



HAWAI‘I STATE ETHICS COMMISSION

State of Hawai‘i · Bishop Square, 1001 Bishop Street, ASB Tower 970 · Honolulu, Hawai‘i 96813

ADVISORY OPINION NO. 2019-5

August 15, 2019

The Hawai‘i State Ethics Commission (“Commission”) received a request for an advisory opinion as to whether the post-employment laws in the State Ethics Code, Hawai‘i Revised Statutes (“HRS”) Chapter 84, prohibits a former state employee (“Former Employee”) from representing a client in a federal lawsuit against the Former Employee’s state agency (“Agency”).

Based on the facts in this case, the Commission concludes as follows: under the State Ethics Code, the Former Employee is not prohibited from representing a private client in an employment lawsuit against the Agency, as long as the legal representation does not involve the use or disclosure of confidential information acquired during state employment.¹

I. FACTS

Based on the information provided by the Former Employee, the Commission understands the facts to be as follows:

The Former Employee was employed as a staff attorney with the Agency. The Former Employee’s duties included advising Agency employees regarding the interpretation and application of state law and handling administrative enforcement actions.

The Former Employee left the Agency and returned to private practice in late 2018. Shortly thereafter, the Former Employee began representing a former co-worker in a discrimination lawsuit against the Agency and other defendants. The lawsuit is currently pending.

¹ This advisory opinion is limited to the application of the State Ethics Code and the post-employment laws.

II. ISSUE PRESENTED

The issue before the Commission is whether the State Ethics Code prohibits the Former Employee from representing a client in a lawsuit against the Former Employee's Agency. As discussed more fully below, the Commission concludes that, under the circumstances described herein, the State Ethics Code does not prohibit this, provided that Former Employee's legal representation does not involve the use or disclosure of confidential information acquired through state service.

III. APPLICATION OF THE STATE ETHICS CODE

Former state employees are subject to certain post-employment restrictions in the State Ethics Code. The purpose of the State Ethics Code is to prescribe a code of ethics for elected officers and employees of the State as mandated by Article XIV of the State Constitution. The Commission is charged with the responsibility of administering the ethics code so that public confidence in public servants will be preserved.²

A. HRS § 84-18(c)

Pursuant to HRS § 84-18(c), a former employee is prohibited for a period of twelve months after leaving state service from "representing" any person or business for pay or other compensation on: (1) any matter in which the former employee participated in his or her state capacity, or (2) any matter involving official action by employee's former state agency.³ For purposes of the post-employment laws, the term "represent" is defined as engaging in "direct communication on behalf of any person or business" with a "state agency or subdivision thereof, or their employees." HRS § 84-18(f).

As explained by the Commission in Advisory Opinion No. 236 (1975) ("AO 236"):

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. These provisions were also intended to prevent the

² Preamble, HRS chapter 84.

³ HRS § 84-18(c) reads in relevant part:

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. . . .

use for personal gain of knowledge that a former state employee had of matters in which he had participated.

AO 236 at 1.⁴

Thus, by establishing a twelve-month “cooling off” period after leaving state service, HRS § 84-18(c) serves 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.” Advisory Opinion 2004-1 (2004) at 5.⁵ See also Advisory Opinion No. 95-2 (1995) at 2.⁶

The first restriction in HRS § 84-18(c) does not appear to apply based on the Former Employee’s representations that the Former Employee neither worked on labor or employment cases while employed by the Agency nor participated in any internal agency discussions regarding the matter. Furthermore, the lawsuit was filed by the client pro se several months after the Former Employee had already left the Agency. Thus, based on the information presented, the Former Employee’s involvement in the lawsuit appears to be unrelated to the matters handled by the Former Employee in an official state capacity.

The primary issue here concerns the second restriction – whether the Former Employee is representing a person or business for pay on a matter involving “official action” by the employee’s former state agency. “Official action” means “a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority. HRS § 84-3. Official action taken by the Agency generally relates to regulatory matters within its jurisdiction.

The lawsuit is not an administrative matter that is before the Agency; it is an employment discrimination lawsuit that is currently pending before a court. In other words, it does not involve any “official action” by the Agency in its state regulatory role.

In past advisory opinions, the Commission prohibited former deputy attorneys general from representing private clients in matters involving negotiations with their former agency or division as an opposing party. See, e.g., Advisory Opinion No. 342 (1978) (concluding that a former employee was prohibited during the post-employment period from representing clients before a state appeals board in cases involving his former division, where there was a likelihood that the parties would be required to engage in settlement discussions); and Advisory Opinion No. 426 (1980) (holding that a

⁴ Available at <http://files.hawaii.gov/ethics/advice/AO236.pdf>.

⁵ Available at <http://files.hawaii.gov/ethics/advice/AO2004-1.pdf>.

⁶ Available at <http://files.hawaii.gov/ethics/advice/AO1995-2.pdf>.

former state attorney was prohibited from accepting court appointments in cases where the State was represented by his former division).⁷

These decisions, however, were specifically overruled by the Commission in Advisory Opinion No. 90-1 (1990) (“AO 90-1”).⁸ In AO 90-1, the Commission considered the matter of a former deputy attorney general who was assigned to provide legal services to a state department. The former employee requested guidance as to whether he was prohibited from representing private clients in matters before a state board that involved his former division, but which did not involve any matters that the former employee had previously handled as a deputy attorney general. The Commission held that although the former employee was prohibited from representing clients before the former division to which he was specifically assigned, and was prohibited from representing clients in matters in which he participated, he was not prohibited from appearing before the state board in new cases that involved his former division as a party. AO 90-1 at 7. The Commission noted that any settlement negotiations between the former employee and deputy attorneys general from the same state division would be subject to independent review and approval by the board. Id.

The same reasoning applies to the facts in this case. Because the Agency and individually named defendants are all represented by counsel, the Former Employee is not engaging in direct communication with the employee’s former state agency. Any communication or settlement negotiations would be through counsel, while the court would oversee the litigation. As a result, the Former Employee’s involvement in the lawsuit does not appear to fall within the post-employment restrictions in HRS § 84-18(c).

B. HRS § 84-18(a)

The post-employment law also contains an express provision regarding confidential information: HRS § 84-18(a) prohibits former employees from disclosing or using any confidential information that was acquired during the course of state employment.⁹ There is no time limit with respect to the use or disclosure of confidential information; in other words, confidentiality continues to apply even after the twelve-month cooling off period has expired.

⁷ Available at <http://files.hawaii.gov/ethics/advice/AO342.pdf>, and <http://files.hawaii.gov/ethics/advice/AO426.pdf>.

⁸ Available at <http://files.hawaii.gov/ethics/advice/AO1990-1.pdf>.

⁹ HRS § 84-18(a) provides:

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.

The Former Employee stated that the underlying litigation will not involve the use or disclosure of any confidential information that was acquired during state employment. The Former Employee also informed the Commission that the Former Employee did not practice employment or labor law while employed by the Agency, and was not privy to certain internal agency discussions. As a result, the Commission concludes that, as long as the Former Employee is not required to use or disclose any confidential information, HRS § 84-18(a) does not prohibit the Former Employee from representing a private client against the Agency.

IV. CONCLUSION

For the reasons discussed above, the Commission believes that the Former Employee is not prohibited from representing a client in the underlying lawsuit against the Agency, as long as the legal representation does not involve the use or disclosure of confidential information acquired during state employment. However, the Commission stresses that it offers no opinion on how the Hawai'i Rules of Professional Conduct, or any other source of authority, may apply.

Dated: Honolulu, Hawai'i, August 15, 2019.

HAWAII STATE ETHICS COMMISSION

Reynard D. Gaulty, Chair
Ruth D. Tschumy, Vice Chair
Susan N. DeGuzman, Commissioner
Melinda S. Wood, Commissioner

[ABSTAINED]
Wesley F. Fong, Commissioner