

ADVISORY OPINION NO. 86-4

The Commission received a request for an advisory opinion from the director of a state board on the question of whether a member of the board had violated the conflicts-of-interests section of the ethics code by participating in his private capacity as a licensed professional in sale negotiations between a private corporation and clients he represented.

The facts relating to a possible conflict of interest on the part of the board member were as follows. A private organization filed a lawsuit against the corporation to prevent it from taking certain action. To help fund its lawsuit, the private organization asked the board for financial assistance. The organization also requested that the board members support its position. After reviewing the private organization's application, the board approved funds for the organization's use for the lawsuit.

A short time later, the private corporation approached the board member in his private capacity as a licensed professional and asked him to contact the sellers of items it wished to purchase.

According to the board member, he asked the corporation employees who approached him to obtain an "authorization" letter from the corporation to assure himself that the corporation had in fact authorized its employees to enter into sale negotiations. At the board member's request, the corporation drafted the letter, which clearly indicated that the board member would be functioning as the corporation's agent in the sales transaction.

Plaintiff members of the private organization who also saw this letter complained to the board that the board member was representing the corporation and that this relationship with the company conflicted with his duties as a board member. In response to this charge, the board member stated to the Commission's staff that the letter was incorrectly drafted, as its purpose was only to indicate the corporation's interest as a purchaser. The board member went on to state to the Commission's staff that he had never represented the corporation's interests nor served as its agent. The board member pointed out that he was representing the sellers in his professional capacity. The board member also pointed out that any commission he might receive would come from the sellers, not the corporation.

The board member also stated that one of the sellers he represented was a member of the private organization and a plaintiff in the lawsuit against the corporation.

The sections of the ethics code relevant to the question of a possible conflict of interest on the board member's part were HRS §§84-14(a) and (b), which in pertinent part state 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.

(b) No employee shall acquire financial interests in any business or other undertaking which he has reason to believe may be directly involved in official action to be taken by him.

HRS §84-14(a) prohibits state employees from taking any official action that would directly affect businesses or undertakings in which they have substantial financial interests. State employees are required to disqualify themselves or abstain from taking action in such cases. HRS §84-14(a) pertains to those businesses or undertakings in which state employees have substantial financial interests (1) at the time they accept state employment or (2) acquired after accepting state employment, so long as at the time of the acquisition of the financial interest the possibility of having to take official action directly affecting the new businesses or undertakings was unlikely.

HRS §84-14(b), on the other hand, prohibits state employees from acquiring financial interests in businesses or undertakings if there is reason to believe that they would be taking official action that would directly involve the businesses or undertakings. The intent of HRS §84-14(b) is to prohibit state employees from acquiring financial interests that are likely to create conflicts with their state positions. Thus, since state employees are prohibited from acquiring financial interests that conflict with their state duties, the need for them to abstain or disqualify themselves is kept at a minimum, allowing them to carry out the responsibilities for which they were elected, appointed, or hired.

The first question the Commission considered was whether, in accordance with section 84-14(b), the board member could represent clients who were likely to be subject to action taken by his board. The Commission concluded that the ethics code would not prohibit the board member from acquiring such clients. The Commission noted that the board member's financial interest in his business as a licensed professional predated his acceptance of a position on the board. Thus, the Commission believed that section 84-14(b) was inapplicable, since it pertains only to financial interests acquired after beginning state employment. The Commission noted, however, that where possible it would be in keeping with the philosophy of the ethics code to avoid acquiring clients who were likely to be directly affected by official action a state employee takes, thus requiring the employee's disqualification or abstention. The Commission believed, however, that because the action the board takes could possibly affect anyone in the State, it was not reasonable to require the board member to reject clients possibly subject to the board's action. Doing so might, in effect, preclude the board member from pursuing his profession.

With respect to section 84-14(a), the Commission concluded that the board member, like all state employees, would have to disqualify himself or abstain from taking official action if that action would "directly affect" businesses or undertakings in which he had a substantial financial interest. Because an employment interest is considered a financial interest for purposes of the ethics code under section 84-3(6)(c), HRS, the Commission concluded that the board member would have to abstain from taking official action if such action would directly affect his clients. Because the board member in his private professional capacity had accepted a member of the private organization who was also a plaintiff in the lawsuit against the corporation as a client, the Commission concluded that the board member would be required to disqualify himself as a board member on all matters that directly affected the private organization. The Commission also concluded that this same restriction would prohibit the board member from taking official action that would directly affect the corporation if it were one of his clients. The Commission accepted, however, the board member's contention that he neither represented the corporation nor served as its agent. The Commission found, therefore, that the board member would not be prohibited

from taking official action that might directly affect the corporation unless such action also directly affected the private organization.

Aside from the conflicts-of-interests section of the ethics code, the Commission also discussed the requirements of the "fair treatment" section of the ethics code with respect to the board member's role as a licensed professional negotiating a sales transaction between a plaintiff member of the private organization and the corporation. The fair treatment section of the ethics code, section 84-13, reads in pertinent part as follows:

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

This section of the ethics code prohibits state employees from using their state positions to grant themselves or others unwarranted advantages. Because of the board member's prominence by virtue of his position as a board member, the Commission expressed concern over the possibility of a strong appearance of impropriety arising when he dealt with a member of the private organization and the corporation in sale negotiations while the board might be determining whether to provide additional monetary aid or other support to the private organization for its lawsuit against the corporation. As the Commission has frequently stated in the past, state employees in such situations must make every attempt to keep their state positions as separate as possible from their private business activities. Thus, the Commission concluded that the board member had to make it clear when dealing with sellers and the corporation that he was functioning in his private professional capacity, not as a representative of the board. The Commission advised that at such times the board member neither refer to his board nor discuss his board's position with respect to the private organization or the corporation.

Finally, when disqualifying himself at board meetings with respect to the private organization's requests for support or other official action, the Commission recommended that the board member leave the meeting room so that the fact that he did not participate in the matter was clear and thus could not be challenged. Furthermore, the Commission advised that the board member refrain from informally expressing his views to other board members on the private organization's requests for support so that it was clear that he had not been involved in any official action the board took with respect to the private organization.

The Commission commended the director of the state board for requesting an advisory opinion on this matter and for his staff's prompt assistance in providing the Commission with information relevant to the case.

Dated: Honolulu, Hawaii, February 14, 1986.

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