

**ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU**



ADVISORY OPINION NO. 170

A member of a City commission with licensing authority participated in proceedings where the defendant licensee sought to retain its license. The defendant licensee was represented by a law firm which had previously hired the commission member in his outside business to provide the firm with professional services unrelated to the defendant licensee.

The ethical question under the City's standards of conduct is whether a member of a City commission may properly participate in rendering a decision in a contested matter before that commission when the law firm representing one party also retained the commissioner in his outside profession in an unrelated matter.

The general rule is that a commissioner may not participate in a matter before the commission of which he is a member where a party to the matter has retained as legal counsel a law firm that also has hired the commissioner in a matter directly related to the matter before the commission.

This rule is derived from Section 6-1.2(1), Revised Ordinances of Honolulu 1978 (1983 Ed.), [ROH], which states:

No officer or employee of the City . . . shall . . . [p]articipate, as an agent or representative of a City agency, in any official action directly affecting a business or matter in which (A) he has a substantial financial interest; or (B) by or for which a firm of which he is a member, an associate, or an employee has been engaged as a legal counsel or advisor or consultant or representative in a matter directly related to such action

"Officer" includes members of City commissions. Section 13-101.4(b), Revised Charter of the City & County of Honolulu 1973 (1984 Ed.) [RCH].

"Agency" includes City commissions. Section 6-1.1(1), ROH; Section 13-101.1, RCH.

"Official act" or "official action" means a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority. Section 6-1.1(8), ROH, Am. Ord. 84-83.

"Financial interest" includes an employment, or prospective employment for which negotiations have begun. Section 6-1.1(6), ROH, Am Ord. 84-83.

"Employee" does not include an independent contractor. Section 13-101.3, RCH.

Under Section 6-1.2(1), cited above, the commission member is a City officer and therefore bound by the City's standards of conduct. However, under the relevant standard of conduct, the first alternative criterion of this section, part (A), does not apply to the commission member because he does not have a financial interest, substantial or otherwise, in the defendant licensee.¹ In addition, the second alternative criterion of this standard of conduct, part (B), does not apply to the commission member because although the defendant licensee has retained the law firm, the law firm has not retained the commission member as a "member," "associate," or "employee" in the matter relating to the defendant licensee. Therefore, the facts do not satisfy two elements of the second alternative criterion of the standard of conduct: 1) the commission member is not a "member," "associate," or "employee" of the law firm; and 2) the commission member performing professional services has no relationship, direct or indirect, with the defendant licensee.

The first distinction turns on the difference between an employee and an independent contractor. See, e.g., Taira v. Oahu Sugar Co., Ltd., 1 Haw. App. 208, 616 P.2d 1026 (1980). An employer has the right to supervise the manner in which an employee performs assigned work. Id. In contrast, an employer does not supervise the work of an independent contractor. Id. For example, as a consultant to the law firm, the commission member performed his professional services in a matter unrelated to the defendant licensee, but the attorneys affiliated with the law firm did not have the right to supervise the manner in which he performed them. In addition, "employee" does not include independent contractors under Section 13-101, RCH. Similarly, a reasonable person would not construe the commission member to be either a "member" or an "associate" of the law firm because he has no affiliation with that association of attorneys other than as an independent contractor hired to perform a service. If the commission member had been an expert witness, he would again have been an independent contractor, as discussed above, in a matter unrelated to the defendant licensee. Therefore, as either a consultant or an expert witness, the commission member was an independent contractor rather than an employee, member, or associate of the law firm.

The second distinction is that the commission member's rendering of professional services has no relation, direct or indirect, to the defendant licensee in the matter before the commission. Therefore, for two independent reasons, the standard of conduct in question does not apply to the facts at hand.

In conclusion, an attorney with the law firm represents a defendant licensee in a matter before a City commission with licensing authority. The attorney's defense includes the claim that a commission member who has been a consultant to the law firm in an unrelated matter may not

¹The Commission member's financial disclosure forms, which the Ethics Commission maintains in confidence pursuant to Section 6-1.4(e), ROH, disclose no interest in the defendant licensee.

properly participate in the commission's decision concerning the defendant licensee because the law firm paid him (\$ amount) to perform professional services unrelated to the defendant licensee. The Ethics Commission [Commission] believes this contention is without merit because the commission member has no financial interest in the defendant and is not an employee, associate, or member of the law firm representing the law firm. Therefore, the Commission believes the commission member properly participated in the commission's proceedings thus far and may properly vote in the final decision, which will be his official action as a commissioner.

Dated: April 23, 1987

JANE B. FELLMETH
Chair, Ethics Commission