

OPINION NO. 364

A member of a state commission had been sworn in by the Governor in May of 1978. This member was also the program director of a private nonprofit organization and had become involved in a matter that concerned both the commission and the organization. Accordingly, the member had asked the Ethics Commission to determine if his activities concerning this matter had been in violation of the statute. He also wished to know the guidelines that would apply to those of his future activities that might concern both the private employer and the state commission.

The matter which was of concern here involved a program to benefit a certain group of persons. The member's private employer had been interested in implementing this program in Hawaii for some time. Other groups had also supported efforts towards its establishment. Accordingly during the 1977 session of the legislature a bill was introduced to establish such a program and funds were allocated to do a statistical study to determine the persons who would be included. In 1978, additional legislation was introduced, but, while hearings were held on the matter, the primary bill was never brought to the floor for a vote. However, a line item was inserted in the state budget for the establishment of such a program.

In the spring of 1978, a private group submitted a proposal to the state commission to establish a program that would utilize these funds. Although this person was not a member of the commission at that time he did attend that meeting as a representative of his employer and asked the commission if it would solicit other proposals. The commission indicated that it would welcome additional proposals; the private employer, with the member's assistance, prepared a program which was submitted to the state commission.

At a meeting in the summer of 1978 the commission accepted this proposal, although, to that time, the funds had not been released. The commission had apparently been advised by a deputy attorney general that it could solicit proposals so long as it indicated that there could be no assurance that the funds would be made available.

In early September persons interested in the furtherance of this program attempted to gain the release of the funds. However, the administration apparently decided that the full sum should not be released. Instead, it was proposed that a much smaller amount would be made available to study the matter further and to determine if already established state agencies might be able to administer and go forward with the program.

The member then met with an employee of the state office that administered these funds to learn more about the purpose for which the funds were to be used as well as the status of his employer's original proposal. He stated that at this meeting he was advised that his employer might propose to the commission that the organization be given a grant to undertake this study. It was at this point that the Ethics Commission learned of the potential conflict; no further action was taken either by the employer or the member until our decision on this matter was rendered.

Certain sections of the code had particular relevance to the question raised by the facts in this matter. HRS §84-14(d) provides:

No ... employee shall assist any person or business or act in a representative capacity for a fee or other compensation ... to obtain a contract, claim or other transaction or proposal in which he has participated or will participate as a[n] ...

employee, nor shall he assist any person or business or act in a representative capacity for a fee or other compensation on such ... contract, claim or other transaction or proposal before the ... agency of which he is an employee

It was our view that this section had specific application to the various actions he had taken in his efforts on behalf of the program. We first pointed out that a member of a state commission is an employee for the purposes of the ethics code. Then, the private employer, although a nonprofit and community oriented organization, was a business for the purposes of the ethics code. Further, he had assisted and represented the private employer in the presentation of its proposal to the state commission. Finally, that proposal was a matter in which he would have expected to participate as a member of the state commission.

HRS §84-14(a), another part of the conflicts section, also had application to his position. It prohibits an employee from taking action that would directly affect a business in which he has a substantial financial interest. Because the member's employment with the private organization constituted a substantial financial interest for the purposes of the code, this section prohibited him from taking action as a commission member that would directly affect the private organization. This section had more direct application to his future role as a commission member than it did to the present case.

We recognized that his participation in the particular program that was of concern here predated his appointment to the commission. We also recognized that he was probably not aware of the particular application of the conflicts section to his role in this matter. Accordingly, our ruling in this matter was primarily prospective.

Nevertheless, we believed that HRS §84-14(d) did prohibit the private employer from continuing to pursue the funds that had been released for a study of this program. The decision to release the funds was made after he had become a member of the state commission. Indeed, he indicated that he had learned of the release of the funds while attending a meeting of the commission. In addition, while the initial amount had been inserted in the budget prior to his being sworn in as a member of the commission, he had been aware of his appointment to that body earlier in the year and before the budget line item was introduced. It was our view, therefore, that, while he had acted inadvertently in this matter, his participation had clouded the circumstances surrounding it to the extent that his private employer should proceed with its plans through other state, federal or private agencies.

We also considered his future role as a member of the state commission. We cautioned him that the private employer and the commission appeared to have somewhat similar goals in the sense that each was attempting to improve the status of a certain group of persons in the community. It had also become apparent from discussing this matter with a number of different people that competition and disagreements could arise as the two groups sought their particular goals. Accordingly, we were aware that he would be treading a somewhat thin line as he participated in both organizations.

We well recognized that there was value in having on the state commission an employee or officer of this private employer. We did not believe that the conflicts between the two organizations should prevent him from serving in both capacities. We also understood that he was not actually appointed because of his employment with the private organization but rather because of a separate interest in a different private organization. We had also learned that the private

employer had rarely sought funding from the commission and, further, that it had not often been involved with the commission in the pursuit of common programs. It appeared that this pattern of the past would continue in the future.

Accordingly, we advised the member that he could continue to serve on the commission. However, he was advised that he should be aware that he would not be permitted to take action in his state capacity that would directly affect his private employer. In addition, he was advised that he was prohibited from representing or assisting his private employer on a matter which would come before the commission for official action. Nor could he act on behalf of the private employer before the commission.

Finally, we brought HRS §84-13 to his attention. This provision requires that an employee avoid using his or her position to grant unwarranted advantage or other treatment to any organization or individual. This section required, for example, when matters came before the commission that might involve the private employer, that he be careful to avoid using his position to advantage the organization.

There was another aspect of this matter that was of concern to us. An employee of the commission had brought this potential conflict to our attention. We became aware of the fact that much criticism had been directed toward this employee because of this action. The Ethics Commission had for some time encouraged employees to feel free to bring matters to our attention so that ethical questions might be resolved early and without the necessity of imposing sanctions on any person or organization. This case was a good example of the value of this attitude. If this employee had not brought this matter to our attention, it is possible that funds would have been improperly granted. Action to void the grant would have hurt both the organizations and the program they were discussing. The employee's timely action, therefore, had saved both agencies considerable embarrassment.

We were aware that other members of the commission might be in positions similar to this member's. Accordingly, we forwarded a copy of this opinion to the chairperson of the commission and asked that the members be acquainted with the guidelines we had set out.

We expressed our appreciation to the private employer for its cooperation in this matter and commended the member for requesting this opinion.

Dated: Honolulu, Hawaii, January 11, 1979.

STATE ETHICS COMMISSION
Gary B.K.T. Lee, Chairman
Audrey P. Bliss, Commissioner
Dorothy K. Ching, Commissioner

Note: Vice Chairman Paul C.T. Loo was excused from the meeting at which this opinion was considered. There was one vacancy on the Commission.