, he had to keep in mind the restrictions imposed by other sections of the Ethics Code. The Commission reminded the former board member that if a particular situation arose, he should contact the Ethics Commission for specific advice concerning the post employment restrictions.

The Commission informed the former board member that it appreciated the concern for ethical considerations that he had shown during his tenure with the board and during the Commission's review of this matter. He early sought the Commission's advice and abided by it and other restrictions throughout the existence of the center. The Commission thanked him for the candor and cooperation that he demonstrated.

Dated: Honolulu, Hawaii, June 14, 1995.

STATE ETHICS COMMISSION
Carl T. Sakata, Chairperson
Cassandra J.L. Abdul, Vice Chairperson
Sharon "Shay" Bintliff, Commissioner

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