

OPINION NO. 380

An employee who provided informational services support to a particular industry had been offered an opportunity to purchase a business within this industry. He asked this Commission for an opinion concerning the applicability of the ethics code to this purchase.

He had indicated that he would not remain in his present state position but would either resign or ask to be transferred to a new position after taking a one-year leave of absence. In addition, it was our understanding that he intended to apply for a loan from another state department. This opinion discussed the restrictions imposed upon him in the purchase of this business, the application for a state loan, and his post-employment activities.

We stated that HRS §84-14(b) prohibits an employee from acquiring a financial interest in a business or other undertaking which may be involved in action he takes in an official capacity. We noted that ownership of a business was, of course, a financial interest. In addition, official action was defined as "a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." While the duties of this employee primarily involved the conveyance of information, he was also involved in helping individual businesses in developing new programs utilizing the information which his office provided. We stated that the development and implementation of these individual programs did involve discretionary action on his part. In addition, he served as an advisor to an industry cooperative and as an unofficial director of an industry association. The business he was interested in purchasing was a member of these organizations. Given these facts, we concluded that the conflicts section would prohibit him from acquiring the business if he remained in his present state position.

We explained to the employee that if he resigned his position with the State, the post-employment provisions of HRS §84-18 would apply to him. HRS §84-18(b) and (c) provide:

(b) 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 in which he participated as an employee.

(c) 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 actually served.

We stated that these provisions would prohibit him from representing or assisting his business on matters that he had participated in as a state employee and on matters which would involve the official action of the subdivision of the department he had served. We explained that the first restriction was intended to prevent a state employee from working on a particular project for the State and then working on that same project in the private sector. While it did not appear likely that such a situation would arise in his case we cautioned him to be aware of this potential problem.

We noted that the second restriction would have more application to his situation. It would prohibit him from seeking the official action of the person who replaced him during the one year following his termination from state employment. He could not, for example, request his

replacement to help him develop an individualized program for his business. In practice we saw little likelihood that he would require such official action as he had the capability of developing his own specific programs without the assistance of the department. However, we also stressed that official action was discretionary action. Accordingly, he would not be prohibited from using research data and information that was available to any person who requested it. The providing of this information was a ministerial duty of this division and did not involve discretionary action. He was directed to contact our office if a specific situation should arise that was not already covered by this opinion.

We noted that if the employee did not resign from his present position and was instead transferred to a new position, the post-employment restrictions would not apply. They were applicable only to persons who left state employment and not to those who merely transferred positions. We pointed out, however, that the use of position section of the code, HRS §84-13, would be applicable. We explained that this section would prohibit him from using his position within the division to gain an unwarranted advantage for himself and his business interests. This included using state time, equipment and facilities in pursuing these business interests or using his personal contacts within the department to gain an advantage for his business.

Finally, we noted that the post-employment provisions would not restrict his efforts to secure a state loan if he should leave his state position. His position was not related to the state office that administered the loan program he would make application to. Accordingly, he would not be seeking official action from the agency he had served as a state employee.

If he did not resign and was transferred, HRS §84-14(d) would prohibit him from applying for the loan if it would be involved in official action he would take in his new state position. However, he had indicated that if he were transferred it would likely be within his department to another position with similar functions but which served a totally unrelated industry. Since this position would not be involved in taking official action with regard to the kind of loan he would seek he would not be prohibited from applying were he to accept this position.

We understood that an individual in the department which administered the loans had suggested that this employee seek this opinion. The department's concern was that if the ethics code would prohibit him from acquiring the business, it did not want to grant him a loan only to be required to recall it at a later time. We have strived to foster such foresightedness in state employees and commended the department's actions here.

We also commended the employee for requesting this opinion and seeking guidelines in the conduct of his new business. His understanding of the possible conflicts involved was evidenced by his awareness that he should not continue in his present state capacity.

Dated: Honolulu, Hawaii, April 16, 1979.

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

Note: Commissioner Dorothy K. Ching was not present at the time this opinion was considered. There was one vacancy on the Commission.