

OPINION NO. 470

The Commission received a request for an advisory opinion from a branch chief of a certain department. The branch chief asked the Commission to determine whether the chairman of one of the department's advisory committees was in conflict because of his employment with a local corporation that had a contract with the department. The advisory committee on which the chairman served had been convened by the department in accordance with concurrent resolutions adopted by the Legislature and was responsible for counseling the director of the department on matters concerning environmental safety.

The chairman of the advisory committee had been employed by the corporation prior to his appointment to the committee. The corporation was engaged in the business of performing environmental monitoring, and, in accordance with its contract with the department, monitored the prevalence of certain harmful substances in various areas of Hawaii.

Because the chairman was a member of the advisory committee, he was a state employee for purposes of the ethics code and was therefore subject to the restrictions contained in the code. Since his employment interest in the corporation predated his appointment to the committee, the relevant code provision was HRS §84-14(a), which reads, in pertinent part, as follows:

§84-14 Conflicts of interests. (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 person whose position on a board, commission, or committee is mandated by statute, resolution, or executive order to have particular qualifications shall only be prohibited from taking official action that directly and specifically affects a business or undertaking in which he has a substantial financial interest; provided that the substantial financial interest is related to the member's particular qualifications.

The Commission has defined "official action," in HRS §84-3(7), as a decision, recommendation, approval, disapproval, or other action, including inaction, that involves the use of discretionary authority. Since this definition encompasses recommendations, the Commission has found that action taken by committees in their advisory capacity constitutes official action. The Commission has also determined that an employment interest in a business constitutes a substantial financial interest.

Thus, under HRS §84-14(a), a committee member is generally precluded from taking official action that directly affects his private employment. Because the Commission has determined that official action that affects an employee's competitors or an employee's industry also directly affects his own business, a committee member may not usually take official action that directly affects his competitors or his industry. However, the last paragraph of HRS §84-14(a) contains an exception to this restriction: committee members who are mandated by resolution to have particular qualifications or expertise are prohibited only from taking official action that directly and specifically affects their businesses. This exception thus allows a committee member with particular qualifications to take official action vis-a-vis his industry or competitors so long as the official action does not directly and specifically affect a business in which he has a substantial financial interest. Of course, the substantial financial interest must be related to the committee member's particular qualifications.

In regard to the chairman's case, the Commission was of the opinion that he was appointed to the advisory committee because of his particular qualifications and expertise in several technical areas related to environmental monitoring. The Commission reviewed the sections of the House and Senate resolutions that dealt with the composition of the advisory committee and came to the conclusion that those sections clearly distinguished between committee members who were needed because of their technical expertise and those members whose primary function was to represent the community.

Since the Commission found that the chairman was appointed to the advisory committee because of his particular qualifications, he was precluded only from taking official action that directly and specifically affected his corporation. In situations where the chairman would be called upon to take official action that would directly and specifically affect his corporation, the Commission required that he disqualify himself. It was the Commission's understanding that at such times he would be able to disqualify himself without impairing the functions of the committee. Thus, if the advisory committee were to take official action that would directly and specifically affect the corporation, the Commission advised that the vice chairman or another should head the committee. Further, the Commission stated that the chairman should avoid participating in any discussions concerning the corporation, except to provide technical information. And, in order to avoid an appearance of impropriety, the Commission stated that the chairman should refrain from signing memoranda that concerned the corporation.

Because the chairman had a substantial financial interest in the corporation, the Commission stated that he should also be sensitive to two other code provisions, HRS §84-12 and 84-13. HRS §84-12, the confidential information section of the code, states that employees shall not disclose information which by law or practice is not available to the public and which they acquire in the course of their official duties, or use the information for their personal gain or for the benefit of anyone. HRS §84-13, the fair treatment section of the code, states that employees shall not use or attempt to use their official positions to secure unwarranted privileges, exemptions, advantages, contracts, or treatment for themselves or others. This section of the code also prohibits the use of state time, equipment, or other facilities for private business purposes.

The Commission understood that the chairman, since the time of his appointment, had been taking measures to avoid ethical violations or the appearance of impropriety. He had informed his fellow committee members and the department of his interest in the corporation and had disqualified himself from taking official action that directly and specifically affected the corporation. The Commission stated that these actions on his part were highly commendable.

Since the above opinion set forth only the general guidelines under which the chairman might serve as a member of the advisory committee, the Commission informed the branch chief that he, or the chairman, might wish to contact the Commission again if questions later arose as to how the above restrictions applied to specific situations.

Section 21-4-2(c), State Ethics Commission Rules, provides that a copy of an advisory opinion rendered by the State Ethics Commission will be sent to a state employee who is the subject of, but has not requested, the advisory opinion. Accordingly, a copy of this opinion was forwarded to the chairman of the advisory committee.

The Commission informed the branch chief that it appreciated his concern for the ethical considerations raised in this matter. The Commission has found that this kind of attention to ethical matters furthers public confidence in state employees and thus contributes to an improved ethical climate in state government.

Dated: Honolulu, Hawaii, July 16, 1982.

STATE ETHICS COMMISSION
Edith K. Kleinjans, Chairperson
Paul C.T. Loo, Vice Chairperson
Allen K. Hoe, Commissioner
Robert N. Mitcham, Commissioner

Note: Commissioner Gary B.K.T. Lee was excused from the meeting at which this opinion was considered.