

## OPINION NO. 323

A state board had tentatively approved participation loans to a certain company. The company was owned by a husband and wife, the husband having previously served on the board for a number of years. Before taking final action on the loan, the chairman was directed by the board to seek an opinion from the Ethics Commission concerning the application.

The section of the ethics code most applicable to the chairman's question was HRS §84-18(c) (Supp. 1975). That section states:

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.* [Emphasis supplied]

Members of state boards and commissions are by statute state employees for purposes of the ethics code. (See HRS §84-3(4)). We pointed out, therefore, that these post-employment restrictions applied to former board members.

The former member had represented and assisted his business on this matter. He received consideration from the business for this kind of action. In addition, this loan required the approval of the very board he had served. We stated that because he made this application before the restricted twelve-month period had elapsed, he had violated this section of the code. We indicated, therefore, that he must withdraw his application for a loan. We noted that he could reapply for a loan when the twelve-month period had elapsed. If he chose to apply for a loan at that time, the board was to treat it as a new application.

We explained that the rationale for such a post-employment restriction was this. An employee or a board member, as the case may be, develops certain personal and oftentimes close relationships with those people with whom he or she works. To avoid gaining an undue advantage because of those relationships, whether or not sought, it was felt that the twelve-month period would provide a necessary "cooling-off" period in which the former employee or board member and his or her former co-workers could adjust to their new positions with respect to one another.

We were pleased that the board recognized the inherent problem in this situation before giving final approval of the loan. We were aware that some of the difficulty involved here was the result of Opinion No. 10, issued by this Commission in 1968, and we appreciated both the former member's and the department's possible misinterpretation of the requirements of the code in this area. In that opinion, the Commission held that the statute did not prohibit members of the board from applying for loans. In addition, the opinion stated that persons who had received loans from the department could be appointed to the board so long as they disqualified themselves from taking action regarding this type of loan. While the question answered in Opinion No. 10 did and still would involve different sections of the ethics code than were applicable to this case, we stated that we could certainly see why a misunderstanding might have occurred. And, we were sorry that the individual involved would suffer some inconvenience because of this. We agreed that it appeared to make little sense to prohibit former members of the board from applying for loans for one year so as to counteract the personal influence they might have with other board members if sitting board members could apply for loans.

The problem as we saw it was not with the post-employment requirements, for we felt the rationale behind those sections was sound. We were concerned that the conflicts section, as it was presently written, technically did not prohibit a sitting board member from applying for and receiving a loan for a going concern. The applicable section, HRS §84-14(b) (Supp. 1975) states:

No employee shall acquire financial interests in any business or undertaking which he has reason to believe maybe directly involved in official action to be taken by him.

A loan is a financial interest for purposes of the statute. However, we noted that a loan interest is acquired in the lender and not in the borrower's own business. In this case, the board was not a business. Therefore, interests, such as loans, acquired in the board, were not covered by the conflicts section.<sup>†</sup>

While the statute did not directly prohibit a board member from applying for and receiving a loan, we nevertheless stated that a member who applied for a loan should strictly adhere to the requirements of certain other sections of the ethics code. HRS §84-12 prohibits an employee from using, for his or her personal gain, information which by law or practice is not available to the public. It seemed to us that a board member could not help but be privy to certain confidential information concerning this loan program; the manner in which it was administered would be of assistance to the member in his or her loan application. Utmost care had to be exercised by the member so as not to take advantage of this information.

Then, HRS §84-13 states that no employee may "use or attempt to use his official position to secure or grant unwarranted privileges, exemptions, advantages, contracts or treatment, for himself ...." We pointed out that this section contains the basic philosophy of the standards of ethics required of public officials. While a member may not consciously use his or her position, that position will necessarily have an effect on both his or her fellow members and upon the staff who make the initial recommendations with regard to the loans. Therefore, we stated that to ensure, as much as possible, that a use of position or confidential information would not occur, a member who wished to apply for such a loan must disclose this fact to the Commission before such application was submitted. Such disclosure was required by HRS §§84-14(e) and 84-17.

In addition, and in keeping with Opinion No. 178, which also concerned loans held by board members, we stated that any member who sought and obtained a loan from the department was required by HRS §84-14(a) to abstain from taking any official action that directly affected his or her loan. We noted that this abstention requirement was also applicable to those members of the board who held loans before being appointed to the board.

We stressed that we were not pleased that under the present ethics code a present board member was not prohibited from applying for or obtaining a loan from the department. Again, while we were limited to enforcing the statute as it read, we hoped that the board would develop its own policy on this matter. We emphasized that the statutory ethics code required only a minimum standard of conduct; this did not ensure that conduct which did not violate the statute was

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<sup>†</sup>It should be noted that at the time Opinion No. 10 was decided a loan was not a financial interest. A loan was a financial interest at the time of this decision but, as the discussion indicates, the conflicts section still did not apply to a member seeking a loan from the board.

proper. A high degree of an appearance of impropriety would almost certainly occur if the board approved a loan to a member and public criticism was almost sure to follow.

Because this opinion would directly affect the former member we forwarded a copy to him. We thanked the chairman for his cooperation and commended the board for recognizing this question and requesting this opinion before any harm had occurred.

Dated: Honolulu, Hawaii, December 1, 1977.

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

Note: Vice Chairman I.B. Peterson and Commissioner Gary B.K.T. Lee were excused from the meeting at which this opinion was considered.