

## **INFORMAL ADVISORY OPINION NO. 96-3**

The Hawaii State Ethics Commission received a charge from a member of the public against a member of a state commission. The charge basically made three allegations relevant to the jurisdiction of the State Ethics Code. First, it alleged that the commissioner had numerous conflicts of interests that prevented him from participating in a contested case currently before his commission. Second, it alleged that he violated the State Ethics Code's conflicts of interests law by voting on another matter that was before his commission while holding stock in a company with an interest in the matter. Third, it alleged that he violated the State Ethics Code by not filing his financial disclosure statement with the State Ethics Commission within thirty days of his appointment to his commission, as was required by section 84-17 of the State Ethics Code, chapter 84, Hawaii Revised Statutes ("HRS").

### **I. Conflicts of Interests and the Contested Case**

The commissioner was a member of a state commission that was responsible for the management of a particular resource. The commissioner was appointed by the governor several months before the charge was filed. He had, at that time, just finished serving as a member of another state board.

The commissioner's commission was considering a contested case involving the management and allocation of a resource. The charge alleged that the commissioner had numerous interests that prevented him from participating in the contested case. The charge listed these interests. In his answer, the commissioner explained the nature of his interests as follows:

1) He owned stock in Company A, a contestant in the case.

2) He was the trustee and one of the beneficiaries of a private trust. This trust owned 100% of the stock of Company B. He was a salaried employee, an officer, and a director of Company B.

One of the other directors of Company B was a partner in a certain law firm. An attorney with this law firm had represented Company B on some matters several years ago. This attorney represented one of the parties in the contested case.

Several years ago, the vice president of Company B wrote testimony to the commission. The testimony supported an application by one of the contestants then before the commission on a related matter. The testimony was written on Company B stationery.

3) Company B owned 49% of the stock of Company C. The commissioner was the Chairman and President of Company C and received a director's fee for the meetings that he attended.

Company C leased property from a business that was also a contestant in the case before the commission. To the best of the commissioner's knowledge, Company C did not use any portion of the resource then in dispute before the commission.

Company C sold property to a business. The business received a loan from a state department that was a contestant in the case. To the best of the commissioner's knowledge, none of the stockholders or officers of Company C had ever been stockholders or members of the business.

4) Company B was a minority stockholder in Company D. Company D leased property from a party in the contested case. The majority owner of Company D was the son of a partner in a law firm that was representing a party before the commission. The majority owner of Company D was an employee of another party in the case before the commission.

5) At one time, a development company held an option to purchase land from Company B. The option lapsed two years ago. The development company also had a deal to buy land from one of the parties involved in the contested case. The party was obligated to provide the resource being contested in the case before the commission.

6) The commissioner chaired a private committee that assisted former employees in finding work in their industry. The committee approved a grant of federal money to a former employee doing business as another company. The company was a lessee of a contestant involved in the contested case and used the resource that was the subject of the case.

The charge claimed that the commissioner's financial interests created a number of conflicts of interests under the State Ethics Code. The State Ethics Commission noted that the State Ethics Code was located in HRS chapter 84. The relevant conflicts of interests law read 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....

For purposes of the State Ethics Code, the term "state employee" included members of state boards and commissions. The term "financial interest" was defined by the ethics code as:

an interest held by an individual, the individual's spouse, or dependent children which is:

- 1) An ownership interest in a business.
- 2) A creditor interest in an insolvent business.
- 3) An employment, or prospective employment for which negotiations have begun.
- 4) An ownership interest in real or personal property.
- 5) A loan or other debtor interest.
- 6) A directorship or officership in a business.

HRS section 84-14(a) would forbid the commissioner from taking "official action" directly affecting a business in which he had one of these financial interests.

At the time the initial complaint was lodged, the commissioner had an employment interest and a directorship interest in Company B. He had a directorship and officership in Company C. He had an ownership interest in Company A by virtue of his stock ownership. Finally, the commissioner appeared to have a directorship interest in the private committee. Accordingly, he had financial interests in all of these businesses. The State Ethics Commission noted that section 84-14(a) would therefore forbid the commissioner from taking any official action directly affecting any of these businesses.

In determining whether or not the commissioner was required to disqualify himself, the complainant maintained that the State Ethics Commission should apply not only the State Ethics Code, but also the Hawaii Supreme Court's decision in Sussel v. City and County of Honolulu Civil Service Commission, 71 Haw. 101 (1989). The Sussel case concerned a contested case hearing. At issue was whether a member of the Civil Service Commission ought to have disqualified himself from hearing a contested case before the commission. The Hawaii Supreme Court held that, in a contested case hearing, due process requires that "where the circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on his [the adjudicator's] impartiality" then the adjudicator should disqualify himself from hearing the case. 71 Haw. at 110. The court concluded that "any commissioner whose impartiality might reasonably be questioned should be disqualified." 71 Haw. at 103. The complainant argued that, under the Sussel case, there was an appearance of impropriety and the commissioner's impartiality might be questioned. The complainant concluded that the commissioner should disqualify himself from hearing the contested case then before the commission.

The State Ethics Commission believed that the complainant's application of the Sussel case may or may not be correct. However, whether the Sussel case required disqualification, as the complainant contended, was not a question that could be addressed by the State Ethics Commission. The Sussel case concerned the requirements of the due process clause of the constitution. The case did not concern the requirements of the State Ethics Code. The State Ethics Commission believed that the correct application of the Sussel case was a matter for the Department of the Attorney General. The State Ethics Commission believed that it had to confine itself to interpreting the State Ethics Code.

State Ethics Code section 84-14(a) would have required the commissioner to disqualify himself from the contested case if the case required him to take "official action" directly affecting any business in which he had a substantial financial interest. Thus, the chief issue for the State Ethics Commission was whether the effect of the commissioner's actions on his businesses would be direct or indirect. Section 84-14(a) did not forbid state employees from taking action that only indirectly affected their financial interests.

In determining whether or not the effect on these businesses was direct, the State Ethics Commission was guided by the Hawaii Supreme Court case of Tangen v. State Ethics Commission, 57 Haw. 87 (1976). The Tangen case concerned the application of HRS section 84-14(a), the same section involved here. The State Ethics Commission had charged Eddie Tangen, a member of the Land Use Commission, with a failure to disqualify himself from participation on several petitions before the Land Use Commission. The petitions requested the commission to reclassify different parcels of land from agricultural or conservation to urban. In each case, the land was leased to businesses in the sugar industry. Each of the lessees had a collective bargaining agreement with the International Longshoremen's and Warehousemen's Union ("ILWU") governing their employees who were members of the ILWU. Eddie Tangen was an international representative of the ILWU.

The court essentially held that Tangen was not required to disqualify himself from taking action on the petitions. The court found that Tangen did have a substantial financial interest in the ILWU. However, the ILWU was not a petitioner before the Land Use Commission. The ILWU would not be directly affected by the commission's actions. The court consulted Webster's Third New International Dictionary in order to define "directly" as "without any intervening agency or instrumentality or determining influence." 57 Haw. at 92. Under this definition, the court concluded

that action on the petitions would directly affect only the petitioners and those with a financial interest in the land. The effects on others would be indirect.

In reaching its decision in Tangen, the court quoted with approval two legislative committee reports concerning the State Ethics Code's conflicts of interests section. The court first quoted Standing Committee Report No. 367 of the House Committee on Judiciary, 1967 House Journal, Regular Session, 613. Part of that report stated:

The public interest is best served by attracting and retaining in our State government and the legislature men and women of high caliber and attainment. A code of ethics, which is unnecessarily rigid and restrictive, will defeat its purpose. It would discourage qualified persons from entering government and may have a demoralizing effect upon incumbents. 57 Haw. at 94.

The court then quoted portions of Standing Committee Report No. 670-72, Senate Committee on Public Employment, 1972 Senate Journal, Regular Session, 1034 at 1035:

At the outset, certain observations, which your Committee considered, should be noted for an understanding of the spirit and intent which underlie the amendments. In drafting a conflict of interest statute it is easy to become overzealous and to forget the impact which a broad restriction might have. A statute clearly should prohibit conflicts of interests which are most damaging to the standards of good government and yet not prohibit so much that competent people will be discouraged from serving or that legislators and employees are deterred or restricted from freely carrying out their intended functions and duties. 57 Haw. at 94.

The court's citing of these reports bolstered its narrow interpretation of the term "directly."

The State Ethics Commission was obligated to abide by the Tangen decision. Thus, in the commissioner's situation, the State Ethics Commission believed it had to apply section 84-14(a) in light of the Tangen decision. The commissioner's actions in the contested case would clearly have a direct effect on Company A. Company A was a contestant in the contested case. It also appeared that there could be a direct effect on Company C because Company C leased property from another contestant. It appeared that action by the commissioner would only indirectly affect Company B and the private committee, the other two businesses in which the commissioner had financial interests. Neither of these two businesses was a petitioner in the case. In addition, neither had a financial interest in land affected by the case.

The commissioner's clearest conflict of interests resulted from his ownership of Company A stock. The commissioner became aware of the possible conflict some time before the charge was filed and called the State Ethics Commission. The staff of the State Ethics Commission then entered into discussions with the commissioner on the possibility of avoiding the conflict of interests problem by placing the stock in some sort of trust. Later, again before the charge was filed, the staff of the State Ethics Commission sent a letter to the commissioner's attorney informing him that it did not appear that the conflict of interests problem could be avoided by placing the stock in a trust if the commissioner derived income from the trust. After receiving this letter, the commissioner placed the stock in a charitable remainder trust, which then sold the stock. In this way, the commissioner divested himself of an ownership interest in Company A.

There remained the issue of whether Company C would be "directly affected" by action that the commissioner would take on the contested case. The State Ethics Commission believed that more inquiry would be needed into Company C's leasehold interest in the contestant's property and whether this property would be directly affected by a decision by the commissioner's commission. For the record, the commissioner stated that he did not believe that Company C would be "directly affected" by any decision affecting the contestant because, to his knowledge, Company C had never used the resource that was the subject of the contested case. In any event, the issue appeared to be moot. Shortly after divesting himself of the Company A stock, the commissioner removed himself from the consideration of the contested case. Because he would not be taking action on this matter, he would not be in violation of HRS section 84-14(a).

Aside from the conflicts of interests section, one other section of the State Ethics Code was relevant. The Fair Treatment section read, in pertinent part, as follows:

§84-13 Fair treatment. No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others....

The State Ethics Commission noted that the Fair Treatment section prohibited a state employee (including a board and commission member) from using his or her state position to grant an unwarranted benefit to anyone. It essentially prohibited favoritism. It did not require disqualification, but only that a state official or employee act with impartiality.

Many of the allegations in the charge that were labeled as conflicts of interests problems were actually issues under the Fair Treatment law. For example, the charge alleged that the commissioner had several connections to a law firm that was representing a contestant in the contested case. These relationships were, at most, matters to be resolved under the Fair Treatment law, rather than the conflicts of interests law. The Fair Treatment law would not require the commissioner's disqualification. It would, however, forbid him from granting an unwarranted benefit or advantage to anyone.

One allegation is of particular interest. The charge alleged that the vice president of Company B sent testimony to the commission supporting a contestant's application. The testimony was written on Company B stationery. The charge cited this letter as evidence of a conflict of interests. In the commissioner's answer, he stated that he did not recall ever seeing the letter.

The State Ethics Commission did not consider that this letter created a "conflict of interests" as that term was used in the ethics code. It did, however, appear to create an issue under the Fair Treatment section of the ethics code. The letter appeared to speak on behalf of Company B. The commissioner was an employee of Company B. Under the Fair Treatment law, the commissioner would be forbidden from taking action that would grant an unwarranted benefit to Company B. The Fair Treatment law would not require the commissioner to disqualify himself from acting on the contested case. The State Ethics Commission believed, however, that if the commissioner were to act on the matter, he might make himself vulnerable to a charge that he had violated the Fair Treatment law if any action that he were to take were to benefit Company B. In order to establish a violation, the complainant would have to show that this benefit was unwarranted. Again, however, the Fair Treatment issues appeared to be moot because the commissioner had disqualified himself from the contested case.

## II. Meeting Vote

The second allegation of the charge was that the commissioner participated in a commission meeting held on a neighbor island. The charge claimed that, at that meeting, the commission was reviewing whether the island should receive a certain designation. If it received the designation, then the island would be subject to various regulations. The charge claimed that Company A was seeking to develop business on the island. The island's designation, it was argued, could adversely affect Company A's plans. The charge claimed that the commissioner voted on a matter while he still owned stock in Company A. In the commissioner's answer to the charge, he claimed that he did disclose his stock interest at this meeting. He also stated that this matter was brought up at a later meeting at which time he disqualified himself and the matter was re-voted.

The staff of the State Ethics Commission consulted the staff of the commissioner's commission and also reviewed the minutes of the neighbor island meeting in order to determine what actually happened. The State Ethics Commission's staff interviewed a member of the staff of the commission who was present at the meeting. The staff member explained that his commission would be deciding whether to designate the island. He said that, in making this decision, the commission would be looking at two documents. One was being prepared by the staff of the commission. It was to contain technical information. This document was not completed by the date of the commission's neighbor island meeting. The second document was a planning document. There was a version of this document that was several years old. This document was supposed to have been updated, however, this had not been done yet. The staff member said that, at the neighbor island meeting, the matter that was voted on was whether to defer the vote on the designation for one year or whether to defer it for only a few months. The commission's staff recommended deferring it for one year, hoping that both of the documents would be completed by this time.

The commission's staff member said that, before the matter was voted upon, the chair of the commission asked the commissioner if he had stock in Company A. In response to the chair's question, the commissioner said that he did own stock in Company A but did not know how much. The staff member said that, after the commissioner's disclosure, the commission voted on the matter. He said that, although the staff recommended that the commission wait a year, there was considerable public sentiment to speed up the process. The commissioner joined in a unanimous vote to defer the matter only a few months. The staff member said that it was difficult to say whether hearing the matter of designation earlier would make his commission any more or less likely to vote a certain way.

The staff member said that, after the neighbor island meeting, the commissioner was criticized for taking part in the scheduling vote without disclosing his interest in Company A. The staff member said that this wasn't true, but it didn't look good. He said that, in order to keep things clean, the commission reconsidered the matter of deferring the date of considering the designation of the island. At a later meeting, the commission re-voted this matter. The commissioner recused himself from the vote and the discussion. The commission ended up again voting to postpone the matter until the earlier date rather than the later date.

The State Ethics Commission reviewed the minutes of the neighbor island meeting. The minutes corroborated the statements of the staff member. The commissioner did disclose his stock interest in Company A. The commissioner indicated to the staff of the State Ethics Commission

that, at the time of the neighbor island vote, he did not know the actual extent of his stock ownership in Company A, but felt that it was "insubstantial" in terms of the total amount of Company A stock. HRS section 84-14(a) prohibited the commissioner from taking action directly affecting a company in which he had a "substantial" financial interest. The State Ethics Commission's view of what constituted a "substantial" interest related generally to the actual dollar value of the stock that one owned rather than to whether the amount of the stock one owned was insignificant when compared with the total amount of stock in existence.

The State Ethics Commission saw no evidence that the commissioner acted in bad faith when voting on the neighbor island matter. Further, the matter was re-voted without the commissioner's participation at a time when the commissioner had already divested himself of his Company A stock. The State Ethics Commission believed that appropriate corrective action had been taken and that no benefit appeared to have accrued to Company A as a result of the first vote. There was also a legitimate question as to whether the first vote actually affected Company A in any meaningful way. The State Ethics Commission believed that there was no reason to further pursue this particular matter in light of these circumstances.

### **III. Late Filing of Financial Disclosure Statement**

The final allegation of the charge was that the commissioner was late in filing a financial disclosure statement with the State Ethics Commission for his position on the commission. The charge alleged that the commissioner filed his financial disclosure statement only after a number of his financial interests were publicly revealed in a newsletter. The charge appeared to view this as deliberate concealment of financial interests. The charge also remarked that the commissioner failed to respond to two letters asking him for a declaration that he had no conflicts of interests in the contested case. The charge appeared to refer to the commissioner's lack of response as further proof of deliberate concealment.

The commissioner was appointed to the commission in the latter part of the year. In accordance with HRS section 84-17, he was required to file a confidential financial disclosure with the State Ethics Commission within thirty days of his appointment. The State Ethics Commission noted that it was not always immediately informed of new appointments to boards and commissions. The State Ethics Commission stated that when it was informed, it was its practice to send a letter requesting that the new appointee file his or her financial disclosure statement within thirty days from the date of the State Ethics Commission's letter.

In accordance with the State Ethics Commission's practice, approximately one month after his appointment, the commissioner was sent a letter asking him to file a financial disclosure statement. The commissioner did not respond to this request. The commissioner later explained that the reason for his lack of response was his belief that, because he had already filed a financial disclosure statement earlier in the year, he did not need to file a new disclosure form. At the beginning of the year, the commissioner was a member of another board. In that capacity, he filed a confidential financial disclosure statement some months before he was appointed to his new position. Thus, although the commissioner was late in filing his disclosure statement for his new position, he did have a financial disclosure statement on file with the State Ethics Commission.

In a telephone conversation, the staff of the State Ethics Commission pointed out to the commissioner that he was required to file a new disclosure form for his new position. Immediately after this conversation, the commissioner came to the State Ethics Commission's office and filed

a new financial disclosure statement. His new financial disclosure statement indicated that his financial interests had not changed from the time of his earlier filing.

Although the commissioner was late in filing a disclosure statement for his new position, it did not appear that his tardiness was part of an attempt to conceal his financial interests. He had already filed a current financial disclosure statement as a result of his earlier position on another board. He believed that this disclosure statement was adequate for his new position as well. His belief was erroneous, but understandable, and not uncommon. The State Ethics Commission noted that many state officials who change positions during the year are confused about having to make a new disclosure filing.

The State Ethics Commission was further persuaded that the commissioner did not attempt to deliberately conceal his financial interests by the fact that he early on approached the State Ethics Commission in order to discuss potential conflicts of interests. Months before the charge was filed, the commissioner was engaged in extensive discussions with the State Ethics Commission's staff regarding his financial interests. Finally, although the charge noted that the commissioner did not respond to requests for a declaration that he had no conflicts of interests in the contested case, the commissioner explained that these requests were sent to his commission rather than to him. The commissioner did not see either of the requests and was not made aware of them until some time after the charge had been filed.

The State Ethics Commission did not believe that any of the allegations in the charge warranted any further action by the State Ethics Commission. With respect to the contested case, the commissioner's ownership of stock created a potential for a conflict of interests. The conflict was avoided when the commissioner sold the stock and removed himself from the consideration of the contested case. The commissioner's removal also avoided any other concerns about conflicts of interests and concerns under the Fair Treatment law. With respect to the neighbor island vote, the commissioner's participation in the meeting followed his disclosure of his stock interest in Company A, a stock interest he, in good faith, felt was not substantial. In any case, any possible problems were corrected by the re-vote at the later meeting. The commissioner did not participate in the re-vote, and had prior to the re-vote divested himself of his Company A stock. Finally, with respect to the late filing of the financial disclosure statement, the commissioner was indeed late in filing for his new position. However, his earlier statement was already on file and the commissioner immediately filed a new form after talking to the State Ethics Commission's staff. The State Ethics Commission did not believe that the commissioner deliberately attempted to conceal his financial interests.

Section 84-31(b), HRS, authorized the State Ethics Commission to investigate charges and to render an "informal advisory opinion" to the person charged in lieu of pursuing further charge proceedings. The State Ethics Commission believed that this informal advisory opinion was appropriate in order to address and resolve the issues in this case.

Finally, the State Ethics Commission commended the complainant for bringing this matter to the attention of the Commission. Legitimate issues of concern were raised in this case. The State Ethics Commission also commended the commissioner for contacting the Commission early on, when the issue of a possible conflict of interests arose. The Commission also noted that in his dealings with the Commission the commissioner had always been forthright and candid, and had always promptly undertaken action suggested by the Commission's staff. The State Ethics

Commission appreciated the commissioner's cooperation, honesty, and candor during its review of this matter.

Dated: Honolulu, Hawaii, March 25, 1996.

STATE ETHICS COMMISSION

Bernard E. LaPorte, Vice Chairperson  
Arlene Kim Ellis, Commissioner  
Carl T. Sakata, Commissioner

Note: Chairperson Cassandra J.L. Abdul disqualified herself from consideration of this matter. There was also a vacancy on the Commission when this opinion was considered.