

ADVISORY OPINION NO. 86-7

The State Ethics Commission ("Commission") received a request for an advisory opinion from the executive director of a state board who wished to know the application of the State Ethics Code to individuals who serve as panelists on panels created by the board to review proposals for services by organizations and to make funding recommendations to the board regarding the proposals.

One of the duties of the board was to promote a certain subject matter throughout the State. To this end, the board received money to provide funding to private organizations involved with the subject matter. The board had broken down the subject matter of its concern into several subject areas for the purpose of dividing up the money it was given.

In the period in which the money was to be awarded, the board prepared a brochure entitled "Requests for Proposals" and circulated this brochure throughout the community. The brochure invited private organizations to apply for funds in the various subject areas and explained the eligibility requirements and the procedures for applying for the funds. After the board received all the proposals from the private organizations that were requesting funds, the procedure of the board was to create panels in each subject area to review the proposals. The administrative rules of the board provided that panel members had to be knowledgeable and experienced in the subject matter of the panel on which they served. The panels consisted of two board members and five to seven members of the community at large. In accordance with the board's administrative rules, the panel members were appointed by the board based upon the recommendation of the executive director and the two board members who served in that panel area. The panel members were chosen from the individuals who applied following an advertisement for volunteers to serve on the panels. The responsibility of the panel members was to review all of the proposals in their subject area and to make funding recommendations to the board regarding the proposals. In accordance with the board's administrative rules, the board accepted, rejected, or modified panel recommendations. The board then made its recommendations to the Legislature, which was the final decision maker regarding the grants.

The Commission noted that if panel members were "employees" as defined in chapter 84, Hawaii Revised Statutes (hereafter "HRS"), governing standards of conduct, then they were subject to the provisions of the code of ethics, including the provision regarding conflicts of interests. Section 84-3(4), HRS, defines "employee" for purposes of the ethics code to mean "any nominated, appointed, or elected officer or employee of the state, including members of boards, commissions, and committees, and employees under contract to the state" Section 84-1, HRS, states that "this chapter shall be liberally construed to promote high standards of ethical conduct in state government." Even though the panel members served for only one or two days, the Commission noted that they carried out duties that the Legislature assigned to the members of the board. The delegation of those duties to the panel members in no way diminished their importance. The panel members were asked to make funding recommendations regarding the disposition of large sums of money. The Commission noted that it was precisely this type of activity that should be closely scrutinized by the Commission in order to preserve the confidence of the public in state government. Thus, the Commission concluded that the panel members were employees subject to chapter 84, HRS, governing standards of conduct.

Since the Commission determined that panel members were state employees for purposes of the ethics code, section 84-14(a), regarding conflicts of interests, applied to the panel members. That section provides, 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; or
- (2) A private undertaking in which he is engaged as legal counsel, advisor, consultant, representative, or other agency capacity.

Pursuant to section 84-14(a), panelists could not take official action directly affecting a business in which they had a substantial financial interest. Thus, if a panel member was a director, officer, employee, owner, or part owner of an organization that had made a request for funding in the panel member's subject area, it would be a conflict for that panel member to take any action directly affecting that organization.

The board informed the Commission that it broke the panel meetings down into three rounds. During the first round, the panels analyzed the organization's request by examining the viability of the organization and the proposed project. In the second round, the panels determined the amount of money that should be awarded to that organization and focused only on whether the amount requested was appropriate for the stated project. Certain rules were applied (e.g., the board would only fund a certain portion of any given project, etc.), but no comparison was made to other projects at this point.

The board stated that if the panel had enough money to give each organization the amount determined in the second round, then no third round was necessary. If there was not enough money, a third round took place in which the panel decided which projects to cut back. During the third round, the panelists inevitably had to compare the various projects.

The Commission found that a panel member with a conflict as to one grant applicant could participate in the first two rounds but not in the third round. The Commission determined that during the first two rounds, a panel member with a conflict had to disqualify himself or herself from taking any action and had to withdraw from any discussion regarding any organization with which the panel member was affiliated as an officer, director, employee, or owner. The panel member could, however, take action regarding the other applicants in rounds one and two because such action would not be action directly affecting his or her own organization. The Commission concluded that during the third round, however, when discussions were held comparing the various projects to divide up the limited money available, the panel member with a conflict could not participate at all because at that time any action affecting any applicant would constitute taking action directly affecting the panel member's organization, since the pool of money was being divided among all applicants. Prior to the third round, this competitive aspect was avoided because each applicant was evaluated on its own merit. The Commission believed that its opinion in this case allowed competent persons to serve as panel members to the full extent possible in accord with the conflicts-of-interests law.

The Commission also brought to the attention of the board two other sections of the code of ethics, section 84-13, regarding fair treatment, and section 84-12, regarding confidential information. The Commission stated that the fair treatment section provided that a panel member could not use his or her position to grant any unwarranted or unfair advantages to anyone, including of course an organization with which that member was affiliated. The Commission stated that this section also prohibited the use of state time, equipment, or facilities for private business purposes. The Commission informed the board that the confidential information section of the ethics code prohibited state employees--and thus panel members--from using confidential information for their own personal gain or for the benefit of others. The Commission stated that the law also prohibited the disclosure of confidential information, which is defined as any information not generally available to the public.

The Commission told the director of the state board that it appreciated his seeking the Commission's advice and commended him for his desire to exercise his administrative responsibilities in a manner consistent with the ethical standards of the State Ethics Code.

Dated: Honolulu, Hawaii, September 22, 1986.

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