

## OPINION NO. 322

A department, through one of its division administrators, was represented on the board of directors of a private nonprofit corporation. There had been a concern within this organization that several of the board members had conflicts of interest. Because this Commission had jurisdiction over the conflicts questions that involved state employees, the head of the department had asked the Commission to determine the application of the state ethics code to his department's involvement in this organization.

The State Legislature had mandated that a state department coordinate the planning and implementation of a program designed to provide counseling to certain individuals. A program was to be developed in conjunction with certain public and private groups. Accordingly, the organization was incorporated as a nonprofit entity whose purposes were to provide assistance to these particular individuals and to sponsor and undertake educational and rehabilitation programs for these individuals and administrative personnel.

The organization was intended to provide personal representation to individuals in domestic relations, creditor-debtor conflicts and other like matters and to represent them in grievances they had with the subject department. A position on the board of directors was designated for the office of administrator of a certain division within the department in question.

The position of this administrator who sat on the organization's board was covered by the conflict of interest provision of HRS chapter 84. That provision (HRS §84-14) states that a state employee may not acquire an interest in a business which is likely to be involved in action he takes as a state employee. Further, if such an interest did not constitute a conflict at the time of its acquisition, the provision nevertheless provides that an employee may not take official action which directly affects the business if such action should be called for following the acquisition of the interest.

The technical question of conflict involved here was a fairly easy one to resolve. Under the provisions set forth above, the administrator would be in conflict in holding a board position with the organization. This was so for several reasons. First of all, the administrator was a state employee and so was subject to the provisions of the ethics code. Then, the holder of this position had very broad discretionary powers in the administration of the state program in this area. The organization in question was solely concerned in its activities with this administrator's division and the individuals over whom his division exercised powerful jurisdiction. It therefore followed that the administrator of this division took official action with regard to the organization. At the time of this organization's founding then, there was the possibility that the administrator would take action in the future that would directly involve the organization. These circumstances constituted a conflict of interest under the statute. The fact that the organization was nonprofit was of no consequence as the term "business" is very broadly defined under HRS §84-3(1) to include any corporation whether or not operated for profit. This clearly included this organization. And, the statute further defines a financial interest to include a directorship or officership in a corporation. Because of the fiduciary responsibilities a director owes to any corporation he serves on, such an interest is a substantial one for the purposes of this statute.

If at the time of the administrator's appointment it could not have been anticipated by the parties involved that the organization would be involved in official action to be taken by the administrator it nevertheless followed that at the present time the administrator did take official

action which directly affected the organization. Because the person holding this position could not realistically disqualify himself from taking such action it followed that the individual must be required to divest himself of this interest.

We emphasized that none of the individuals involved in the establishment of this organization, and certainly not the present administrator, were in any way guilty of wrongdoing. The question before us was solely one of determining if a conflict existed that was contemplated and should have been remedied by this statute. And the difficult question to decide in this case was not whether the situation here involved a conflict under the statute, for it appeared quite clearly to us that it did, but whether the statute should apply to the unique aspects of this particular case.

Despite the various and significant policy arguments that had been put forward in favor of this administrator sitting on this board, it was our conclusion that the statute did apply to this situation and required that the administrator of this division not sit on this board.

We recognized that this position on the board was mandated by the charter of incorporation originally filed on behalf of this corporation. Therefore, in accepting this board position, the department was merely following the wishes of the organizers of this organization and fulfilling what appeared to be a public duty.

In discussing the roots of this organization with individuals involved in its founding as well as a representative of the board of directors and the present executive director of the organization, we found a divergence of opinion. Certain of these individuals had the view that litigation would be unusual and that the relationship between the administrator's division and the organization would be a non-adversarial one. Other individuals, however, did anticipate that there would be litigation involving these two bodies and that a certain adversarial tone would probably develop. It seemed clear to this Commission, however, that an adversarial relationship did exist between the subject division and the organization. In addition, there was significant and potentially far-reaching litigation in the courts involving the two organizations. The administrator was a named defendant in these suits and would in all likelihood be called upon to testify when the cases were tried. He was therefore in the anomalous position of being sued by the organization he served as a director.

From our hindsight view, it appeared natural that these two results should have come about. For a body such as this organization which was mandated to represent the interests of specific individuals could not have the same point of view on many significant matters as were shared by representatives of this division. And, in our system of justice, the adversarial relationship that resulted from two parties vigorously advocating the interests they represent was a beneficial one. In sum, regardless of the intentions at the beginning, and there did seem to be some disagreement on this, the present relationship, as we saw it, was an adversarial one. We emphasized that this opinion was based on the organization as it appeared to exist at the time this opinion was rendered.

In the past, in cases such as this, we had taken into consideration the public purposes involved in naming a state employee to serve a corporation or organization that was involved in action the employee took in an official state capacity. Where such a conflict did not appear to be a real one under the circumstances as they existed, and where such a conflict appeared to have no or only a negligible disadvantageous effect on the private organization or the state program, the Commission had waived the technical application of the statute. We stated that such waivers had

quite frankly been applied very strictly. And we did not see those factors applying strongly enough in this case.

The organization and the division represented two very different points of view. We felt that each of those points of view should be represented as vigorously as possible. While we saw the merits in the view that led to this administrator being named to the board, we found here that the technical violation of the ethics code resulted in the organization's having on its board the representative of a state agency that must be significantly at odds with the basic purposes of the organization. The principal purpose of the organization was to represent the interests of the clients it served. In an area that was so fraught with contention this factor, in our view, led to an adversarial relationship. The conflict here then was a real one. It was our conclusion, therefore, that the administrator, whoever that might be at any given time, should not serve on this board.

The individuals that established the charter and bylaws of the organization as well as those persons who originally were appointed and served on the board of directors could only have a vision of what the organization would actually become in practice. That is, the board of directors existed before the organization had a life of its own. Those individuals were not necessarily involved in the establishment of the organization nor were they necessarily conversant with the history of similar organizations that had been established in other states. That is why we emphasized that the decision we reached here was based on the organization as we actually saw it rather than how the organization might be characterized in the documents that led to its formation. While the Legislature mandated that an organization should be established, it did not indicate who should serve on the board of directors or for that matter, whether or not the organization should be served by a board of directors at all. We noted that should the organization eventually be established as a state organization, it would no longer be a business as the term was defined in the statute and any individual named by the Legislature to serve on the board could serve without being in conflict of interest. But at this time the organization was not a state program and indeed might never become one. It was a private corporation and was established to be independent of state government. While we gave much weight in our deliberations to the fact that the administrator was mandated to serve by the organization's charter, we felt that this mandate could not be dispositive of the conflict issue raised here.

We emphasized that there could be no question of wrongdoing on the part of any of the individuals involved in the organization or the department. It was clear that the individuals who originally chartered the corporation, the persons who had served on the board of directors, and the personnel of the department who had been involved in the organization had served only the public interest and not their personal interests. The cooperation offered by all of these people in our review of this matter had been exemplary.

We pointed out further that the essence of a conflict of interest statute was not that individuals act improperly; rather, when such a code operates in an ideal fashion it defines those situations in which the best acting individuals should refrain from taking official action or from participating in a private organization. This was such a case and we saw that even against the quality of individuals involved here an irresolvable conflict existed that was to the ultimate disadvantage of the organization.

We appreciated the department head's concern in this matter and particularly expressed our appreciation to the administrator involved, the executive director of the organization, and the

president of the organization, for their fine cooperation. We also received the assistance of a number of other individuals, to whom we expressed our thanks.

Dated: Honolulu, Hawaii, December 2, 1977.

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