OPINION NO. 392

We received a request for an advisory opinion from a recent appointee to an administrative position in a state department. At the time of his appointment he was an officer in a business that was regulated by the state agency. Because of this circumstance, he asked the Commission to advise him as to the effect of the ethics code upon his officership position.

The business was a nonprofit corporation that enjoyed tax-exempt status under both state and federal laws. Its board consisted of 27 directors, none of whom was paid a fee for services to the corporation. He had served on the board for approximately 14 years and had been named president to succeed an individual who had resigned from that position before the expiration of his term.

The relevant provision of the ethics code was found in HRS §84-14(a):

> (a) No employee shall take any official action directly affecting:
>
> (1) A business or other undertaking in which he has a substantial financial interest; or
>
> (2) A private undertaking in which he is engaged as legal counsel, advisor, consultant, representative, or other agency capacity.
>
> A department head who is unable to disqualify himself on any matter described in items (1) and (2) above will not be in violation of this subsection if he has complied with the disclosure requirements of section 84-17 ....

Because he had accepted a state position, he was subject to the restrictions of the State Ethics Code. Further, his position on the board of directors of the corporation, even though unpaid, and even though the business itself was a nonprofit corporation, was defined to be a financial interest under HRS §84-3(6)(F). Further, the Commission had generally considered directorship positions, and particularly officerships, to be substantial interests. The Commission had defined "substantial" to mean an interest which was of sufficient magnitude to influence an employee in the course of his or her duties. We believed that board of director positions were substantial because of the significant fiduciary responsibilities owed by a director to the business. Accordingly, it was our conclusion that his interest in the corporation was a substantial financial interest and, therefore, subject to the restrictions of HRS §84-14(a). In addition, we construed the exception noted for department heads as applying exclusively to these officers and not to other administrators.

We noted, however, that the conflicts of interests section did not require divestment of an interest which one had held prior to accepting a state appointment but required that the employee abstain from taking action that would directly affect the business in which he held the interest. Accordingly, we advised him that he could retain his position with the nonprofit corporation so long as he was not required to take action which would involve this organization. We noted here that such action was not restricted to final decision making but included discretionary action that would affect the business such as the making of recommendations and other input into final decisions.

It was our understanding that his primary responsibilities with the department would not concern the area of business that concerned this corporation. In addition, he had disclosed his interests to the director of that department, who had assured him that he would not be assigned to matters that would have any impact upon the corporation.

The employee also disclosed stock interests in a former employer. The value of his interest was such that HRS §84-14(a) operated to restrict him from taking action that would affect this business. He had advised us, however, that he would not be involved in matters in his state position that would have an effect upon the business. Accordingly, we advised him that he could retain his stock interest.

We commended him for bringing this matter to our attention at an early time so that any possible conflicts could be resolved satisfactorily.

Dated: Honolulu, Hawaii, September 17, 1979.

STATE ETHICS COMMISSION
Paul C.T. Loo, Vice Chairman
Dorothy K. Ching, Commissioner
Edith K. Kleinjans, Commissioner

Note: Commissioner Robert N. Mitcham was excused from the meeting at which this opinion was considered. Chairman Gary B.K.T. Lee was not present during the discussion and consideration of this opinion.