OPINION NO. 528

In response to Advisory Opinion No. 527, a board member requested a reconsideration of the opinion. He and his attorney met with the Commission to discuss the circumstances he believed were not considered by the Commission when it rendered its decision. The Commission noted that the information presented by the board member and his attorney represented a significant change in the factual circumstances of his situation; accordingly, the Commission determined that the request was not a request for reconsideration but a request for another advisory opinion based upon the board member's new situation.

After issuing Advisory Opinion No. 527, in addition to the information presented by the board member, the Commission also had received information from the state board indicating that very few applications for funds in the past two years included requests for funds for the cost of renting space. The board noted that space rental was "almost always listed as an in-kind expense" and that requests for funding were usually for other costs. Furthermore, in the board member's discussion with the Commission, he commented that requests for funds for space rental were uncommon because it was widely known in the community that only a limited amount of state funds were available for the support of projects. Notwithstanding the figures of the last two years, the Commission was not convinced that organizations in the future would not apply for funding by the board for the cost of renting space. The Commission noted that the board's 1983-1984 and 1984-1985 applications included "space rental" as an item in the "proposed budget" section and that "space rental" was not included in the "activities not funded" section. As a consequence, the Commission believed it had no alternative but to conclude that it was possible that the board might receive future requests for funds for space rental, including the space the board member was responsible for in his private employment. Finally, although the board member had commented that his term as a board member officially terminated on December 31, 1983, he also had stated that the Governor had requested that he continue to serve as a holdover member. Additionally, the board member had noted that he did not terminate his service on the board. Clearly, then, the provisions of the State Ethics Code continued to apply to the board member while he carried on responsibilities as a board member and exercised discretionary authority on behalf of the State. Accordingly, the Commission reaffirmed its finding in Advisory Opinion No. 527 that the board member had contravened the provisions of HRS §84-14(b) when he accepted the employment.

The board member had, however, presented information to the Commission that indicated a marked change in his circumstances. Specifically, he had submitted a statement from his employer stating that the company would not accept applications from any organization funded by the board to rent space during the term that the board member served on the board. Because of the statement by the board member's employer, there was no possibility that the company would receive rental fees that resulted from action by the board. Consequently, the Commission noted that the conflicts-of-interests section of the ethics code no longer applied to the situation. Under these circumstances, although the board member initially had violated the prohibited acquisition section of the ethics code, the Commission decided that the statute would permit the board member to continue to serve on the board without leaving his employment.

The board member also had stated that he would disqualify himself from participating on a subcommittee of the board and that he would not serve as a voting member of a private committee involved in his private work. The Commission presumed that the board member had voluntarily taken these steps in order to satisfy the provisions of HRS §84-13, the fair treatment section. The Commission recognized that because it was perceived in the community that the board member held significant positions in both the public and private sectors, the original question presented to the Commission seemed to focus on the potential for misuse of position on the board member's part. The Commission believed that if he desired to lessen the possibility that fair treatment questions would be raised, it would be appropriate for the board member to take the precautionary steps he had outlined. Nevertheless, the Commission advised the board member that in order to ensure that fair treatment questions would not arise, he might wish to consider disqualifying himself not only from participation on the subcommittee but also from any board action regarding certain purchases. Additionally, in the Commission's view, merely abstaining from voting as a member of the private committee would not be sufficient to allay community concerns. The Commission noted that it had often commented that because voting is just one step in the decision-making process, individuals who must disqualify themselves from action should avoid participating in any part of the decision-making process, including discussions. Finally, the Commission advised the board member to consider refraining from participating in all purchase decisions made by the board, because all projects might be categorized as competing projects for limited state funds. The Commission appreciated the board member's willingness to adopt safeguards to avoid fair treatment problems in the future.

In summation, the Commission reaffirmed its decision in Advisory Opinion No. 527 but determined that because of the change in circumstances, namely a change in the policy to be followed by the board member's private employer, the board member no longer was in a position of potential conflict of interest and it would be permissible for him to continue as a member of the board while employed. Furthermore, to assist the board member in avoiding potential ethics problems under the fair treatment section, the Commission had set out guidelines for his consideration.

The Commission advised the board member that an opinion issued by the Commission is based on and limited to the facts set forth in the opinion, and noted that should the facts change, the board member might wish to contact the Commission for another opinion.

As requested, a copy of this advisory opinion was sent to the board member's attorneys.

Dated: Honolulu, Hawaii, April 10, 1984.

STATE ETHICS COMMISSION
Edith K. Kleinjans, Vice Chairperson
Tim S. Farr, Commissioner
Mildred D. Kosaki, Commissioner
Rabbi Arnold J. Magid, Commissioner

Note: Chairperson Allen K. Hoe was excused from the meeting at which this opinion was considered.