

OPINION NO. 255

A state employee who had entered into a contract of employment with a state agency to perform certain services requested an advisory opinion from the Commission. According to his employment contract, he was required to review and evaluate projects assigned to him by his supervisors and to monitor, assist, supervise and control activities engaged in by the agency. He was not a permanent employee and, under the terms of his employment contract, his services could be terminated by the agency upon thirty days' notice to him. Prior to his employment with the agency, he had held a real estate license and had been in business for himself. He now wished to move his real estate license to a brokerage firm, and, as an agent of that company, to sell real estate during his off-duty hours. He asked us to determine if his employment with this real estate agency would conflict with the state ethics code.

We believed that the specific question he had raised with us should be analyzed under HRS §84-14(b) which concerns the acquisition of financial interests after one becomes a state employee rather than under HRS §84-14(a) which restricts one's conduct as a state employee with regard to a financial interest held at the time one becomes a state employee. We recognized that he was involved in real estate sales and development prior to the time he became a state employee and that his agency was aware of his involvement in this business. It was our view, however, that his moving to a company was the acquisition of a new financial interest and was therefore subject to HRS §84-14(b). We believed, however, that HRS §84-14(a) did have application to another aspect of this matter and this is discussed later in this opinion.

Under HRS §84-3(4) an employee under contract to the State is an employee for the purposes of the ethics code. Then, under HRS §84-3(6)(C) an employment is a financial interest. Accordingly, his prospective employment was a financial interest and was therefore subject to the restrictions of HRS §84-14(b). The question the Commission had to resolve was to determine if there was a strong probability that in his official capacity with the agency he would directly be required to take official action with regard to his prospective private employer.

The facts of a past Commission opinion (Opinion No. 210) had relevance to his situation. The employee there was associated with a real estate firm; he also had broad responsibilities in his state capacity. The Commission found that the employee's agency had a broad involvement with the real estate market on a state-wide basis and that almost all actions he took as a state employee would have a direct effect upon both his company and its clients. The Commission ruled that he should divest himself of his interests in the firm and place his license on an inactive status.

We described a number of the functions of the employee's agency in this case and noted our conclusion that its actions were having a growing and pervasive impact on the private real estate market.

As concerned his own position in the agency, we noted that proposals were sent to him for his analysis and review. The recommendations he made on such proposals constituted official action as that term is defined in HRS §84-3(7). We were aware that his recommendations were screened at several levels; nevertheless, he did, through his recommendations, have input in final decisions and we could not conclude that that input was insignificant. Accordingly, we found that his employment would constitute a violation of HRS §84-14(b) and that he should not, therefore, hang his license with this company.

We also brought to his attention the restrictions of HRS §84-14(a). That section provides:

No employee shall take any official action directly affecting:

(1) A business or other undertaking in which he has a substantial financial interest.

There was such a close interplay between the agency and the private real estate market that many actions he took as a state employee would have a direct effect on the real estate market. Should he have continued to be active in the sale of real estate or the development of projects, we believed it would have been impossible for him to separate his private interests from his state duties. Therefore, we concluded that the ethics law required that he refrain from selling real estate in his off-duty hours.

It was our view that those employees of this agency who had interests in the real estate market should disclose those interests to the Commission as provided by HRS §84-17. We indicated that we would then review each disclosure to determine if the specified outside interest conflicted with the employee's duties to the agency. We stated that we would advise the director of the agency of our finding in this regard and request that he send appropriate notice to employees of the agency.

We recognized that this decision worked a hardship upon the employee and we regretted this effect. But as we had often stated, the employee's responsibility to the State must come first. Where employment in the private sector would conflict with the employee's public performance, such employment must be avoided.

We commended him for bringing this matter to the attention of the Commission. We also commended the director and other employees of the agency for the information and assistance they provided in our consideration of this matter.

Dated: Honolulu, Hawaii, May 19, 1976.

STATE ETHICS COMMISSION
Audrey P. Bliss, Chairman
Dorothy K. Ching, Commissioner
Gary B.K.T. Lee, Commissioner
I.B. Peterson, Commissioner

Note: Vice Chairman Paul C.T. Loo was excused from the meeting at which this opinion was considered.