

OPINION NO. 241

A member of a state board inquired whether he might participate in certain matters that were expected to come before it.

He advised us that he was a user of services provided by the agency the board administered. In addition, the private company with which he was employed had been engaged by the board to provide certain services to it. However, in his private employment he had only minimal contact with that branch of his company that was to provide the subject services. He advised us that as a member of the board he might be called upon to participate in decisions concerning the services to be provided by his company. He asked us to determine the propriety of his participating in discussions and voting on proposals for action submitted by his employer.

A subcommittee appointed by the board recommended that his employer, along with certain other companies in the same field of expertise, be hired to provide the services required. The board ratified this recommendation. He participated in discussions concerning this decision but abstained from voting on the matter.

The employee stated that it was likely that initial decisions on the recommendations of the companies would be made by a subcommittee of the whole board. The board would then consider the action taken by the subcommittee at its regular meetings. He further advised us that the fees of the companies were determined automatically and would generally not be affected by decisions of the board.

We stated that HRS §84-14(a) had most direct application to the question he had raised. This section provides:

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

As he was an appointed member of a board, he was, for the purposes of the ethics law, considered to be an employee under HRS §84-3(4). Furthermore, HRS §84-3(7) defines "official action" to mean "a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." As a member of the board, a decision-making body, he clearly exercised many of these functions, and we therefore concluded that he did take official action in his state role. Finally, we noted that HRS §84-3(6) defines "financial interest" as an employment. His employment with the private business concern constituted a substantial financial interest.

We concluded that while he was subject to the requirements of HRS §84-14(a), it was the Commission's opinion that his participation as a member of the board in decisions to adopt or reject the recommendations of his private company would not be a violation of HRS §84-14(a). This opinion was based on our view that, in general, such official action would have no direct effect upon the company. As we had noted, the fees that the company would receive would not be directly determined by the specific decisions made by the board on the proposals offered by the company. In general, other effects upon the company of decisions made by the board would also be, at most, indirect.

We did state that if a proposal should recommend the purchase or sale of company property, then his participation in the decision concerning such a proposal would have a direct effect on the company, and, under HRS §84-14(a), he should abstain from taking official action in such a matter. We advised the employee that should this circumstance arise, he should not only abstain from voting on the particular matter raised but should also refrain from making recommendations or giving opinions directly affecting the company. This would not preclude him, however, from providing information relating to matters that came within his area of expertise. We stated that the restriction we had set forth would also apply if a decision were before the board on whether to discontinue the company's services or to increase or decrease its fee. Further, we advised him that he should disqualify himself from participating in any decision that would be likely to have a direct effect upon the company.

We also held that his status as a user of the agency's services would not disqualify him from taking action on these matters. We noted that HRS §84-14(a) prohibits one from taking official action directly affecting a business or undertaking in which he has a substantial financial interest. Initially, we pointed out that the state agency was not a "business" as this term is defined in HRS §84-3(1). In any event, his status as a user did not give him a financial interest, as this term is defined in HRS §84-3(6), in the state agency or matters relating to actions to be taken by his private employer.

While the Commission was of the opinion that, in most matters, HRS §84-14(a) would not restrict his participation in decisions relating to proposals made by his employer, we noted that he had been given advice by an advisor to the board who had made an analysis of other statutory and case law that would apply to the role that board members would have in the adoption of proposals for action submitted by the private companies. Under that analysis, in several instances, the standards of conduct were significantly more restrictive than the conflict of interest section of the ethics code. We stated that the ethics code sets minimum standards of conduct but state agencies and boards and commissions may set or have stricter standards to which persons serving such agencies must adhere. We advised the employee that where a ruling under this opinion set the stricter limit, then he must conduct himself in conformance with the ethics code. Concomitantly, should the board exact a more rigorous standard, then he would be required to follow a course of conduct consistent with that stricter rule.

We advised him that should circumstances arise that were not adequately dealt with in our opinion, he should request an additional advisory opinion.

We commended him for bringing this matter to the attention of the Commission.

Dated: Honolulu, Hawaii, January 21, 1976.

STATE ETHICS COMMISSION
Audrey P. Bliss, Chairman
Paul C.T. Loo, Vice Chairman
I.B. Peterson, Commissioner

Note: There were two vacancies on the Commission.