

OPINION NO. 330

We received a request from a former member of a state board who had been adversely affected by Opinion No. 323. This opinion had been issued to the chairman of that board. In it we had ruled that a post-employment provision of the ethics code would prohibit the former member from applying for or receiving a loan from the board during the twelve-month period following his termination from state service.

The former member appeared before the Commission to present his views. He indicated that he was aware of an early opinion, Opinion No. 10, which he had thought applied to his situation. In that opinion the Commission had held that a board member could apply for a loan from the board so long as he abstained from taking any action affecting his own loan. He stated that he had assumed that the same rule would apply upon a member's leaving the board. He indicated that he was quite surprised to learn from Opinion No. 323 that this was not the case and that a section of the ethics code that had not been discussed in Opinion No. 10 would apply to a member upon his leaving state service.

In our reconsideration of this matter, we thoroughly reviewed the question of a board member seeking action from the board he or she serves. We also reviewed the sections of the statute that had application to the question he had specifically raised which was basically a post-employment concern.[†]

He argued that, in the past, members of his former board had been permitted to apply for and receive loans so long as they disqualified themselves from taking action specifically affecting their own loans. Therefore, if a board member could take such action while serving on the board, such member should logically be able to apply for a loan after leaving the board and should not be subject to the post-employment provisions. He felt that the conflict that existed when one sat on the board was far greater than the conflict that might arise after one left the board. We agreed that there was an inherent logic in his argument on this point and recognized that, generally, where an individual had been permitted to take a certain action as a state employee that affected his or her own personal interest that the individual should in most cases be able to engage in the same conduct after leaving state employment.

Opinion No. 10 had been decided under the conflicts section; the question raised in Opinion No. 323 had come under the post-employment section. We pointed out that the post-employment and conflicts provisions have very different policies and goals. We noted that the conflicts section is intended to prohibit one who serves the State from taking action that affects or involves his or her private interests. The post-employment provisions are concerned with a former employee gaining advantage for himself or a business employing him because of the contacts and relationships he has established while serving the State. Therefore, there might well be instances in which the post-employment provisions should apply to restrict conduct that was permissible while the individual was a state employee. While we recognized that this would not generally be the case, we still emphasized that all post-employment questions must be brought to the attention of the Commission.

[†]The individual had also raised an argument that board and commission members who did not receive compensation for their services were not covered by the post-employment provisions of chapter 84. It had always been the Commission's view that these members were subject to the post-employment provisions and a detailed explanation of our view on this question is set forth in the appendix to this opinion.

Our primary concern as we reviewed this matter was with that holding of Opinion No. 10 which had permitted a member to apply for a loan from the board he or she had served. We did not believe that it was proper for a sitting board member to apply for a loan from the board without some showing of justification for such action. Were such action prohibited, the post-employment provisions would clearly and logically apply to continue to restrict such action once the employee terminated state service. After a thorough review of the statute and of the prior cases that pertained to the question of employees seeking action from the agencies they served, we ruled that Opinion No. 10 should be overturned. Our decision on this point was based on two grounds.

Subsequent to the issuance of Opinion No. 10, the Legislature amended chapter 84 and added additional provisions to the conflicts section. We held that one of those sections, HRS §84-14(d), was applicable to a board member applying for a loan from the board. That section provides:

No ... employee shall assist any person or business or act in a representative capacity for a fee or other compensation to secure passage of a bill or to obtain a contract, claim, or other transaction or proposal in which he has participated or will participate as a legislator or employee, nor shall he assist any person or business or act in a representative capacity for a fee or other compensation on such bill, contract, claim, or other transaction or proposal before the ... agency of which he is an employee....

In a number of previous opinions we had held that this provision prohibited an employee from assisting or representing any person or business for a fee or other compensation on a transaction before the agency by which he was employed if the transaction were the kind of matter he would normally participate in as a state employee.

We pointed out to this individual that he was compensated by his company for taking action on its behalf such as, for example, making applications for loans. The application he had made to the board was the kind of transaction he would participate in as a state employee. Accordingly, our interpretation of this section meant that, as of this opinion, if he were still a sitting board member, he would not be permitted to apply for a loan from the board.

Secondly, we pointed out that in our earlier opinion to the chairman of the board we had established strict guidelines under the fair treatment section, HRS §84-13, that applied to a board member applying for a loan. HRS §84-13 provides that an employee shall not use or attempt to use his official position to secure unwarranted advantages or treatment for himself or others. We had implied there and held specifically in this opinion that an employee who sought official action on his own behalf from the agency he served, created a presumption, under the fair treatment section, that he was using his position in an unwarranted manner. The relationship a board member or employee had to his or her fellow board members and employees was such that a truly objective decision on the action sought by the fellow employee or board member could not be achieved. While we did not hold that all such action was barred, we did state that any board member or employee intending to seek such action must raise such a matter with the Commission for its approval. Such actions were, of course, still subject to the restrictions of HRS §84-14(d), cited above, and other provisions of the ethics code. Our ruling here was supported by the language of HRS §84-1 which provides that the ethics code shall be liberally construed to promote high standards of ethical conduct in state government.

We pointed out that if Opinion No. 10 had been decided as we were now holding, the post-employment provision would have applied to this individual's situation in a logical and just manner. We believed that this was a proper policy and the approach to this problem that most upheld the principles of the code. The experience of the last ten years had demonstrated that this holding would not discourage citizens or employees from serving in state government. We noted that individuals being considered for nomination to state office should probably not accept such appointments if they anticipated that their private businesses would be substantially involved with the departments or boards they contemplated serving. Our experience, however, was that this result would rarely occur. We also continued to recognize that certain boards required the appointment of citizens who were involved in the industry their board served or regulated.

Because of the precedent established by Opinion No. 10, which precedent was impliedly upheld in Opinion No. 178, we felt constrained to permit this individual to proceed with his application before this board. While we believed this was action that should not generally be permitted and would not be permitted by the post-employment provision, we understood that he might well have detrimentally relied on our past opinions and that he should be given the opportunity to proceed with his loan application at this time.

The evidence indicated that the individual had not used his position to grant himself a loan that he would not otherwise have received. It did appear that he had met all of the requirements of the department's loan division and that funds were available such that no other applicant would be disadvantaged by the monies that would come to him. However, we noted that such showing was generally of no relevance to the application of the post-employment provision. A key purpose of this section was to prevent even the appearance of a post-employment use of influence. Such use of influence would rarely appear in documents and the exhibition of such documents would not be persuasive to the public when it saw a former employee seek and gain favorable action from the agency he or she had served as a state employee.

Copies of this opinion and the dissent which follows were forwarded to the chairman and members of the board.

Dated: Honolulu, Hawaii, February 9, 1978.

STATE ETHICS COMMISSION
Paul C.T. Loo, Chairman
I.B. Peterson, Vice Chairman
Gary B.K.T. Lee, Commissioner

DISSENT OF COMMISSIONERS BLISS AND CHING

We concurred in that part of the majority opinion that overturned Opinion No. 10 for the reasons stated and we further agreed with the majority that the post-employment provisions applied to all employees irrespective of their receipt of compensation for their services to the State.

However, we could not agree that HRS §84-18(c) should not be applied to this individual because of his reliance upon the holding of Opinion No. 10. In our view, his reliance upon that decision was not reasonable. Opinion No. 10 had dealt only with the failure of the conflicts section, as it read at that time, to deal with the anomalous situation of a board member applying for a loan

from the board he had actually served. It did not and could not extend itself to a post-employment situation as the provisions covering post-employment were not in effect at that time. We saw no reason to exempt this individual from a provision that clearly applied to him.

We recognized that Opinion No. 10 held it to be legally proper for a sitting board member to apply to the board for a loan. But while legally proper, such action nevertheless created a strong appearance of impropriety. The original conflicts section which permitted this conduct, as pointed out in the majority opinion, did not have the same purposes as the post-employment provisions. Opinion No. 323 had held that HRS §84-18(c) clearly applied to this individual, and we saw no reason to find differently now.

The post-employment provisions had been in effect since June of 1972 and were enacted during the time this individual was appointed to this board. Therefore, he had had the opportunity to familiarize himself with the effects these provisions could have upon his conduct as a former employee.

We stated that ignorance of the law was a defense that should be yielded to in only extraordinary circumstances. Those circumstances did not exist in this case, and, therefore, we dissented from the holding of the majority that this individual might apply for a loan from this board at this time rather than in June of 1978 when the post-employment period would end.

Audrey P. Bliss, Commissioner
Dorothy K. Ching, Commissioner

APPENDIX

This appendix sets forth our reasons for applying the post-employment provisions to board and commission members regardless of whether they receive compensation for their services to the State. We stated that while the discussion concerned HRS §84-18(c), the section relevant to this case, the same argument held for HRS §84-18(b). The individual had pointed out that the restriction of HRS §84-18(c) applies for the period "within twelve months after termination of his employment." As "employment" was defined in HRS §84-3(6) as the rendering of services for compensation, he had argued that the provision should apply to only those state employees who had been compensated for their services. He thus argued that some state "employees" did not enjoy an "employment" status with the State. We did not agree.

It was our view that board and commission members were subject to the post-employment provisions. The language of the section relevant to the individual, HRS §84-18(c), was as follows:

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.

As he was aware, board and commission members are defined as employees by HRS §84-3(4). Again, he maintained that the definition of the word "employment" in HRS §84-3(5) and its inclusion in the time limitation phrase "within twelve months after termination of his employment" limited the application of this provision to those board members who were compensated. We did not accept this argument for a number of reasons.

In the first place, it was our view that the definition of the word "employee" fully circumscribed and included all aspects of the concept of what it was to be a "state employee." This concept, in our view, included the state of "employment" as well as the state of being an "employee." To separate employment status from employee status did not make sense to us as we reviewed this statutory language; to be an employee was also to be in a state of employment. It was true that to be an employee or in employment usually required that one be compensated in wages. But the statute specified that for the purposes of the ethics code one might be an "employee " and in the "employment" of the State without being paid.

The definition of the term "financial interest" was relevant here. The interests included in this term, one of which is "employment," are those held in the private sector. It was our view that the Legislature included a definition of the term "employment" to ensure that all private services offered by a state employee were considered to be his financial interest in the business served if any compensation was made to him, whether that compensation consisted of traditional wages or some other return. This definition closed an obvious loophole under which a person might not be considered to be an employee of a business if he was compensated in a form other than wages. It was our view, therefore, that the employment discussed in HRS §84-3(5) was private as opposed to state employment and did not further define or limit the term "employee" as that term related to state employment.

Secondly, our analysis of the word "employment" was in keeping with the tenor of the code as a whole and the post-employment provision specifically. The word "employment" was used in a phrase that was intended to indicate the time period during which the provision applied. It was not contained in that part of the provision which set forth the restrictions that applied to employees; it was not an exclusionary phrase. Further, we noted that nearly all board and commission members serve without compensation. If those members were to be excluded from the coverage of this provision, it was our view that the Legislature would have more clearly and specifically excluded them from its coverage. The code did contain a number of such specific exclusions. The language this individual had focused upon merely established the period during which the restriction applied but, in our view, did not exclude any class of employees from its coverage.

The post-employment provision was intended to provide a "cooling off" period following termination from state employment so that the relationships one made and the influence one gained as a state employee were not used to advantage one's self or others when one left state service, even when such advantage was not explicitly solicited. An additional intent of this provision was to eliminate the appearance of impropriety that was created when a recently terminated public servant received action from the state agency he had served. These policy considerations applied with as equal force to non-paid board and commission members as to those who were compensated. It might not be clear why some board members received per diem payment and some did not. But it was clear that the relative power of state boards was not at all related to the receipt of per diem payments. Further, we noted that the compensation received by the very few part-time board and commission members who did receive payment was minimal. That the Legislature would have distinguished between the few board and commission members who were compensated this minimal amount and those who were not, on policy matters of such fundamental importance, by the use of the language this individual had cited, was not a reasonable conclusion in our view and was not consistent with the overall tenor of the statute.

The powers of board and commission members who are not paid might well be equal to and in excess of those wielded by full-time compensated employees. And, as indicated, the power held

by part-time commissioners had no relevance to whether or not they received compensation. The intent of the code was to prevent official action from being taken in certain types of conflict situations. Nowhere did the code distinguish between full-time, part-time, compensated, or non-compensated employees. The abuses that were of concern had no relevance to these categories of people who serve the State; the abuses could and have existed in all these areas. In view of this general approach of this code, we saw no intent to exclude unpaid board members from the coverage of the post-employment provision.

We found support for our position in Standing Committee Report No. 718, issued on April 13, 1971, concerning House Bill 54 which became the present chapter 84. In paragraph two of that report the following statement was made:

[HRS §84-18(c)] provides for certain restrictions on post-employment. The present law contains no such restrictions. Your committee feels that the special advantage individuals may have who are assisted or represented by former employees should be minimized. These provisions on post-employment, including the restrictions relating to confidential information which by law or practice is not available to the public, are applicable to the members and staff of the State Ethics Commission.

As members of the state ethics commission were not compensated, the intent as expressed in the Standing Committee Report was that the provision applied to all board members. To infer that this report meant that only state ethics commission members should be subject to the law was not supportable by the statutory language as that language made no specific reference to ethics commission members but referred merely to employees. The only inference that could be drawn was that the ethics commission members would not be free of the restrictions placed upon all other such public servants, one of which burdens was HRS §84-18(c).