

OPINION NO. 246

The chairman of an advisory committee advised the Commission that a member of the advisory committee had recently applied for and acquired a commercial license and had commenced, on a part-time basis, a commercial business in an area related to matters of concern to the committee. He wished to know if his acquisition of this financial interest would constitute a conflict under the ethics code.

These advisory committees were established by the legislature to consider and make recommendations concerning certain matters within each county. The members were to be knowledgeable in the areas of concern to the committees and were to report findings and recommendations to a division of a state agency.

The committee member stated that he had in the past been engaged in this commercial work, but had terminated all activity in this area several years prior to his appointment to the committee. He had recently taken out a new license and had been doing some commercial work on a part-time basis while, nevertheless, maintaining his business as his primary employment. He stated that the advisory committee had no enforcement powers but that it did make recommendations to the division.

HRS §84-14(b) (Supp. 1975) had application to the question raised. That section states:

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

The committee member served in a part-time capacity and was not compensated for his services. Nevertheless, pursuant to HRS §84-3(4), he was an employee of the State for the purposes of the ethics code. Also, under HRS §84-3(6)(A) an ownership interest in a business is a financial interest. His sole ownership of his commercial enterprise constituted a financial interest and that interest was subject to the restrictions of HRS §84-14(b). Then, official action is defined to mean "a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority."

While the committee had no enforcement or regulatory powers, it did have a recommendatory function under the mandate given to the committee by the legislature. In a past opinion (Opinion No. 163) we had stated that when an advisory board makes recommendations it takes official action within the meaning of the ethics law. Accordingly, this individual, as all other members of the committee, did take official action in his state capacity.

The question we had to resolve in this matter was whether his business interests would be directly involved in official action he might take as a member of the committee. In interpreting HRS §84-14(b) in Opinion No. 175 the Commission stated:

[A]n employee should not acquire a financial interest ... in a business if there is a strong probability that he directly will be required to take official action with regard to the business.

In considering this matter we determined that though the division this committee served was primarily concerned with other matters, it might take action that would have a substantial effect on this member's new enterprise. However, we were advised that the advisory committee itself had taken no action in this area. We were also advised that it was unlikely that the committee would, in the foreseeable future, make recommendations in this area. Further, we were aware that this member's term on the committee would expire on December 31, 1976.

We concluded from all the facts presented to us that while this committee member might be required to take action in the future with regard to his business, this was a mere possibility and not sufficient, in our view, to require that he divest himself of this interest. We ruled that he could maintain this interest and continue to serve on the committee.

We brought to his attention HRS §84-14(a) (Supp. 1975) 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

We stated that if the committee were called upon to make recommendations that would directly affect individuals licensed in his area of work, then he should abstain from participating or voting on such matters. We recognized that the committee did not have regulatory powers. However, its recommendations to the division might lead to the establishment of rules that would have regulatory effects.

We took note of the committee member's concern that the request for an advisory opinion in this matter was an indication that the chairman had adopted the view that his acquisition of a commercial license constituted a conflict of interest. The Commission's staff advised him that a request for an advisory opinion merely indicated a concern that a question under ch. 84 was involved. We stated that where such questions are raised, the state employee should not attempt to determine the effect of ch. 84 but should, as the chairman had done, refer such questions to the Ethics Commission so that such matters might be decided against the background of the policies and guidelines that had been developed during the Commission's tenure.

We commended him for bringing this matter to the attention of the Commission and for the concern for ethics in government that his action represented.

Dated: Honolulu, Hawaii, April 7, 1976.

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

Note: Commissioner Dorothy K. Ching was excused from the meeting at which this opinion was considered.