

OPINION NO. 286

An employee requested the Commission to determine if his acceptance of a position on the board of directors of a private corporation in 1974 had constituted a violation of the state ethics code.

Shortly after accepting the position the employee had advised the State Ethics Commission of his election to the board of directors of the corporation. The Commission then reviewed his disclosure and acknowledged its receipt. No further action was taken at that time indicating the Commission's view that his election to that board was acceptable under chapter 84 of the state ethics code. At that time he held a high administrative position in a certain department, a position he had assumed the previous year. Immediately before that time he had been the director of another department. He was continuously a state employee during this period and had no interruption in his state service.

In 1975 we issued an opinion to this employee concerning the application of the ethics code to certain directorship positions he held at that time. As he had resigned his directorship position with the corporation some months before we issued that opinion, his directorship position was not discussed in the opinion. That opinion was primarily concerned with the application of the conflict of interest section of the ethics code, HRS § 84-14(b), to his directorship positions. That section prohibits the acquisition by an employee of a financial interest, such as a directorship, in a business if it is likely that that business will be directly involved in action the employee takes in his official capacity. After a thorough review of the employee's various positions and his duties as an officer of his department, we found no conflict. We stated to the employee that the analysis set forth in that opinion would also have applied to his directorship position with the subject corporation and was the reason the Commission found no such violation in his acceptance of this position when he first brought the matter to our attention.

The specific question raised in his present request for an advisory opinion had to do with the post-employment section of the code. HRS §§84-18(b) and (c) (Supp. 1975) provide as follows:

(b) No former legislator or employee shall, within twelve months after termination of his employment, assist any person or business or act in a representative capacity for a fee or other consideration, on matters in which he participated as an employee.

(c) No former legislator or employee shall, within twelve months after termination of his employment, assist any person or business or act in a representative capacity for a fee or other consideration, on matters involving official action by the particular state agency or subdivision thereof with which he had actually served.

Because the employee assumed his position with the subject corporation within twelve months of his departure from the department of which he had been the head, he wished to know if, in retrospect, he should not have accepted that position because of the post-employment provision.

We pointed out to the employee that these provisions did not prohibit the acceptance of employment but rather prohibited the assistance to or representation of a person or business, for a fee or compensation, on certain matters. We emphasized that it was not the acceptance of a position within twelve months of one's termination from employment that was prohibited but rather the performance of those particular functions that was prohibited by the statute. We indicated that

those functions were (1) assistance or representation on matters in which one participated while in state employment and (2) assistance or representation on matters requiring official action by the agency with which one was employed during the previous twelve months. As an example, we noted that a former employee could accept employment with a person or business that had an official relationship with the agency with which the individual was employed so long as the former employee did not assist or represent that person or business on matters in which he had participated as an employee or on matters that required official action by his former agency, within the twelve-month period established by the statute.

The section quite clearly applied to persons leaving state employment. Here, however, the fundamental question was whether the post-employment section applied to an employee who transferred from one state department or position to another. We held that it did not.

We noted that first, the word "employee" in the code provisions meant, pursuant to HRS §84-3, a state employee; further, the post-employment provisions applied to former employees within the twelve-month period following "termination of employment." The clear meaning of these words was that the provision applied to former state employees within twelve months of termination of state employment. This employee's change in status had been a transfer or promotion from one state agency to another. At no time did he cease being a state employee. In our view it was not transfer from one department to another that was the concern of the post-employment provisions but, simply, termination. And, quite clearly, his state employment had never been terminated. Accordingly, HRS §84-18 would have had no application to his election to the board of directors of this private corporation, and for this reason the post-employment provisions had not been brought to his attention at the time he had advised us of his election to this board.

We noted in reaching this conclusion, that in language concerning the jurisdiction of the Commission over former state employees, HRS §84-31(a)(6) states that the Commission "shall have jurisdiction for purposes of investigation and taking appropriate action on alleged violations of this chapter in all proceedings commenced within one year after termination of state employment by a legislator or employee." Clearly, what was being discussed here was separation from state employment and not transfer from one agency to another. Similarly, in HRS §84-32(c), which is concerned with the sanctions that may be imposed upon a person who violates the code, the sanctions against "former employees" were limited to a public statement by the Commission and legal and equitable remedies available to the attorney general. If a "former employee" included an employee who had been merely transferred or promoted from one agency to another, then other sanctions would be available in the same manner as they were available in the case of employees who committed violations of the code. In sum, "former employee" referred to those persons who left state employment and did not apply to those individuals who transferred from one position to another.

We noted that persons who do transfer within state government continue to be subject to all provisions of the ethics code. For example, the Commission would have jurisdiction over allegations that this employee had used confidential information to aid this private corporation or that he had otherwise used his position to grant unwarranted advantage or treatment to this company.

Finally, we pointed out, as we had stated in our earlier opinion to him, "that the ethics statute was never intended to completely prohibit state officers and employees from acquiring outside financial interests. Indeed, it is our opinion that an iron-clad rule prohibiting the acquisition of

outside interests by all state officers would be neither realistic nor beneficial to the community. There must be a proper balance in the relationship between the public sector and the community" We stated that this should not be taken to mean that high-ranking state officers should accept all positions offered to them in the private sector that did not directly conflict with the ethics code. On the contrary, we emphasized that such officers should very carefully consider the effect upon public confidence that the acquisition of such interests might have and should not accept those positions that raised serious questions of propriety. This, we believed, was a matter to be left to the discretion of the employee and the agency. We noted that those positions that did conflict with one's state duties were prohibited by the code. But the total prohibition of outside interests would tend to further isolate public officials from the community. We recognized that there must, of necessity, be areas of decision that were left to the integrity of the public official. The ethics code applied strict rules in several areas of conduct and the establishment of such rules was vital to the proper functioning of government. However, as all matters could and should not be regulated, the proper conduct of government was dependent upon the appointment of persons who have a sense of personal ethics and an understanding of the public trust placed upon them.

While it was appropriate for persons to comment upon the wisdom and propriety of this employee's acceptance of the board position with this corporation, the assumption made that his action in taking the position was in violation of the ethics code was incorrect.

We noted that the employee had always made full disclosure of his private interests well in advance of the time period established in the statute and that he had always given full cooperation to this Commission in its analysis of the possible conflict of those interests with his public duties.

Dated: Honolulu, Hawaii, January 14, 1977.

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

Note: Commissioner Gary B.K.T. Lee was excused from the meeting at which this opinion was considered.