

OPINION NO. 401

The chairman of a state board that exercised powers in a state preservation program requested our opinion as to the application of the ethics code to the participation of one of the members in an important case before the board. The parties in this matter had challenged his participation.

The bulk of the research work relevant to the matters reviewed by the board was performed by a state office. That office made recommendations to the board.

Several years prior to the filing of this request, the challenged board member had been a member of that staff and had, in fact, done research and prepared documents on the matter now before the board. And it was the member's staff work on this matter that formed the basis for the present challenge to his right to participate in the case before the board. The chairman also asked us to determine if the ethics code would prohibit this member from participating in any matter he had researched while employed in the state office.

We learned that after this board member had left his state position, it had been decided that many of the opinions rendered by the board were of questionable standing because the board had failed to give appropriate notice to the parties involved. Accordingly, most of the matters this board member had researched were being reconsidered. Present state staff members were doing the research on these cases.

Our review of the facts indicated that the board member would not violate the ethics code by participating and voting on this matter. The conflicts-of-interests section, HRS §84-14, had no application because the board member had no financial interest of any kind in the matters to be reviewed or in the parties involved.

The fair treatment section of the ethics code, HRS §84-13, did have application to that conduct of state officials that was not covered by the conflicts-of-interests section or other specific sections. However, we noted that the Commission had not, in the past, found employees in violation of this section without some showing of a use of position to gain or attempt to gain a clearly unwarranted advantage for a specific party, whether that party be the employee, or another person or business.

In this case, there had been no challenge to the member's conduct. His action would not affect either himself or any person or business he was associated with. The question instead seemed to be restricted to whether his past work on the matter in question had predisposed him to a particular view of the question before the board such that the due process rights of the parties would be affected. Our review indicated that he would not be guilty of ethical misconduct by his participation in this matter. As we had indicated, he had nothing to gain by his participation. In addition to the fact that he had no financial interest in the matter, the board was not reviewing his work product but the work product of the present state staff. Further, the work he had performed relative to the matter had been completed more than seven years prior to the time of this request.

We emphasized that our decision as to the application of the ethics code did not preempt either the board or the courts, upon review of the board's decision, from determining that the member's past work on the matter had created a pre-disposition to find a particular result. Accordingly, we advised the chairman that the Commission's decision that the member had met the State's ethics standards did not preclude the board from deciding, for reasons other than those prescribed in the ethics code, that it would be appropriate for him to abstain in this matter.

Because, as an administrative body, we were also concerned about observing the due process rights of the parties that appeared before us, we had reviewed the general law in this area. We had found no precedents which clearly commented upon this member's right to take action in this matter. It was a question that called for a more thorough review and analysis than was appropriate for us to embark upon because this question was not a matter that fell within our power to decide.

We went on to comment that, in adopting the ethics code, the legislature had indicated that a basic standard-of-conduct code should apply to all state employees, including unpaid board and commission members, to prevent employees from taking action which would violate ethics principles. But such a code was not to be so broad as to keep persons from taking action or from serving the state government. It was our view that board and commission members should generally take action on the matters that came before them, unless specific reasons could be identified for them to abstain. To refrain from taking action out of fear of challenge or criticism did not serve the public interest. This was particularly true in controversial cases. On the other hand, however, we recognized that other considerations, aside from those expressed in the ethics code, might also be applicable to such situations. We stated that such considerations should be seriously weighed before a decision was made on the participation of a board member.

We commended the chairman for bringing this matter before the Ethics Commission to permit us to determine the coverage of the ethics code.

Dated: Honolulu, Hawaii, January 2, 1980.

STATE ETHICS COMMISSION
Gary B.K.T. Lee, Chairman
Paul C.T. Loo, Vice Chairman
Dorothy K. Ching, Commissioner
Edith K. Kleinjans, Commissioner
Robert N. Mitcham, Commissioner