

ADVISORY OPINION NO. 2004-1

The Hawaii State Ethics Commission ("Commission") received a request for an advisory opinion from a former state employee regarding the application of the post-employment laws set forth in the State Ethics Code, chapter 84, Hawaii Revised Statutes ("HRS"). The former state employee had earlier received oral advice about the State Ethics Code's post-employment laws from the Commission's staff pertaining to his recent employment with a state agency. Because the former state employee disagreed with the Commission's staff's advice, the Commission's staff advised the former state employee to seek an advisory opinion from the Commission itself. The Commission's staff realized that the former state employee's situation was susceptible to differing interpretations of our State's ethics laws. The former state employee thus requested an advisory opinion from the Commission concerning the interpretation of the post-employment laws in the State Ethics Code in regard to his recent employment with his former state agency.

Facts

The former state employee explained that he had recently left a position with a state agency. The former state employee explained that toward the end of 2002, he was hired by his former state agency. This initial position was a full-time temporary position. The position ended sometime in May of 2003.

On the same day this position ended, the former state employee was hired, without any break in service, for another position with his agency. As a full-time employee in this second position, the former state employee accrued vacation leave and sick leave, and other benefits commensurate with full-time state employment.

The former state employee explained that it was his belief that the funding for this second position ran out toward the end of 2003. Prior to the end of this second position, however, the former state employee became aware that he would be hired for the position he first held when he first joined his former state agency. The former state employee was in fact terminated from the second position toward the end of 2003. The former state employee cashed out his state benefits at this time. The day after his last day of service in this second position he held with his former state agency was a state holiday. On the day after the state holiday, the former state employee began employment again in his original position with his former state agency. This position then ended sometime in May of 2004.

The Post-Employment Law

The former state employee left state employment with his agency sometime in May of 2004. The former state employee then accepted employment with a private organization. The former state employee asked for advice about the application of the post-employment section of the State Ethics Code to his current private employment. The post-employment section of the State Ethics Code is set forth in HRS section 84-18. This section reads, in its entirety, as follows:

§ 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.

(b) No former legislator, within twelve months after termination of the former legislator's employment, shall represent any person or business for a fee or other consideration, on matters in which the former legislator participated as a legislator or on matters involving official action by the legislature.

(c) No former employee, within twelve months after termination of the former employee's employment, shall represent any person or business for a fee or other consideration, on matters in which the former employee participated as an employee or on matters involving official action by the particular state agency or subdivision thereof with which the former employee had actually served.

(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.

(e) This section shall not apply to any person who is employed by the State for a period of less than one hundred and eighty-one days.

(f) For the purposes of this section, "represent" means to engage in direct communication on behalf of any person or business with a legislator, a legislative employee, a particular state agency or subdivision thereof, or their employees.

HRS section 84-18(c) places two prohibitions on former state employees. First, this section prohibits a former state employee, for a one-year period after leaving state service, from being compensated to represent any person or organization before any agency on a matter in which the former employee participated while employed by his or her former state agency. For example, a former state employee could not be paid to personally represent a person or business before any agency on a contract negotiation if the former employee while in state service was responsible for formulating the scope of services of the contract.

Second, HRS section 84-18(c) bars a former state employee, for a one-year period after leaving state service, from being compensated to represent any person or organization on a matter involving official action by the former employee's former agency. For example, a former state employee could not be paid to personally represent a person or business in seeking discretionary action from the former employee's former state agency.

The restrictions of HRS section 84-18(c) applied to the former state employee. The former state employee raised two questions about the application of this section. The former state employee's first and primary question involved the determination of the starting time of the one-year period of restriction. The former state employee's second question concerned the types of activities the law restricted.

Determination of Starting Time of the One-Year Period of Restriction

The former state employee first began work with his former state agency sometime toward the end of 2002. Sometime in May of 2003, the former state employee's first position with his agency ended, but on the day of termination, the former state employee began employment in a second position with his agency. Around the end of 2003, the former state employee's employment in this second position was terminated. After a one-day break in service, which fell on a state holiday, the employee began employment again in the position with his agency that he first held. That employment ended sometime in May of 2004.

HRS section 84-18(e), quoted above, states that the post-employment restrictions shall not be applied to anyone who was employed by the State for less than one hundred and eighty-one days, or approximately six months. The period of employment for the former state employee in his third position with his former state agency was for less than one hundred and eighty-one days. The former state employee asked the Commission whether the one-year period would start from the end in 2003 of his second position with his agency, which was followed by a one-day break in service, or whether the one-year period would start from his last day of service in May of 2004, the last day of his service in his third position with his agency.

At a meeting of the Hawaii State Ethics Commission, the former state employee appeared and explained his views regarding the application of the State Ethics Code's post-employment laws to his situation. The former state employee had earlier set forth his views in his written request to the Commission for an advisory opinion. The former state employee believed that the one-year restriction period should start from the end of his second position with his former state agency, which was a day around the end of December of 2003. At that time, the former state employee's full-time position ended and he cashed out his benefits. He then had a one-day break in service on a state holiday. He then began employment in his third position after the one-day break in service, and worked for less than one hundred and eighty-one days in the third position before leaving state employment.

Essentially, the former state employee believed that the last day of his service in his second position with his agency should be used as the start date for purposes of HRS section 84-18. The former state employee's subsequent employment a day later in his third position with his agency was, in his view, a "new" employment, and the only employment that should be considered regarding the State Ethics Code's post-employment laws. Because this third position ended before the one hundred and eighty-one day period set forth in HRS section 84-18(e), it was not relevant to the post-employment provisions, in the former state employee's

view. For this reason, the former state employee believed that the one-year period of restriction should start from the last day of his second position with his former state agency.

For the reasons set forth below, the Hawaii State Ethics Commission did not concur with the former state employee's view of the law. It was the Commission's opinion that the one-year period of restriction started from the final day of employment in May of 2004, rather than from the last day of employment in the second position the former state employee had with his former agency, which had ended in December of 2003. The Commission believed that this interpretation by the Commission was consonant with the legislative intent underlying HRS section 84-18, the post-employment law, and the well settled rules of statutory construction.

The Commission had not previously addressed, under its post-employment law, the situation in which an employee of an agency is terminated from one position and then after a one-day break in service begins employment in another position within the same agency. In the Commission's view, the post-employment statute was silent as to this particular situation. The Commission did not believe, however, that the statute's lack of such specificity was any bar to the Commission's ability to issue an opinion in this case. It is not possible for the Legislature to foresee every possible scenario and adopt legislation to cover every particular situation that might arise. It is the role of an adjudicative agency to use its expertise, in the area it was established to administer and enforce, to interpret the statutes that it administers in keeping with the legislative intent underlying these statutes.¹ Accordingly, the Commission had no hesitation in interpreting HRS section 84-18 in this case, and, in fact, was mandated by law to do so.

It is a bedrock rule of statutory construction that whenever a statute is plain and unambiguous, then it must be interpreted in a literal matter. If a statute is ambiguous, then the statute must be construed to give effect to the legislative intent of the law.² In this situation, the Commission sought to give effect to the Legislature's intention in enacting the post-employment law. In doing so, the Commission took note of HRS section 84-1, which states as follows:

§ 84-1 Construction. This chapter shall be liberally construed to promote high standards of ethical conduct in state government. [Emphasis added.]

In accordance with this section of the State Ethics Code, the Legislature charged the Hawaii State Ethics Commission with the duty to "liberally construe" the State Ethics Code and to thus interpret the State Ethics Code as broadly as possible within the confines of the law.

¹ See, for example, TIG Insurance Co. V. Kauhane, 101, Haw. 311 (2003). "Where an agency is statutorily responsible for carrying out the mandate of a statute which contains broad or ambiguous language, that agency's interpretation and application of the statute is generally accorded judicial deference on appellate review." [Citing Vail v. Employees' Retirement System, 75 Haw. 42, 59 (1993)]

² See, for example, Alvarez v. Liberty House, 85 Haw. 275 (1997); Ka Pa'akai o Ka'aina v. Land Use Commission, 94 Haw. 31 (2000).

The term "liberal construction" is defined in the Sixth Edition of Black's Law Dictionary as follows:

Liberal (or equitable) construction, on the other hand, expands the meaning of the statute to meet cases which are clearly within the spirit or reason of the law, or within the evil which it was designed to remedy, provided such an interpretation is not inconsistent with the language used. It resolves all reasonable doubts in favor of the applicability of the statute to the particular case. It means, not that the words should be forced out of their natural meaning, but simply that they should receive a fair and reasonable interpretation with respect to the objects and purposes of the instrument. [Emphasis added.]

The original version of HRS section 84-18, the post-employment section of the State Ethics Code, was enacted in 1972 as part of a broader omnibus ethics bill. Committee reports referencing this bill do not specifically mention the post-employment section of the bill. However, post-employment provisions are common in ethics laws throughout the country. The justification for post-employment laws is widely accepted. Ethics laws are in place in order to preserve the public's confidence in government.³ Post-employment laws are enacted to alleviate concerns that a former employee of an agency may have information and influence gained through public service that could provide a private client with an unfair or improper advantage in dealings with the agency.⁴ In order to alleviate this concern, post-employment laws set forth a period of restriction, or "cooling-off" period. During this time, former employees are barred from certain activities. Typically, a former employee is subject to a period of restriction before the former employee can represent a person or business for pay before the former employee's former agency. This allows the relationship between the former employee and his or her former agency to "cool" so that the perception of influence-peddling or unfair treatment is eliminated.

The Hawaii State Ethics Commission has previously discussed the purpose of the post-employment section. In Advisory Opinion No. 204, issued in 1975, the Commission described the rationale behind the post-employment law as follows:

. . . 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 of 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

³ The Commission notes that the Preamble to the State Ethics Code states that the Commission is to "render advisory opinions and enforce the provisions of this law so that public confidence in public servants will be preserved."

⁴ See, for example "Ethics in Government Act," United States Senate Report No. 95-170.

discouraging of a State employee from using his State position to obtain a future job in the private sector.

The Commission recently reiterated this rationale in Advisory Opinion No. 95-2, as follows:

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.

Without this "cooling off" period, agency employees could leave state service and then immediately represent clients before their former agencies. This would create an appearance of favorable treatment to the former employee's clients. The creation of such an unfavorable perception would run counter to the purpose of the State Ethics Code.

The post-employment law was amended in 1995. At that time, the law was made less restrictive in certain aspects. The Conference Committee report on the bill remarked on the general purpose of the post-employment section of the State Ethics Code as follows:

. . . such prohibitions are necessary to instill public confidence in elected officials and state employees. Conference Committee Report No. 78, Regular Session of 1995.

During the 1995 legislative session, the one hundred and eighty-one day period for exemption from the post-employment restrictions was placed in the law. The Commission is not aware of any legislative history that clearly explains this addition to HRS section 84-18.

Although there is no apparent dispositive legislative history regarding the language of HRS section 84-18(e), the Commission believes the language was placed into the law to avoid the obvious unfairness of imposing a one-year restriction on a state employee who only served the State for a short period of time, for example, no more than approximately six months. The Commission believes that HRS section 84-18(e) was meant to apply to "new" employees, that is, employees who had no previous employment with their agency. Since the Legislature opted to impose a one-year restriction on an employee who worked for just over six months, it is obvious that the Legislature was enacting a strong post-employment restriction. The Legislature could have set the initial employment for nine months or even one year before a one-year restriction should apply. Instead, it chose a stronger restriction.

It seemed clear to the Commission that HRS section 84-18(e) was meant to apply only to "new" hires of an agency, with no prior work with the agency, or else the law would have taken into account employees who by law are required to take one-day breaks in service, but who may work for long periods of time, or employees who may incur various breaks in service of different lengths while changing jobs within the same state agency.

The Commission did not believe that HRS section 84-18(e) envisioned the former state employee's situation. Further, the Commission could not conceive of how a one-day break in service adds meaningfully to the notion of a "cooling off" period. To interpret the law in accordance with the former state employee's views would run directly counter to the long established rationale of the law, and would certainly conflict with the mandate that the Commission "liberally construe" the State Ethics Code.

In the former state employee's situation, he was originally hired by his agency in December of 2002. In December of 2003, the former state employee terminated full-time employment with his agency. The next day was a State holiday. Following that day, the former state employee began his third position with his state agency. Thus, over a State holiday, the former state employee had a one-day break in service while he moved from one position to another in his agency. This third position in his state agency ended sometime in May of 2004.

The Commission believed that, for purposes of the post-employment section of the State Ethics Code, the one-day break in employment between positions in the same state agency did not significantly reduce the former state employee's involvement with his agency to warrant the start of the one-year period in December of 2003. Although the former state employee held three different positions during his tenure with his former agency, the Commission believed that there was no meaningful break in service between the last two positions. For this reason, the Commission believed that the former state employee's move from one position to another with a one-day break in service did not amount to such a severance of his employment with his agency that the one hundred and eighty-one day provision of HRS section 84-18(e) should apply to his last position with his agency.

To conclude otherwise, the Commission believed, would subvert the Legislature's intention in enacting the post-employment law. This law was intended to promote high ethical standards by requiring a meaningful "cooling off" period before former employees are allowed to represent others before their former agencies. The Commission held that the period of restriction for the former state employee must therefore start from the last day he worked for his agency. To conclude otherwise would, the Commission believed, allow the former state employee to represent clients before his former agency after a "cooling off" period of a little over six months after more than almost one-and-a-half years of employment with his agency. Again, the one-day break in employment had no effect, to the Commission's mind, on diminishing in any meaningful way the former state employee's contacts with his former agency. To conclude otherwise would lead to an absurd interpretation of the law. A person who served the same agency exactly as the former state employee had but without a one-day break in service would receive the full force of the law without any meaningful distinction. The Commission did not believe that this was the intent of the Legislature.

The Application of the Post-Employment Law

During his appearance before the Commission, the former state employee stated that he was uncertain about the application of the post-employment law to his actions if the post-

employment law were found to apply to him. As discussed earlier, HRS section 84-18(c) places two restrictions on former employees. First, it prohibits a former employee from being paid to represent a person or business on a matter in which the former employee participated while he or she was an agency employee. Second, it prohibits a former employee of a state agency from being paid to represent a person or business on matters involving official action by the employee's former agency. The term "represent" is defined by HRS section 84-18(f) as "direct communication" on behalf of another.

The Commission informed the former state employee that the post-employment law would not prohibit him from being compensated by his organization, or anyone else, for doing work that did not amount to direct communication with his former agency. For example, the former state employee could discuss strategy with his organization relating to his organization's involvement with his former state agency. The former state employee could advise his organization regarding material presented to his former agency so long as his name did not appear on the material. The former state employee could perform any work for his organization that did not involve in-person communication, written communication, telephone communication, or any other form of direct communication with his former agency.

In regard to his representing his organization or clients, the Commission informed the former state employee that the post-employment law did not restrict him from communicating with another agency that worked closely with his former agency. The post-employment law only restricted personal representation involving the former employee's former state agency.

The first prohibition of HRS section 84-18(c) bars a former state employee from being paid to personally represent another person or business on a matter in which the former employee participated while a state employee. For example, if the former state employee worked on a matter while an employee, then he could not, for pay, personally represent his organization, or anyone else, on that matter for one year.

The second restriction was more important. The Commission informed the former employee that HRS section 84-18(c) would prohibit him from receiving compensation to personally represent his organization, or anyone else, on matters involving official action by his former agency. The term "official action" is defined by HRS section 84-3 as:

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

Thus, HRS section 84-18(c) prohibited the former state employee from receiving compensation to personally contact individuals at his former agency on matters subject to official action by them.

During his appearance before the Commission, the former state employee expressed some concern as to whether he would be able to casually speak with his former colleagues. The Commission informed the former state employee that HRS section 84-18(c) would not

prohibit him from socializing with employees of his former agency. This section only restricted direct communication that involved official action by his former agency that would affect his organization or clients. The Commission informed the former state employee that, for example, if he encountered a former colleague, he could discuss any matters that he wished, so long as he did not attempt to influence the person on official matters relating to his organization or any clients. The Commission noted that similar restrictions are not uncommon in government, where many officials and employees are privy to confidential aspects of otherwise public matters, or are otherwise precluded from discussing a particular matter. The Commission stated to the former state employee that it would assume that he, in his prior state employment, had dealt with such situations.

The Commission informed the former state employee that it appreciated receiving his request for advice at an early stage. The Commission carefully considered the former state employee's arguments in issuing this opinion. The main issue was the determination of the start of the period of restriction under the post-employment laws of the State Ethics Code. While the Commission understood the former state employee's arguments, the Commission nonetheless believed that the legislative intent was best served by starting the one-year period from the former state employee's last day of service with his former agency.

Dated: Honolulu, Hawaii, September 8, 2004.

HAWAII STATE ETHICS COMMISSION

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