

OPINION NO. 389

The executive secretary of a state board requested an opinion regarding the application of the post-employment provisions of the ethics code to the activities of a former state employee. The former employee had been employed to assist a state office in the development of a state certification program. This office had a contract with the state board to develop the practical exams to be given to applicants for the licenses issued by the board.

The executive secretary received a call from one of the persons scheduled to take the written portion of the exam. He stated that he had received a flyer from a private organization advertising that it was offering a review course for this exam and that "a *former employee* of the [office's] Certification Center," would be conducting the seminars. The flyer also stated that, when they registered, all participants would be given a written guarantee that they would pass the exam. The cost of the seminars was listed at \$175.

As required by our rules, the former employee was notified that a request for an opinion had been made concerning his proposed activities. He met with the staff in our offices to discuss the situation. We explained to the requester that a copy of this opinion, with his name deleted, would be forwarded to the former employee in accordance with Commission Rule 4.2(c).

The questions raised here came under the post-employment provisions of the ethics code, which are found in HRS §84-18. Subsection (a) prohibits a former employee from disclosing "any information which by law or practice is not available to the public and which he acquired in the course of his official duties or us[ing] the information for his personal gain or the benefit of anyone." Obviously, the content of the exams was to be kept confidential. Therefore, the former employee was prohibited by this section from disclosing to any person information about any portion of the exam, written or practical, which he gained while working for the certification program. We noted that this prohibition remained in effect until the test was changed such that the information he had gained was no longer valid. Unlike the other post-employment provisions, there is no time limit involved in this subsection.

The former employee indicated to the staff that his only responsibility in the organization was as a lecturer for the review seminar on the written portion of the exam. He stated that, while working for the certification program, he had dealt only with the exam's practical portions; he had neither contributed nor had had access to the written exam. He had himself taken the written exam and was familiar with it to that extent. The former employee's supervisor at the state program confirmed the former employee's statements. From all indications, the organization's seminars were geared to only the written portion of the exam; its brochure stated that the guarantee was for the written exam, and the seminars were timed to coincide with the offering of the written portion of the exam and not the practical portions.

Therefore, we concluded that if the former employee lectured with regard to only the written exam, he would not be violating the code section concerning the use of confidential information. We cautioned him, however, that he would violate this section if he were to disclose confidential information about the practical exams which he had acquired while working on the certification program.

Subsection (b) of the post-employment provision prohibits a former employee, within 12 months after termination of his employment, from assisting any person or business for a fee on

matters in which he had participated as a state employee. The former employee had indicated that he was now an employee of the organization, paid to assist its participants in passing the written exam. Because he did not assist in developing this exam, however, it was not a matter in which he had participated and, therefore, his activities concerning the written exam were not prohibited. We stated, however, that he would be prohibited from accepting a fee for assisting any person in passing the practical sections of the exam.

Subsection (c) prohibits a former employee, during the 12 months following his termination from state employment, from representing or assisting any person or business for a fee on matters involving official action by the subdivision of the agency for which he had actually worked. We noted that this portion of the code was to allow for a "cooling off" period for the personal relationships an employee develops within his or her own subdivision. However, we stated that the former employee's lecturing of persons preparing to take the written exam administered by his former subdivision would not fall into this category. While his former colleagues graded the exam, their actions were purely ministerial and did not constitute "official action." Our conclusion here was based on the fact that the exam consisted of multiple choice and true-false questions and was graded with a key.

Finally, our staff had been advised that the state office might be interested in rehiring the former employee for additional work on the models used for the practical exam. We pointed out here that subsection (d) exempts from the post-employment restrictions the hiring of a former employee to work on any matter on behalf of the State. Therefore, we stated that he could return to the office to work on this project. We advised him, however, that if he should then choose to participate as a lecturer for this private organization, he should request an opinion from the Commission as the restrictions which applied to present employees were different from those which applied to former employees.

In summary, we found that the post-employment provisions prohibited the former employee from using confidential information he had gained while being employed by the State and, in addition, prohibited him, for the 12 months following his termination from state service, from representing or assisting any person or business for a fee on matters in which he had participated as a state employee and on matters involving the official action of the office which had employed him. The provisions, however, did not prohibit him from returning to work in this program on behalf of the State.

We commended the state employee who requested this opinion and the board which he served for being sensitive to the questions involved and for seeking this opinion.

Dated: Honolulu, Hawaii, July 17, 1979.

STATE ETHICS COMMISSION
Gary B.K.T. Lee, Chairman
Edith K. Kleinjans, Commissioner
Robert N. Mitcham, Commissioner

Note: Commissioner Dorothy K. Ching was excused from the meeting at which this opinion was considered. Vice Chairman Paul C.T. Loo was not present during the discussion and consideration of this opinion.