

OPINION NO. 373

We received a request from the head of a division of a state department. In his state capacity he promoted industry in the State of Hawaii in order to develop new areas of employment. Representatives of a particular industry met with him to discuss the possibility of department support for a program to further develop the industry in Hawaii. Persuaded that this was a positive idea that offered a good hope of additional employment for qualified persons, he had committed department support to the program. In the course of its development a nonprofit corporation was formed to assist in the development of the industry. He was named to the initial board of directors of the corporation and continued to serve in that capacity. He asked the Commission to determine if he might continue to serve on the board of directors and, if so, what guidelines might apply to his conduct both as a board member and as a state employee. He was also concerned with what restrictions might be placed upon his conduct as the department sought state funding for this nonprofit corporation.

The nonprofit corporation had a number of missions, foremost of which was to undertake research and development contract work for government and industry; provide a reservoir of talent and expertise in high-level technology; encourage spin-off industries; serve as a focal point for the industry for the State of Hawaii. One of its primary purposes was to provide employment in the State for qualified persons who had generally found it necessary to leave the State to find suitable work.

The corporation was to be self-supporting in three to four years; it would earn funds through the acquisition of contracts and grants, the conducting of training seminars and the receipt of corporate donations and equipment. Initial seed money was required from the Legislature for organization, start-up costs and the development of contract services and seminars. State support was to cease in the third year at which time the revenues that the corporation would earn on its own would obviate the need for further state financial support.

Aside from the proposed funding, the corporation was to be an independent corporation and would not require support from the department. In essence, therefore, while it would be somewhat dependent upon the State financially, and while the employee would anticipate representing the State's interest in the corporation by serving on its board, it was an organization in and of itself and not merely an extension of the department or any other branch of the state government. With these various factors in mind, we proceeded to an analysis of his position on the basis of the relevant provisions of the ethics code. The primary concerns here revolved around HRS §84-14(a) and 84-14(b).

HRS §84-14(b) prohibits the acquisition of an interest which is likely to be involved in action one takes as a state employee. It was our view that his position in this organization at its very beginning had been a function of his state duties. His consultations with the other principals involved were accomplished on state time, consistent with his work as an employee of the department. Therefore, while it was likely at that time that the corporation would become involved in action to be taken by him in a state capacity we did not feel that it was reasonable to hold that the acquisition of his interest as a board member had been in violation of the statute. In view of the fact that he was essentially acquiring the interest as a state employee, we believed, consistent with a similar finding in Opinion No. 165, that he had not at that time acquired a financial interest in the corporation.

However, at the time of his request the initiative of the State in promoting this organization was to be limited to the providing of funds. The original organization had now become an independent nonprofit corporation. Accordingly, we advised the employee that should he continue to sit on its board of directors his interest in the corporation would constitute a financial interest for the purposes of the statute. While there continued to be a state interest in the company that interest was not sufficient to treat his directorship as anything less than a financial interest. HRS §84-14(a), therefore, was applicable to his position.

This section provided that he could not take official action directly affecting the corporation because of his financial interest in it. Accordingly, we stated that if he would be required to take official action affecting the company as the department or other state agencies monitored its use of state funds, then he would be required to resign his position on the board. However, in staff's discussions with him and the department head it appeared that it would not be necessary for him to take such action and that this responsibility might quite readily be delegated to other employees of the department. We, therefore, found that he could continue to sit on the board of directors so long as his state involvement would be as anticipated. However, we cautioned him that if circumstances should change so that it was impractical for him to abstain from taking action affecting the company he should so advise us.

We also believed that he should limit his input into the legislation concerning this program. While he might be called upon to provide information as a resource person, he was advised that he should not lobby for the passage of legislation favorable to the corporation.

We commended the employee and the department for bringing this matter to our attention and for cooperating with us as we gathered information concerning this request.

Dated: Honolulu, Hawaii, March 19, 1979.

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

Note: There was one vacancy on the Commission.