OPINION NO. 237

This matter concerned a request for an advisory opinion by the head of a government agency.

This employee had previously filed with this Commission, pursuant to HRS §84-17 (Supp. 1974), a financial disclosure statement and letters amending this statement advising us of his election as a member of the boards of directors of certain private companies. The Commission, in each instance, had acknowledged receipt of his disclosure and amendments by indicating to him that they had been reviewed by the Commission and filed without further action. The employee asked the Commission to make a determination as to the propriety of his continuing to serve in these private positions.

The employee's primary duties were to direct the development of plans and programs and to recommend policies to advance the goals of his agency. The day-to-day administration of his agency was delegated to other employees of the agency.

In his capacity as a director, he attended board meetings once a month or less and was compensated for his participation.

Each of the companies, as well as a number of others, had solicited him to sit as a director. The employee indicated to the Commission that whether or not he accepted such an offer turned upon a determination as to whether the position would conflict with his duties,[†] demand more time than was available to him, and, if these criteria were met, whether or not the experience gained would be of value to him as a public officer by broadening his experience and giving him insights into the operations of businesses whose policies had a significant impact on Hawaii. When, on the basis of this analysis, he accepted a directorship position, he had disclosed this fact to the Commission for its review.

As of the end of 1975, the employee would have devoted a total of approximately thirty hours to fulfilling his responsibilities as a director. He indicated that he had attended the board meetings on his own time.

The employee stated that in his state capacity he had not taken official action affecting these companies in the past and did not anticipate that such action would be required of him in the future. He also indicated that should he find himself in a position where it would be necessary for him to take official action affecting the companies, he would be able to delegate this responsibility to an employee serving under him.

Each of the companies he served had contacts of varying extent with his agency. In each instance, however, decisions concerning these transactions were made by other individuals. His approval and participation in these decisions were not required.

In view of all the circumstances, it was our opinion that under the particular facts of this case his continuing to hold the directorships in question would not be in violation of the ethics law. We

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[†]He indicated that he had refused directorships when the business activities of the company offering the position appeared likely to come within his authority. He stated further that he had resigned a directorship with a company whose business had changed such that a possibility of conflict had been created.

emphasized that our holding was based on the specific facts, and the totality of the circumstances, of this case and that it should not be extended to other individuals or situations. We stated that a case-by-case determination must be made in matters such as these.

The relevant section of the ethics code was HRS §84-14(b), which states:

> No employee shall acquire financial interests in any business ... which he has reason to believe may be directly involved in official action to be taken by him.

Under HRS §84-3(6)(F), a directorship, whether compensated or not, is a financial interest.[†] Also, HRS §84-3(7) provides that official action is "a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority."

Clearly, the employee's position involved the exercise of broad discretionary authority. But the question before the Commission was to determine whether, at the times he had acquired the three directorships, there was reason to believe that he would be required to exercise this authority in matters involving the companies he served as a director. We concluded that there was no basis to find from the facts before us that, when he had acquired the directorships, there was reason to believe that he would be required to take such action in the future.

The decisions that were made on behalf of the agency in transactions involving the companies were day-to-day administrative actions that did not come within the ambit of his authority. He neither ratified nor reviewed these decisions.

The Commission has held in the past that, pursuant to HRS §84-14(b), a state employee should not acquire a financial interest in a business if, at the time he is acquiring the financial interest, there is a strong probability that he directly will be required to take official action with regard to the business. The facts did not justify a finding that such probability existed in this case. It can never be determined with absolute certainty that a business in which a state employee wishes to acquire a financial interest will not be involved in official action to be taken by him in the future. We believed that such certainty was not required by either the letter or the spirit of HRS §84-14(b).

It was clear to the Commission that the ethics statute was never intended to completely prohibit state officers and employees from acquiring outside financial interests. Indeed, it was our opinion that an iron-clad rule prohibiting the acquisition of outside interests by all state officers would be neither realistic nor beneficial to the community. We stated that there must be a proper balance in the relationship between the public sector and the community, and, because ethical lines may sometimes be fine, it was for this reason that the legislature created the Ethics Commission to assist in the definition of proper ethical standards.

[†]The fact that the employee was compensated for his directorship duties was not directly relevant to the determination that we made in this case. Where it is likely that a state officer or employee will be required to take action affecting a business he serves as a director, it would be improper for him to acquire such a position even if it were a non-compensated directorship. The fact that an individual receives compensation as a result of a directorship in a business would not, under the ethics law, be a sole basis for finding a conflict of interest.

We recognized that a state employee might receive substantial personal benefits from outside interests; but we felt it was equally the case that the experience and knowledge gained through such interests might be of public advantage.

In the instant case, it was the employee's opinion that the directorships in question would be a valuable experience for him and would provide him with insights that would better enable him to serve the State. We believed that his past refusal to serve on boards that did not promise these insights testified to the fact that he had considered that there was a balance to be strived for in this area. Furthermore, good faith on his part had been evidenced by the fact that he had consistently and conscientiously notified the Commission whenever he had acquired an outside interest.

It was the Commission's opinion that his continuing to serve as a director did not violate the ethics law; in addition, we were of the opinion that his motivation in accepting these positions was to gain further knowledge and experience which might increase his contributions as a public servant.

The employee indicated that should a business he served as a director come before him for official action, he would refer the matter to another employee in the department. We advised him that this would be the proper course of action as required by HRS §84-14(a), which provides the following:

> No employee shall take any official action directly affecting ... [a] business or other undertaking in which he has a substantial financial interest.

He also indicated that he did not use state time to attend the meetings of the boards he served. This was in accord with HRS §84-13, which prohibits a state employee from using state time (as well as state facilities) for private business purposes. We were aware that the jobs of certain state employees allowed them to have some flexibility in the scheduling of their hours of work. We stated that while we would not be opposed to such state employees adjusting their state working hours to accommodate an occasional private pursuit, we expressed our view that where most or all of a work day was devoted to an outside interest, the employee should take this as vacation time.

Our decision in this case was based on our interpretation of the ethics law as it applied to the specific interests this individual had acquired and his responsibilities as a state employee. We advised him that as he acquired or disposed of other interests or as the duties required of him by the State varied in the future, he should, as he had done in the past, bring such changes to the attention of the Commission and, if appropriate, request additional advisory opinions.

We limited our opinion to the legal questions arising under the ethics statute and to general questions of ethical propriety, both of which matters came within our expertise.

We commended him for bringing this matter to the Commission so that the ethical issues could be examined as provided for in the ethics code. We stated that the questions raised by a case such as this were not always susceptible to easy solutions, but when they were discussed and examined by an agency such as the State Ethics Commission, then it was most likely that the interests of both the public and of the individual would be properly balanced and protected.

Dated: Honolulu, Hawaii, November 25, 1975.

STATE ETHICS COMMISSION
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