

OPINION NO. 249

A division head of a state department with broad responsibilities relating to a certain area of business served as the manager of a committee that was established to provide, on behalf of the State, administrative support to this industry.

He had also been appointed staff secretary for another state committee that had concerns in this area. In this position, and, again, on behalf of the State, he provided administrative support; in addition, he evaluated specific project proposals and loan applications and provided various other services.

In August of 1975 a state loan was approved for a company doing business in the area of this employee's concern. One condition of the loan was that the head of the department would appoint two members to the board of directors of the company to represent the public sector. Subsequently, the division head was appointed as a member of the board of directors.

In his various state positions he had access to confidential price, sales, and shipment data from all the companies in this industry, and he exercised certain responsibilities with regard to this particular company. He was concerned that his duties as a director might conflict with his state responsibilities. He asked us to determine the application of the ethics law to his situation.

Our analysis was primarily based upon information provided by the employee and his department head in an interview they had with the Commission.

We believed that HRS §84-14(b) (Supp. 1975) had most direct application to this matter. 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.

First, a directorship is a financial interest under HRS §84-3(6)(F), whether or not the position is compensated. Then, official action "means a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." Thus, the question raised by his position as a director was whether, at the time he accepted this position, there was reason to believe that he would exercise official authority in matters directly involving or affecting the company.

The Commission had held in the past that a state employee should not acquire a financial interest in a company if, at the time of acquisition, there was a strong probability that he personally would be required to take official action with regard to the business because of the nature of his state duties and responsibilities and because of the existence of special facts. He and his department head both stated that he would be taking such action with regard to the company in the future. We concurred with their judgment. He had very broad responsibilities with regard to this industry. He also indicated that because of his many responsibilities in this area, it was difficult for him to clearly distinguish between the area he occupied as a state employee with responsibilities in this area and the role he occupied as a director of the private company. We had stated in a previous opinion that freedom of action in one's government capacity may be, at times, restricted or restrained by possible fiduciary liabilities. We had further stated that such a close relationship

with a private organization might increase the likelihood of using one's position to obtain unwarranted treatment. Such a position might also have a possible effect upon the action of other agencies.

It was very clear in this case that his intent in serving on the board of directors was to serve the best interests of the State of Hawaii, and there was no question but that the efforts he had put forward had been for the sake of the State and its citizens rather than for any gain on his part. However, we believed that the difficulty he had faced in determining precisely what his role should be was unavoidable and was one of the bases of the language of HRS §84-14(b). His access to considerable confidential information further complicated his position. Accordingly, because he would be taking official action with respect to the company in the future and because we did not believe that the difficulties he had encountered could be resolved satisfactorily, we concluded that he should divest himself of his directorship position.

In the course of our meeting with him and his department head, the question was raised as to whether, if he could not serve, other state employees, as a general rule, might nevertheless be allowed to accept such positions on the boards of companies in which the State had a significant financial interest. Our view was that so long as the employee involved was unlikely to take official action directly involving the business he would serve as a director, his acceptance of such position would not violate HRS §84-14(b). Further, if it were improbable that such an employee would take action directly involving the company he served, then his area of expertise was not of particular concern in determining the application of HRS §84-14(b). We emphasized in giving this advice that official action included recommendatory action and was not confined to decision making.

We stated that any state employee who occupied a position with a private company was subject to the restrictions of HRS §84-12 which prohibits the disclosure of confidential information which he acquires in the course of his official duties and HRS §84-13 which prohibits the use of official position to grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for himself or others.

We further stated that any state employee appointed to such a position should be aware of the requirements of HRS §84-14(a) which provides that an employee shall disqualify himself from taking official action directly affecting a business in which he has a substantial financial interest. The Commission had held in the past that a directorship was a substantial financial interest.

We noted that there might be conflicts between the position one occupied as a state employee and the role an individual filled as a director of a private company that did not come within the coverage of HRS §84-14(b). This might be particularly so where the State had a substantial financial stake in the success of the company. The ethics code would permit such a director to serve despite such conflicts. It was the responsibility of the individual employee and the individuals who appointed him to such positions to determine if those conflicts were so substantial that an appearance of impropriety would be created by his serving in such dual capacity. We stated that each such instance should be judged on its own merits. We could only note that under the statute such an appointment would not be barred.

In reaching its decision the Commission considered the fact that the State often had difficulty in controlling the actions of companies that had received loans. The department head stated that the private investors in such ventures might not have expertise in the particular business

area, and that such investors were more likely to be speculators than would be the case in a more usual situation. It was primarily for these reasons that the State had adopted a policy of appointing state employees to directorship positions. However, the employee's testimony clearly indicated that the position of an individual who in state employment took action over a company he served as a director was an untenable one. It appeared to the Commission that the State's interest might be as well protected by vigorous monitoring of company activities coupled with the appointment of capable state employees as directors who would not be required to take official action affecting the companies they served.

We took note of the full cooperation we had received in this matter and of the frankness of the testimony and evidence the employee and his department head had provided to the Commission. We commended the concern for ethics in government that their position in this matter had demonstrated.

Dated: Honolulu, Hawaii, April 14, 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.