

ADVISORY OPINION NO. 86-11

The Commission received a request for an advisory opinion from the administrator for the licensing division of a state department on the question of whether the current chairman of a state board within the division should be allowed to participate in board action affecting educational and training requirements for licensure. On November 26, 1986, the board chairman appeared before the Commission to further discuss the facts of this situation and to convey his opinion on this matter.

The board chairman had been a member of the board since July 12, 1983. He was appointed to the board because of his experience as a licensed therapist in the profession regulated by the board. In September of 1986, he was elected chairman of the board. The chairman also owned and operated his own professional school in this State, where he taught this profession to candidates for licensure. The chairman established his school in June of 1982, prior to his appointment to the board.

The chairman's board did not license professional schools or professional school instructors. However, the rules of the board prescribed certain educational requirements for apprentices in the profession and further provided that courses satisfying those requirements must be taught by a school that is licensed by the state Department of Education ("DOE"), the University of Hawaii, or other board-approved institutions. The board chairman's school had been licensed by the DOE. There were approximately eight (8) DOE-licensed schools in the State that taught the profession regulated by the board.

The applicable section of the ethics code was section 84-14(a), Hawaii Revised Statutes ("HRS"), which provides in pertinent part as follows:

§84-14 Conflict 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.

Section 84-14(a) requires state employees to disqualify themselves from taking official action directly affecting businesses in which they have substantial financial interests. State board and commission members are "employees" for purposes of the ethics code. There exists a limited exception to this general disqualification requirement for board and commission members who are mandated by statute, resolution, or executive order to possess particular qualifications. The Commission has referred to such board or commission members as "mandated" board or

commission members. Mandated board members are allowed to take official action affecting their industries or professions as a whole, and are only prohibited from taking official action that directly *and specifically* affects businesses in which they have substantial financial interests. The Commission has interpreted "specifically" to mean "individually" or "as opposed to another business." Section 84-14(a) further provides that these substantial financial interests must be related to the mandated board member's particular qualifications. If a board member's financial interests are *not* related to his or her particular qualifications, the general conflicts-of-interest requirement applies, and that member is prohibited from taking official action that directly affects those financial interests.

The Commission observed that the issue in this case was whether the board chairman's financial interests in his professional school were related to his particular qualifications as a mandated board member for purposes of section 84-14(a). If these financial interests *were* related to his mandated qualifications, the board chairman would be prohibited only from taking official action that would directly *and specifically* affect those interests. On the other hand, the Commission noted that if these financial interests were *not* related to his mandated qualifications, the general conflicts-of-interest requirement applied, and the chairman would be prohibited from taking official action that would directly affect his financial interests.

The Commission noted that the particular qualifications for mandated members of the chairman's board were prescribed by a state statute establishing that board and providing that three members of the board shall have at least three years of practical experience as licensed therapists in the profession regulated by the board. The Commission concluded that this statute established that the particular qualification for a mandated member of the board, such as the chairman, was three years of practical experience as a licensed therapist. For the reasons set forth below, the Commission determined that the chairman's financial interests in his professional school were not related to this particular qualification.

The Commission observed that neither the statute establishing the chairman's board, nor any other statute, resolution, or executive order expressly or impliedly provided that the particular qualifications for mandated board members included an affiliation with teaching or with a professional school. The only qualification specified was three years of practical experience as a licensed therapist. It appeared to the Commission, from the language of the statute establishing the board, that practical experience as a licensed therapist, as opposed to educational or academic experience, was the qualifying factor for mandated board members.

The Commission noted that the legislative history of that statute did not clearly indicate whether the Legislature intended mandated board members to be affiliated with, or representative of, professional education. The Commission found that the relevant legislative reports did not clearly express a specific intent to either exclude or include individuals with educational affiliations as mandated board members.

The Commission stated that it had also reviewed statutes prescribing the mandated memberships of other state boards and commissions. The Commission noted that the Legislature had specifically excluded affiliations with professional schools from the mandated qualifications for some boards. For example, the particular qualifications for mandated members of one professional board provided that no member of the board could be a stockholder, member of the faculty, or member of a board of trustees of any professional school. The Commission noted that in direct contrast, the Legislature had also specifically mandated that another state professional board be

composed of members who were representative of professional education. The Commission observed that unfortunately, the Legislature had neither expressly mandated nor prohibited members of the chairman's board who were affiliated with professional education. The Commission stated that it was simply unclear in this case whether or not the Legislature intended that the particular qualifications for mandated board members included an affiliation with teaching or with a professional school.

The Commission further believed that although one individual might teach the profession regulated by the board or operate a professional school *and* might also practice the profession for compensation, these were nevertheless distinct occupations. Because of this distinction, and because no statute, resolution, or executive order so provided, the Commission was unable to conclude that an affiliation with teaching or education fell within the particular qualifications for mandated board members.

Therefore, the Commission believed that the general conflicts-of-interest requirement applied to the board chairman's financial interests in his professional school: the chairman was prohibited from taking official action that directly affected those financial interests.

The Commission was aware that because of the chairman's involvement in professional education, as both teacher and school operator, he brought to the board an expertise and perspective that other members might not possess. And the Commission acknowledged that this expertise and perspective could be valuable to the board in formulating policies and guidelines on educational and training requirements for licensure. Nevertheless, the Commission pointed out that section 84-14(a) of the ethics code states that the limited exception to the general conflicts-of-interest requirement applies *provided* that a mandated member's financial interests are related to that member's particular qualifications.

The Commission believed that this exception should not be applied indiscriminately. Rather, the Commission held that the exception to the general conflicts-of-interest requirement should only be applied if it clearly appears that a mandated member's financial interests are in fact related to his or her mandated qualifications.

In this case, it was the Commission's understanding that professional schools were founded after establishment of this state board. The Commission had also learned that educational requirements were yet to be fully developed within this particular profession. It did not appear to the Commission that the Legislature had specifically considered whether or not individuals associated with professional schools or teaching should serve as mandated board members and should participate in board action affecting educational requirements for licensure. The Commission stated that unless and until some clarification was provided by way of statute, resolution, or executive order, the Commission simply could not conclude that the chairman's financial interests in his school were related to his particular qualifications as a licensed therapist with three years of practical experience.

The Commission held that the chairman, therefore, was prohibited by the ethics code from taking official action that would directly affect his financial interests as a teacher and school owner in the profession regulated by his board. The Commission noted that "official action" was defined in HRS §84-3(7) as a decision, recommendation, approval, disapproval, or other action, including inaction, that involves the use of discretionary authority.

The Commission explained that because it had in the past determined that official action that affects board members' competitors or their industries or professions also directly affects their own businesses in the industry or profession, board members may not usually take official action that directly affects their competitors or their particular industry or profession as a whole. Thus, the Commission held that the board chairman could not take official action that would directly affect his profession's teachers or schools in general.

The Commission was also asked to address the following questions relating to the chairman's "participation" in board action:

- (1) whether the chairman could initiate and facilitate board discussions on matters in which he should not take official action;
- (2) whether the chairman was prohibited from making motions or from seconding motions on matters relating to examinations, and educational and training requirements for licensure;
- (3) whether the chairman was prohibited from participating in the formulation or amendment of rules relating to examination, education and training requirements for licensure; and
- (4) whether the chairman could testify at legislative hearings on behalf of the board on bills relating to the examination, education or training requirements for licensure in the profession regulated by the board.

It appeared to the Commission that matters relating to examinations, educational and training requirements for licensure would directly affect the profession's teachers and schools. The Commission held that if this was indeed the case, the chairman was prohibited by section 84-14(a) from taking official action relating to such matters. The Commission further held that this prohibition would apply to initiating and facilitating board discussions or otherwise expressing opinions on such matters, initiating or seconding motions, and participating in the formulation or amendment of rules. The Commission held that this prohibition would also apply to testifying at legislative hearings if such testimony involved policy discussions or recommendations.

The Commission further noted that the request for an advisory opinion concerning this matter had referred to advice contained in Advisory Opinion No. 519. In that opinion, the Commission held in part that members of a board who were also instructors in the profession the board regulated were prohibited by sections 84-12 and 84-13 of the ethics code from (1) participating in the formulation of licensure examinations, (2) having access to examinations, and (3) administering the examinations if this would involve grading students or acquiring knowledge about the examination's contents. The Commission stated that it continued to adhere to this ruling and held, therefore, that the chairman was likewise prohibited from participating in the formulation and administration of licensure examinations and from having access to the examinations.

The Commission observed that Advisory Opinion No. 519 also held that section 84-14(a) prohibited board members who were instructors or who had their own schools from participating in policy decisions affecting the qualifications for instructors or schools. Advisory Opinion No. 519 held that section 84-14(a) prohibited board members from taking official action that would directly *and specifically* affect their own businesses, and concluded that because in that case the number

of instructors and schools was extremely small, any action taken by the concerned board members involving other instructors or schools would directly and specifically affect the board member's own financial interests as instructors or as owners of a school. The Commission stated that although it agreed with the end result of that advisory opinion, it believed that Advisory Opinion No. 519 applied to an exceptional case and should not be relied upon as precedent. The Commission held that even where the number of schools is small, board members with schools may be allowed to take action affecting schools in general so long as their particular qualifications for serving as a board member included educational affiliations.

The Commission stated that it was aware that as a result of its decision, the chairman's board would not be able to rely upon his expertise in education. However, the Commission believed that the board was not precluded from seeking information and assistance from other professionals with expertise in this area. The Commission noted that there existed statutory authority for the board to call to its aid any person of established reputation and professional ability to conduct examinations, inspections, and investigations. The Commission felt that this statute authorized the board to obtain assistance from other professionals when their expertise was required. Thus, the Commission observed that the board might be able to compensate for the loss of the chairman's expertise in certain areas by seeking assistance from other experts in the same field.

Finally, the Commission stated that in accordance with section 21-4-2(c) of the State Ethics Commission's rules, a copy of this advisory opinion would be sent to the board chairman as the state employee concerned in this matter.

The Commission thanked the state administrator for bringing this matter to its attention and further stated that it appreciated the administrator's cooperation with the Commission's staff. The Commission also commended the board chairman for his cooperation and assistance.

Dated: Honolulu, Hawaii, December 24, 1986.

STATE ETHICS COMMISSION
Tim S. Farr, Chairperson
Cynthia T. Alm, Commissioner
Rev. David K. Kaupu, Commissioner

Note: Commissioner Arnold J. Magid was excused from the meeting at which this opinion was considered.

DISSENT

I respectfully dissent.

I believe that the majority construes the statute establishing this state board too narrowly by concluding that the particular qualifications for mandated members of the board are not related to the chairman's affiliation with professional education. The statute establishing the board provides that mandated members of the board shall have three years of practical experience as licensed therapists. Another statute defines a professional therapist as any person who engages in the "occupation" or "practice" of this profession for compensation. It thus appears that a licensed therapist is an individual licensed to "practice" this profession *and* to engage in the "occupation" of

this profession for compensation. I believe that the Legislature intended mandated board members to represent not only practitioners, but licensees devoted to the general occupation as well--including licensees teaching this profession.

If the Legislature did not wish to have on this board licensees who were affiliated with schools teaching this profession, the Legislature could have excluded such individuals from the board. This, however, the Legislature did not do. I believe that the Legislature desired individuals with an expertise in this profession to serve on the board and that the chairman's association with education relates to his expertise in this area.

I would hold that the chairman's financial interests in his professional school are related to his particular qualifications as a mandated board member and that he should only be prohibited from taking official action that directly and specifically affects his own financial interests.

Laurie A. Loomis, Vice Chairperson