

## OPINION NO. 294

In Advisory Opinion No. 288 the Commission decided that an employee's representation of a company (Company A) in a petition before a state commission would not be improper under HRS §84-14(b) of the state ethics code. The employee served a state board which supervised a state agency.

Our determination was based on two findings: (1) although the owner of the land involved in the petition was likely to come before his agency for official action, his interest in Company A was not an interest in the owner of that land; and (2) it was highly unlikely that Company A, his private client, would come before his state board for official action.

Subsequent to the issuance of that opinion, the Commission learned that officers of Company A had similar positions and interests in another company (Company B) which was leasing space to a division of the state agency which was supervised by the employee's board. Because the Commission was concerned that this interest of his might affect the judgment rendered in Advisory Opinion No. 288, the Commission directed its staff to interview him and a number of other individuals to gather information about his representation of Company A, the corporate structure of Company B and Company A and the status of the lease of space from Company B. As a result of the investigation ordered in this matter, the Commission made the following findings of fact:

1. The employee was initially contacted by a person who served as executive vice president of both of the companies involved in this matter, prior to May 15, 1975; on that date, the employee notified that person that he would represent Company A in a petition before the state commission. He had no state responsibilities to this commission.

2. The head of the division of the agency supervised by the employee's board was contacted on October 24, 1975, by an agent representing the owners of an office building to indicate that space was available in that building which might be suitable to the purposes of that division. The head of the division decided in early 1976 that the office space in that building was most adaptable to the needs of the division and at that time rejected a number of other alternative proposals.

3. The employee's board was officially notified of the negotiations for this office space on June 17, 1976, but may well have had information concerning this lease in the several weeks preceding that meeting.

4. In July of 1976, the contract for this office space was executed by officers of the agency. This lease was reviewed by the board on September 9, 1976. Following that period, another lease was executed for additional space in the same building on September 1, 1976. The employee was not involved in the negotiation or the execution of either of these agreements.

5. A review of the corporate structure of the two companies involved in this matter indicated that they essentially shared the same board of directors. Both companies were also housed at the same business address. The employee had also indicated that the person who served as executive vice president for each of the companies was the primary force behind both companies.

Our review of these facts indicated that this employee's acquisition of Company A as a client in May of 1975 was not a violation of HRS §84-14(b). As indicated in Opinion No. 288, that section prohibits the acquisition of an interest in a business where an employee has reason to believe that that business will be directly involved in official action to be taken by him. In view of the fact that negotiations with Company B for the office space had not begun until late 1975, it was not reasonable to conclude that the employee could have reasonably anticipated that Company B would be involved in action before his state board at the time he acquired Company A as a client in May of 1975.

We stated, however, that the additional facts noted in this opinion brought this employment interest of his within the restrictions of HRS §84-14(a) (Supp. 1975). That section provides as follows:

No employee shall take any official action directly affecting ... [a] business or other undertaking in which he has a substantial financial interest ....

The Commission recognized that Company A and Company B were two separate companies, each pursuing somewhat different purposes and goals. Nevertheless, we believed that there was an identity of interest between those two companies, such that the principals of those companies had to be considered to be this employee's real employer rather than Company A by itself. This finding was based on the fact that both companies shared the same board of directors and the same business address, and the further fact that one individual did appear to be the organizing force behind both of these companies. We noted in this regard that HRS §84-1 directs the Commission to construe the ethics code so as to promote high standards of ethical conduct in state government. We had noted in an earlier opinion, Opinion No. 274, that the Commission would look behind a business' surface structure to determine the real employment interest. It was our view, interpreting this section in the most reasonable manner, that this employee was employed by those persons forming the management of those companies rather than by the one company that had actually retained him.

Accordingly, we stated to the employee that in his role as secretary to the state board, he could not take official action directly affecting Company B, Company A, and any other companies that were directed by this same group of people. While we recognized that in his position with the state board his primary duties were ministerial in nature, we nevertheless recognized, as noted in Opinion No. 288, that he did on occasion give input into board matters. We noted that the term official action did not merely signify the power to make decisions but included as well "recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." We believed that an opinion rendered to the board by the employee involved a use of discretionary authority which constituted official action. It was for this reason and to avoid any possible conflict of interest in this area that we directed that he not take official action directly affecting any of these companies in his state position while he was privately employed by the management of these companies.

We noted that this decision was restricted to the facts described above. We reminded him that should additional facts come to light or should his situation change, he should advise the Commission promptly.

In rendering this decision, the Commission acknowledged the full cooperation given by this employee and many other employees and citizens during the course of the investigation made in this matter.

Dated: Honolulu, Hawaii, March 24, 1977.

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

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