



HAWAII STATE ETHICS COMMISSION

State of Hawai'i · Bishop Square, 1001 Bishop Street, ASB Tower 970 · Honolulu, Hawai'i 96813

ADVISORY OPINION NO. 2021-2

October 15, 2021

A State Agency (“Agency”) requested an advisory opinion regarding the application of the State Ethics Code, Hawai'i Revised Statutes (“HRS”) chapter 84, to allow some of its employees to transfer to a non-profit corporation (“Non-Profit”). The Agency recently created the Non-Profit and intends to have some Agency employees become employees of the Non-Profit, rather than have them continue as employees of the Agency. The Agency asked whether these employees would violate the Post-Employment law, Hawai'i Revised Statutes (“HRS”) § 84-18(c), or other provisions of the State Ethics Code, by working in Agency facilities and/or by communicating with the Agency on behalf of the employees' new employer, the Non-Profit. The Commission concludes that, because the Non-Profit was formed by the Agency and essentially serves as an extension of it, the Commission does not believe that the Post-Employment law prohibits former Agency employees from representing the Non-Profit before the Agency, or working in Agency facilities, during the one-year post-employment period.

I. Facts

The Agency employs the relevant employees at state-run facilities. Recently, it has allowed some employees to become employees of the Non-Profit, which can offer additional benefits beyond those typically offered to state employees. The Non-Profit

was formed by the Agency recently, and the only three people on its board of directors are high-level Agency employees. The Agency contracts with the Non-Profit to provide services at its state facilities.

II. Application of the State Ethics Code

As state employees, the Agency employees are subject to the State Ethics Code.¹ Once they leave state employment, they are subject to the Post-Employment law, HRS § 84-18(c),² which prohibits former state employees from representing a business for pay before their former state agency or on matters in which they

¹ See HRS § 84-2 (“This chapter shall apply to every nominated, appointed, or elected officer, employee, and candidate to elected office of the State and for election to the constitutional convention . . .”).

² HRS § 84-18 provides in relevant part:

(c) No former employee, within twelve months after termination of the former employee's employment, shall represent any person or business for a fee or other consideration, on matters in which the former employee participated as an employee or on matters involving official action by the particular state agency or subdivision thereof with which the former employee had actually served. This section shall not apply to a former task force member who, but for service as a task force member, would not be considered an employee.

(d) This section shall not prohibit any agency from contracting with a former legislator or employee to act on a matter on behalf of the State within the period of limitations stated herein, and shall not prevent such legislator or employee from appearing before any agency in relation to such employment.

participated as state employees. “Representing” a business³ includes engaging “in direct communication on behalf of any person or business” with a state agency or its employees. Typically, employees who leave state service are not permitted to communicate with their former state agencies on behalf of their private employers.⁴ However, the Commission has not applied the Post-Employment law to prohibit communications from former state employees working at a non-profit corporation if the non-profit “was functioning in essence as an extension of the state agency the former state employee had left.” Advisory Opinion No. 88-6, at 3, available at <https://files.hawaii.gov/ethics/advice/AO1988-6.pdf>. In Advisory Opinion No. 88-6, the Commission determined that the Post-Employment law did not prohibit former state employees working at a non-profit corporation from communicating with their former state agency where the State had specifically hired those employees with the goal of eventually having them work at the non-profit corporation. In reaching this conclusion, the Commission stated that:

[W]hen a nonprofit organization is utilized by a state agency to assist it in fulfilling its mission, the state agency and the nonprofit organization often become indistinguishable. Likewise, there can be little difference between the state employees working for the state objective and the employees who work for the nonprofit organization also in furtherance of the state objective. In cases where the functions of a nonprofit organization are so closely entwined with a particular state agency that the two work hand-in-hand to further the state objective, the Commission has concluded

³ HRS § 84-3 defines a “business” as including “a corporation, a partnership, a sole proprietorship, a trust or foundation, or any other individual or organization carrying on a business, whether or not operated for profit.” (Emphasis added.)

⁴ The Post-Employment law has a limited exception which allows state employees to provide their personal services “to act on a matter on behalf of the state” even within the one-year “cooling off” period. See HRS § 84-18(d); see supra n.3.

that sections 84-18(b) and (c) should not apply, since the non-profit organization does not constitute a “business” as the Commission believes that term was meant to be interpreted by the Legislature.

Id. at 2 (emphasis added).

In this case, the Agency has specifically formed the Non-Profit to assist it in running state facilities. Although the Non-Profit is technically defined as a “business” under HRS § 84-3, it is essentially an extension of the Agency and is controlled by the Agency. Therefore, the Commission concludes that the Post-Employment law does not prohibit employees who leave the Agency to work for the Non-Profit from representing the Non-Profit before the Agency during the one-year post-employment period.

III. Conclusion

For the reasons discussed above, the Commission concludes that Agency employees who leave their employment to work for the Non-Profit are not prohibited from working in Agency facilities, or representing the Non-Profit before the Agency, during their one-year post-employment period under HRS § 84-18.

Dated: Honolulu, Hawai'i, October 15, 2021.

HAWAI'I STATE ETHICS COMMISSION

Melinda Wood, Chair
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