

OPINION NO. 280

By virtue of a department resolution the director of that department sat as a member of the board of directors of a non-profit organization as a representative of the department. Because the department did business with the organization, the employee wished to know if his service on the board of directors of this organization created a conflict of interest on his part or a violation of the ethics code on the part of the department.

The organization was established to assist education, government, community agencies, business, and labor in bringing about improvement in programs and processes used in its specific area of concern by a number of means, including evaluating the effectiveness of programs and projects now used, in serving as an information resource on effective programs and processes for future use, and in conducting research on problems presently encountered in the field.

We learned that the organization was begun in 1965 by representatives of state agencies and interested public institutions representing western states and territories to conduct research, development and evaluation of its area of concern on a non-profit basis. Upon its inception its administrative and technical staffs were hired. The policies of the organization were set by the board of directors which was made up of individuals representing business and industry, community and professional organizations, public and private institutions, their personnel and management, and various state departments. The board members were not compensated and met four times a year on the West Coast, where the company was headquartered. The everyday functioning of the organization was under the direction of an executive director and staff.

Previous directors of this department had served on the board since 1971 when the department became a member of the organization. The department had entered into a number of contracts with the organization, and, since the employee undertook his present position contracts had been executed on five different projects in amounts varying from approximately \$20,000 to \$117,000. These contracts were entered into on a sole source basis after certain necessary approvals in the state system were secured.

The question the employee raised was generally covered by HRS §84-14(a) and §84-15(a), the conflicts and contracts sections of the ethics code. Each of these sections comes into effect only upon the holding of a financial interest. In the case of HRS §84-14(a), the interest must be substantial; in the case of HRS §84-15(a), that interest must be a controlling one.

However, this request raised an issue we had discussed on another occasion. That was, did the fact that the employee served solely in a state capacity on this board, with no private interest on his part, place this matter in a perspective such that ch. 84 should not apply in the usual manner. In Opinion No. 165 a state agency inquired of the Commission whether members of the agency who were directors of a private corporation, a large percentage of whose stock was owned by the agency, were in violation of the state ethics law. The Commission noted there that because of the relationship between the private corporation and the state agency the members of the agency were technically in violation of the conflicts section of the ethics code by serving in this dual capacity. However, we stated that the Commission waived the conflicts section as to those directors by finding that a directorship in a business owned by a state agency was not a financial interest held by an individual within the definition of the ethics law when the individual was an officer or employee of the agency. In reaching that result the Commission declared that to rule otherwise

would have led to an absurd result as only state interests and no personal financial interests had been involved.

We indicated that we believed the same rationale was applicable here. In this case, the State had no ownership interest in the organization. However, having a voice in the policies of this organization might be of great benefit to the State. Certainly, this was the judgment made by the department when it decided to join the organization. We noted, in reviewing the minutes of the meeting at which this action had been taken, that the department had considered that conflicts might arise in the future but decided that they would be minor in terms of the advantages to be gained by having this employee or his representative sit on the board of directors of the organization. It is clear that the conflicts and contracts sections are concerned with the juxtaposition of one's private interests and one's state responsibilities. In the employee's capacity as a director of the organization, he had no personal financial interest in the organization. He served solely as a representative of the State. Nor did he have any choice as to whether to sit on this board of directors as the department, by virtue of its action, had made this responsibility a part of his position description.

It was our view, therefore, that his directorship could not be considered a financial interest within the definition of the ethics law. As the conflicts and contracts sections of the code would not be applicable, we found no violation on his part or that of the department by virtue of his position on the organization's board. We emphasized, however, that the appointment of a state employee by a state agency to a directorship or officership position in a private business did not, per se, exempt either the department or the employee from the provisions of ch. 84. We indicated that in our decision here and in our reaffirmance of Opinion No. 165, we were merely stating that in certain limited circumstances to apply the provisions of the ethics law would lead to illogical results.[†] We stated that such appointments should be discussed with the Commission in advance of action by the state agency to determine the applicability of the ethics code.

Additionally, it was our view that the conflicts and contracts sections would have had no application to this case even if we had found the employee's position to be a financial interest. The conflicts section prohibits an employee from taking official action directly affecting a substantial financial interest. We had generally found that a directorship, even when noncompensated, was a substantial financial interest within the meaning of HRS §84-14(a); however, we did not find in this case that this employee had in his state position taken action directly affecting the organization. The responsibility for developing the contracts between the department and the organization lay primarily with the particular divisions of the department that were involved with the subject matter of the contracts. The employee in this case merely passed on the division recommendations to the executive branch of the department for action. Further, a department head who was unable to disqualify himself could take action on a matter if he had disclosed his financial interest in that matter to the Commission.

We explained that the restrictions of HRS §84-15(a) were not invoked unless the state employee had a controlling interest in the business that was contracting with a state agency. In view of the fact that the employee had no ownership or officership interest in the organization and was one of twenty-three members on the board of directors, we did not believe that he could be

[†]See Opinion No. 249 for an instance in which the Commission ruled that the acceptance of a directorship position by a state employee for state purposes was prohibited by the ethics code.

considered to have a controlling interest in this organization. Accordingly, HRS §84-15(a) would have had no application to contracts between this organization and any state agency, including this department.

We noted the employee's awareness that there might have been an appearance that the organization was favored for certain state business over Hawaii companies because of his position as a director. Accordingly, we stated that he and department employees should exercise utmost care to see that no particular advantage was granted to the organization. That would be in accord with HRS §84-13 which requires that an employee not use or attempt to use his official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for himself or others. That section of the statute applied to business conducted between the organization and the department despite our findings in this case.

We noted from a review of the executive board's minutes that some concern over potential conflicts was aired when the resolution to become associated with the organization was adopted. We reiterated that we preferred to make findings in cases such as this prior to the time that a state agency appointed an employee to a position in a private business or entered into business with a private concern. We noted that it would have been preferable for the department to have contacted the Commission prior to the time the enabling resolution was adopted.

We commended the employee for taking the initiative in requesting this opinion.

Dated: Honolulu, Hawaii, November 30, 1976.

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

Note: Vice Chairman Paul C.T. Loo and Commissioner Dorothy K. Ching were excused from the meeting at which this opinion was considered.