

OPINION NO. 318

We received a request for an advisory opinion from a former state employee who had worked as a technician in a particular field. After he left state employment he became involved in a business enterprise which was related to the work he had performed for the State. In the course of developing his private business, his company had applied for a state loan. The department responsible for setting up and monitoring this transaction became concerned that the ethics law might apply to his participation in this business. Accordingly, he had asked the Commission to determine the application of the post-employment provisions of the state ethics code to his participation in this business venture.

As a technician he had been responsible for the care of the state facility used for the development of a product that was distributed to people who were interested in developing this product commercially. He had also done extension work in which he assisted these people in their operations.

In the early part of 1977, another individual had become interested in the development of this product and had been discussing this possibility with the head of a state agency. The former employee had himself been interested in getting involved in this field on a commercial basis for sometime. Prior to his leaving state service he had contacted this individual to determine if he was interested in starting such an operation. His conversation with him apparently coincided with this individual's discussions with the agency head. Eventually he became a partner with this individual and left state employment to devote full time to this business.

The company was about to formally enter into a cooperative agreement with the former employee's state agency to receive the product it needed to begin its operations. The product was developed for just this purpose and a number of businesses had begun in this manner. Businesses entered into three-year cooperative agreements with the agency under which the agency provided the product at no charge in exchange for the business providing certain information on the product received and developed for commercial sale. Our concern had to do with whether his company had received consideration and advantage because of his former employment with the agency that it would not have otherwise received.

The relevant language of the ethics code was contained in HRS §§84-18(b) and (c) (Supp. 1975). These sections 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.

We discussed this matter at length with his former state supervisor. He indicated that the former employee had not worked on the application for this product by this company while he was

still a state employee. Therefore, HRS §84-18(b) did not apply to this question as he had not assisted or represented his company on matters in which he had participated as a state employee.

Since the time he had left state employment, he had assisted and represented the company in its attempts to receive the product under the cooperative agreement program. Because the granting of the product to a business involved official action, his representation and assistance of his company constituted at least a technical violation of HRS §84-18(c). He had been acting in behalf of the company for a fee or other consideration as those terms are used in the ethics code. We stated that official action was action involving the use of discretionary authority and in our view the decision to give the product to his company or any other company was action involving the exercise of discretionary authority.

We had also learned, however, that any person who had wanted to start a commercial operation in this field had been able to receive sufficient product to do so. Further, while the division gave assistance to those businesses which wished to become involved in this business those who did not follow the advice offered nevertheless received product so long as they had a facility that was capable of accepting it. It therefore appeared to the Commission that while the former employee may have been in technical violation of the statute his participation had no affect on the official action taken by his former supervisors. His company would have received the product even if he had not been involved. Further, the State's attitude was so liberal that the exercise of discretion in the grant of the product to businesses was minimal. Accordingly, it was our view that his company could receive both the product and state loan which had been tentatively granted.

We expressed some concern about the way his post-employment activities had been conducted. He indicated in an interview before the Commission that he had long been interested in this field. We were satisfied that he had been open about his intentions and had not conducted his business affairs in a secretive manner. This was commendable on his part. His former supervisor also indicated that he did not expect the technicians to remain with the division for long periods of time and anticipated that they would become involved in the industry either in Hawaii or elsewhere. We had no disagreement with this encouragement of technicians to advance themselves. However, the division, for the sake of its own employees, had to be more aware of the application of the post-employment provisions. In his own case, because the supply of product was sufficient to supply all those who wished to engage in this business, we felt that to prohibit him from accepting either the loan or the product would not have been a sensible decision. However, we saw that, in the future, the supply might not be sufficient and that the amount of discretion involved in granting product to a business might become more significant. It was therefore essential that the supervisor advise his employees of the possible application of the post-employment provisions to their future private endeavors. The former employee's actions, as we had indicated, had been in violation of the statute. Those actions had had the potential of disadvantaging businesses who did not have his access to the state division. We pointed out that the fact that no remedy was needed in his case was more a matter of his good fortune than good planning on either his part or that of the division.

In order to apprise the former supervisor of our concerns in this matter, we forwarded a copy of this opinion to him.

Dated: Honolulu, Hawaii, October 26, 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.