

OPINION NO. 262

A member of a board that had responsibility for a particular state program requested an opinion concerning his employment under a contract with the agency that was assigned administrative responsibility for the employee's board.

It had been proposed that the employee enter into a contract with the agency to do research on a book which the agency intended to publish in the near future. He would be paid \$2,000 for his services. He asked the Commission to determine if his entering into this contract would be in violation of HRS ch. 84.

In an interview with the Commission, he stated that the idea for the book was germinated at the agency by certain individuals who approached him to determine his interest in doing this project. At that time neither he nor the agency considered that an ethics problem might be raised by the fact that as a member of the board, a branch of the agency, he would be receiving monies in a private capacity from a state organization which he served in a public capacity. Prior to the time that he had filed a request for an advisory opinion, the director of the agency contacted the Commission staff to determine whether this contract would be proper under ch. 84. On the basis of the facts presented at that time, the staff had advised this individual that this contract might raise problems under ch. 84. Following that informal advice the employee submitted his formal request for an advisory opinion from the Commission.

We believed that HRS §§84-13 and 84-14(b) had application to the questions raised by the proposed contract. HRS §84-15, the contracts section of the ethics code, did not apply here as the contract under discussion was clearly a personal contract of employment and was thus exempted from HRS §84-15 by HRS §84-15(c).

HRS §84-13(1) (Supp. 1975) provides:

No ... 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; including but not limited to ... [s]eeking other employment or contract for services for himself by the use or attempted use of his office or position.

First, because he was an appointed member of a board established under state statute, he was, under HRS §84-3(4), an employee for the purposes of the ethics code and was, therefore, subject to the restrictions of ch. 84. Further, his membership on a board closely related to the agency might well cause an observer to question whether his position on the board was the primary factor involved in his obtaining consideration for employment under the proposed contract. He and a member of the agency both stated to the Commission and its staff that he at no time participated in the germination of the idea for the book. They stated that the idea originated solely with the agency and that he was approached to do this project only after the agency itself had voted to proceed with the project and had voted to contact him with regard to researching the book. In view of the fact that there was no evidence before the Commission to indicate that he had initiated this project, we concluded that he had not used his position on the board to secure an unwarranted advantage. Accordingly, we found no violation of HRS §84-13(1).

HRS §84-14(b) (Supp. 1975) states that:

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, his employment under the proposed contract with the agency would constitute an undertaking and the compensation that would be paid to him would clearly constitute a financial interest. Further, as we had previously indicated, he was a state employee for the purposes of applying the ethics code. The question for the Commission to resolve then was whether or not there was a strong likelihood that his financial interest in this matter would be directly involved in official action to be taken by him as a member of the board.

He had stated to the Commission that in his opinion the board would have no role in the proposed book. Other individuals interviewed by the Commission staff confirmed this opinion and indicated that the agency preferred to maintain this as a project independent of the board. However, the staff had also interviewed individuals who expressed the view that the board would be very much interested in participating in this project and in having some responsibility for its financial underwriting and its publication. It was the Commission's opinion that so long as this project remained solely an agency venture his entering into a contract to do research work on the project would not be in violation of HRS §84-14(b). We emphasized, however, that participation in this project by the board might change our view of this situation. Should the board provide financing for this project, the board would be placed in the position of reviewing the work that he would be submitting. As a member of the board, he would be required to take action directly involving his own work. Even if he were able to disqualify himself, it had long been the Commission's view that an individual employee should not place himself in a position that would require him to disqualify himself from taking state action.

We also pointed out that our opinion on the question he had raised was limited to the facts and circumstances that he had presented to us and was binding on the Commission only to that extent. Further, the Commission's opinion was restricted to those questions which were raised under ch. 84. We were aware that the receipt of a state contract by a state employee from the division or department which he served in a state capacity had the potential of creating an appearance of impropriety. We stated that in such circumstances the department and the employee himself may wish to consider whether particular action should be taken even if such action is not explicitly prohibited by ch. 84. This, however, was a question to be answered by the individual and the department in the light of the relevant circumstances.

Finally, we noted that considerable time had passed before the ethics questions in this matter were presented to the Commission. We emphasized that both the individual employee and the agency were responsible for recognizing the existence of ethics questions and for promptly bringing such matters to the attention of the Commission for resolution. We commended those individuals in the agency who were sensitive to the questions involved and who did play a role in raising this matter before the Commission, and we also appreciated the action the employee had taken in formally requesting this opinion.

Dated: Honolulu, Hawaii, July 23, 1976.

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

Note: Chairman Audrey P. Bliss and Commissioner Dorothy K. Ching were excused from the meeting in which this opinion was considered.