

OPINION NO. 256

An employee of the State who was responsible for handling certain business arrangements for his department had been approached by a company he had done business with in his state capacity to do a formal commercial for them. Because he anticipated that he and other employees might be called upon to make commercial endorsements in the future, he requested an advisory opinion from the Commission concerning the propriety of an employee making such commercials, either with or without compensation, under the ethics code.

The employee appeared at a Commission meeting to provide us with further information. He stated that on a previous occasion officials from this company had asked him if he would mind being interviewed before their cameras. He had agreed, and this interview was later incorporated into a commercial. Later, the company had approached him about making a more formal commercial endorsement, and he had initially agreed to do so. The company had always treated his department well and had from time to time done certain favors for the department. Because of this relationship he had agreed to do the commercial without compensation. However, because of previous difficulties relating to the commercial endorsement of a company by another state employee, he had been somewhat hesitant about doing the commercial, even though without compensation, and had sought some guidelines or a ruling from his department. He was advised that the department had not issued guidelines in this area and that he should bring the matter to the attention of the Commission. After speaking with the Commission's Executive Director, the employee had decided to cancel his appointment for the filming of the commercial and to ask the Commission to determine if the ethics code had application to the making of commercial endorsements.

We pointed out initially that the ethics code did not preclude an employee from engaging in outside activities. Such activities, however, were subject to certain restrictions when they had the potential of conflicting with the employee's performance in his state capacity. We believed that HRS §§84-13 and 84-14 had application to the specific question the employee had raised. We first considered the application of HRS §84-14(b). That section provides:

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 "financial interest" is defined by HRS §84-3(6)(C) to include "[a]n employment, or prospective employment for which negotiations have begun." Then, "employment" is defined as "any rendering of services for compensation" (HRS §84-3(5)). We concluded that this employee's making of a commercial endorsement for compensation constituted an employment and would, therefore, be a financial interest in the business involved. Then, "official action" is defined by HRS §84-3(7) to mean "a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." Because the employee dealt directly with this company in his official position and had a discretionary role in the allocation of business to this and similar companies, we concluded that he took official action with respect to these companies in his state capacity. It was also clear that such action directly affected these companies. Further, it was likely that he would be taking official action directly involving these companies in the future. We, therefore, concluded that his participation on a compensated basis in a commercial endorsement for one of these companies would be prohibited by HRS §84-14(b). We stated that this same restriction would apply to the compensated endorsement of

any business which would be likely to be directly involved in official action he took in his state capacity.

We stated that a commercial endorsement for which he received no compensation of any kind would not constitute a financial interest and would, therefore, not be subject to HRS §84-14(b).[†] We believed, however, that HRS §84-13, the fair treatment provision of the ethics code, did have application to this situation. That section states in part that "[n]o ... employee shall use or attempt to use his official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for himself or others" It is a well-known fact in the business and political worlds that an endorsement by a well-known person provides a competitive advantage to the individual or company endorsed. That such endorsements are often vigorously pursued seemed to us to be proof of this fact. The employee in question had gained a commercially usable public image; his endorsement of a company that would be affected or likely to be involved in action he took in his state capacity would grant it an advantage over competitive companies which we believed would be unwarranted.

We stated in a past opinion that the State should not act in such a way that a company would have reason to feel that it might be discriminated against in its attempt to secure state business (Opinion No. 45). We believed that should this employee endorse the product or service or a company he dealt with in his official capacity, that company's competitors would, in our view, be justified in concluding that their attempt to win his department's business would be disadvantaged by the fact that he had endorsed a competitor. We believed that such suspicions would seriously undermine the confidence in governmental functions that is essential to effective government. We drew the employee's attention in that regard to the preamble to ch. 84 which speaks in terms of preserving the public's confidence in public employees. We concluded, therefore, that he should avoid making endorsements of the products or services of businesses with which he dealt or was likely to deal in his official capacity. Specifically, we believed that an endorsement by him of the company which had approached him would have been improper under HRS §84-13 even if made without compensation.

The fact that he might have contact or dealings with a company did not necessarily mean that he would have an official relationship with that company. We stated that such a relationship arises only when the employee takes or is likely to take official action directly affecting or involving the company. It was our view that his endorsement of a business with which he did not have an official relationship would not violate the ethics code. As he would not be taking official action directly affecting or involving the company, HRS §84-14(b) would not be applicable. Further, we did not believe that he would be granting an advantage that would be specifically prohibited by HRS §84-13. However, we suggested that he should be sensitive to the fact that the endorsement of a company with which he had a close relationship might have serious implications for public confidence even if he was not likely to take official action directly affecting or involving the company. In such situations he should consider voluntarily refraining from making the requested endorsement.

We were aware that commercial endorsements offered a potential source of additional revenue to this employee and to other state employees as well. However, we stated that the

[†]Compensation is an all-encompassing term which includes any return for services. The fact that one is not paid in cash for services does not necessarily mean that he is not being compensated. Whether a return for services other than cash would constitute a compensation would of necessity have to be decided on a case-by-case basis.

endorsement of a business with which an employee has an official relationship has the potential of undermining the integrity of government and its employees and must be avoided. As we had stated, the ethics code does not prohibit the endorsement of a business with which the employee has no official relationship; it was our view that the government of this area was best left to the various state departments.

In summary, we found (1) that if the employee engaged in a commercial endorsement for compensation for a company which was likely to be directly involved in action he took as an employee, he would be in violation of HRS §84-14(b); (2) that if he made such an endorsement, whether with or without compensation, for a business with which he had a relationship in his official capacity, he would be in violation of HRS §84-13; and (3) that he might endorse the product or service of a company that would not be involved in official action he took as an employee with the caveat that he should be sensitive to the concerns that might arise from the endorsement of a company with which he had a close relationship as a state employee.

We thanked him for his openness and frank presentation to the Commission and commended him for his concern for ethics in this area.

Dated: Honolulu, Hawaii, June 7, 1976.

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

Note: Commissioner I.B. Peterson was excused from the meeting at which this opinion was considered.