

OPINION NO. 438

We received a request for an advisory opinion from the chief executive officer of a state department who was elected as a member on the board of directors of a private nonprofit organization. Service on the board was on a non-compensated basis. He requested an advisory opinion as to whether it was permissible under the State Ethics Code for him to continue to serve on this board during his tenure as chief executive officer of the state department.

The Commission had previously discussed that person's responsibilities as the chief executive officer. That person was the chief executive officer of a department, and served under the direction of the board of the department, which was responsible for formulating policy and exercising overall control of the department. His duties as the chief executive officer were to direct the development of plans and programs and to recommend policies to advance the goals of the department; to maintain effective working relationships with government and the general public and among members within the department's community; and to maintain contact with other similar institutions. The day-to-day administration of the department was delegated to other department officers.

The applicable section of the code was HRS §84-14(b), which prohibits an employee from acquiring financial interests in any business or other undertaking which he has reason to believe may be directly involved in official action to be taken by him. Board memberships were included as financial interests under the code, and eleemosynary organizations were considered by the Commission to be businesses for the purposes of the ethics code.

The question before the Commission was whether or not the employee, as the chief executive officer of the department, was in a position to take official action which might have affected the nonprofit organization. In his memorandum to the Commission, the employee noted that the nonprofit organization was one of the cooperating organizations connected to a section of the department. Agreements with each organization were negotiated on an annual basis by the head of the section. The funds involved in these agreements were a part of the section's division operating budget, which was subject to review and approval by the chief executive officer's office before recommendation by him to the department's board. The employee also noted that his review was made on a broad department-wide basis rather than upon a detailed examination of individual projects and agreements. In the Commission's view, his position was that of a department head who was not personally or actively involved in negotiations but who exercised discretion by his or her subsequent review and approval of agreements as part of the department's total operating budget.

The Commission considered whether or not such action taken by the chief executive officer thereby precluded him from continuing to sit on the board of the nonprofit corporation because its actions were discretionary rather than ministerial in nature. A strict interpretation of HRS §84-14(b) would have prohibited him from continuing to serve on the board of directors since his responsibility to review, approve, and recommend action to the board of the department was discretionary action.

Although the chief executive officer did have discretionary authority, the Commission noted that he routinely reviewed the budget of the section which involved the non-profit organization. Further, he was never required to take action which affected the nonprofit organization solely. The Commission, therefore, had decided that his part in the review, approval, and recommendation to the department's board of matters which related to the nonprofit organization was so limited that public confidence would not be undermined, and it would not have been a violation of HRS §84-14(b) if he remained on the board of directors of the nonprofit organization while serving as the chief executive officer of the department.

The Commission advised him that the situation discussed herein was unusual and that the exception granted to him had been based on the facts we had reviewed. If his situation changed in the future, he was requested to consult the Commission for additional advice.

We appreciated his bringing this matter to the attention of the Commission.

Dated: Honolulu, Hawaii, June 12, 1981.

STATE ETHICS COMMISSION
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