

OPINION NO. 317

We received a request for an advisory opinion from a permanent civil service employee. His primary responsibilities were to assist the head of his division and to administer and service a number of financial and management assistance programs. He also served as acting division head when the division executive was away from the islands. In that position he supervised the work of personnel involved in several additional programs. He had decided to leave his state position and had already received a number of job offers. One of these offers had come from his supervisor, the division executive. He was executive director of two organizations that he served as a representative of the State. He had offered this employee a position with these two organizations. His primary responsibilities, if he accepted the offer, would be to assist the division executive in meeting his responsibilities to them. He would supervise a small staff, maintain the books and records, and monitor and analyze on-going research projects. He would also draft recommendations and correspondence.

The organizations were particularly interested in the development of a certain industry in the Pacific. The members were representatives of governments and of private industry and the primary funding came from the federal government with additional contributions from private industry. The governments themselves generally provided in kind and related project expenses but either no or nominal sums of money.

Because these organizations appeared to be private entities and because his responsibilities to them would involve the office with which he had worked as a state employee, the employee saw the possibility of an ethical conflict under the state ethics code. He therefore asked the Commission to determine if the post-employment section of the ethics code would prohibit him from accepting this offer of employment.

The relevant portion of the ethics code was HRS §84-18 (Supp. 1975). It provides 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.

(d) This section shall not prohibit any agency from contracting with a former legislator or employee to act on a matter on behalf of the State within the period of limitations stated herein, and shall not prevent such legislator or employee from appearing before any agency in relation to such employment.

In his state position he had had a variety of duties, some of which had been related to these organizations. Accordingly, if they were considered to be private entities, then, should he accept employment with them, he could not, for a period of twelve months following his termination from

state employment, represent or assist them on matters in which he had participated as a state employee. The circumstances were such that HRS §84-18(b), if applicable, would essentially have prohibited him from accepting employment with them for twelve months.

The department had taken continual action that affected and concerned both organizations and would continue to do so. Therefore, if they were looked upon as private entities, he would not be able to represent or assist them, for a twelve-month period, on matters requiring the official action of the department. HRS §84-18(c) then would also have prohibited him from accepting employment with these organizations for a period of twelve months following his termination from state employment.

The primary point to be determined was whether these entities were true private organizations or State of Hawaii programs. If they were found to be state programs, the language of HRS §84-18(d) would permit him to serve them. This section provides that a state agency may contract with a former state employee on any matter on behalf of the State.

The facts of this case raised an inference that he would not be under contract to the State of Hawaii. His employment agreement would be with the organizations. However, the Commission had learned that Hawaii had been the motivating force behind their founding. A number of factors supported this conclusion. The division executive and the department itself had provided logistical support for them from their inception. Their offices were actually located in the division itself. While their bylaws seemed to provide that the members might change the directorship of the organizations from the department to other members, it did not appear likely that such an eventuality would occur. The actual participation of the other members was minimal. In the early days of their formation the organizations received all of their support from the State of Hawaii. With the passage of time and as the responsibilities for this organization increased, the department had requested that the members provide some staff support. They had agreed to this and established positions that were funded by these organizations. The position the employee sought was one of these and would be funded by the organizations and not by the State of Hawaii.

From the inception of these programs, state employees had been used on organization projects. At the same time, employees who by name were employed by the organizations had performed state work. The members of the organizations and the federal government, which provided a great deal of the funds that supported them, were not fully aware of this fact. While in our view it appeared to be a questionable practice, at the same time it lent credence to the proposition that these were basically state programs which received input and help from other governments and industries.

Some members of the organizations were not fully aware of the fact that employees paid with organization funds were performing state work. One board member had specifically noted that it was his understanding that when these employees performed state work that they were paid from State of Hawaii funds. Another member had expressed the view that these persons were employees of the organizations and were specifically not State of Hawaii employees. It did appear to the Commission, therefore, that there was considerable confusion and ambiguity as to the true relationship that existed between the State of Hawaii and these organizations.

We had some very real concerns about the manner in which the business of these supposedly private organizations were intermingled with state government business. We recognized, however, that this ambiguity was a departmental rather than Ethics Commission

matter. Our concern was to determine whether, despite and in view of these ambiguities, these two organizations were essentially state programs. For, if they were, the employee would be permitted to accept the position that had been offered to him under the exemption to the post-employment section.

We found that despite the private aspects of these organizations and the independence from the State of Hawaii that appeared in their bylaws they were nevertheless programs of the State of Hawaii. It was our view that they fulfilled Hawaii State program objectives in the area of developing industry in the Pacific areas. The benefits to the State were no doubt considerable and the State quite clearly had a very real investment in these programs. While the employee would in name be an employee of the organizations he would in reality be under contract to the State of Hawaii and subject to the State of Hawaii's jurisdiction. Despite the fact that the division executive held offices with both organizations he was always acting as a state employee. It was, therefore, our view that the employee might accept this offer of employment without being in violation of the post-employment provisions of the state ethics code.

We were concerned that because of the structure of these programs his hiring as an aide to the division executive could raise an appearance of impropriety. Under the statute, however, that concern was outweighed by what appeared to be the essential "State" nature of the organizations. Nevertheless, we stated that this appearance was a factor that he, the division executive and the director should consider before a final decision was made.

We commended the employee for anticipating the ethical questions involved and for bringing this matter to the Commission's attention at the earliest possible time.

Dated: Honolulu, Hawaii, October 19, 1977.

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

Note: Commissioners Dorothy K. Ching and Gary B.K.T. Lee were excused from the meeting at which this opinion was considered.