

## **ADVISORY OPINION NO. 87-1**

The Commission received a request for an advisory opinion from the chairman of a state board on the question of whether a board member could take action as a board member on certain reports if previously the board member had worked on the preparation of the reports for a private company in a private capacity for compensation. The reports consisted of an "initial appraisal" and a later "full appraisal," which were required by law under certain circumstances. The appraisals were prepared to disclose certain negative impacts. On December 17, 1986, the board member, the board's deputy attorney general, and a fellow board member appeared before the Commission at its meeting of that date and provided further information relevant to the advisory opinion request. In discussing the request for an advisory opinion, the Commission also considered the broader question of whether members of the board would be in violation of the State Ethics Code if in a private capacity they worked as consultants for compensation on the appraisals while serving as board members. The Commission addressed both of these questions in its advisory opinion.

### **1. Application of Section 84-14(d).**

The first issue the Commission addressed in its advisory opinion was the question of whether board members might in a private capacity work as consultants on the appraisals for compensation. The section of the State Ethics Code relevant to this question was section 84-14(d), which reads as follows:

No legislator or employee shall assist any person or business or act in a representative capacity for a fee or other compensation to secure passage of a bill or to obtain a contract, claim, or other transaction or proposal in which he has participated or will participate as a legislator or employee, nor shall he assist any person or business or act in a representative capacity for a fee or other compensation on such bill, contract, claim, or other transaction or proposal before the legislature or agency of which he is an employee or legislator.

The term "employee" in this section of the ethics code included the board members, since "employee" is defined in section 84-3(4) of the ethics code to include members of boards, commissions, and committees:

"Employee" means 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 or of the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices and judges.

The Commission then discussed the two restrictions found in section 84-14(d). The first restriction prohibits board members from assisting or representing anyone in a private capacity for compensation on a matter that the board member participated in or would participate in as a board member. The second restriction prohibits board members from assisting or representing others in a private capacity for compensation on matters before their board. The Commission concluded that both of these restrictions would prohibit the board members from working on the appraisals for compensation as private consultants. The Commission first discussed the application of the second restriction found in section 84-14(d).

a. **Application of Second Restriction in Section 84-14(d).**

The Commission in its advisory opinion first discussed the application of the second restriction in section 84-14(d). The second part of section 84-14(d), as stated above, prohibits board members from assisting or representing in a private capacity for compensation others on matters "before" their board. In applying this restriction in the ethics code, the Commission had to determine whether the appraisals were matters "before" the board members' board. The Commission thus reviewed the law creating the board; the law that required the appraisals in certain circumstances; the board's rules of practice and procedure; and comments made by the board members and their deputy attorney general.

Part of the law that specified the functions of the board explicitly stated that one of the functions of the board was to administer the law that required appraisals. The law requiring appraisals called for the appraisals in certain circumstances to disclose certain negative impacts. The appraisal law stated that the board shall "make, amend, and repeal rules to implement" that law. In implementing the law, the board was given the responsibility of formulating rules that would (a) specify the contents of a full appraisal; (b) specify procedures so that a group of proposed actions could be treated by a single full appraisal; (c) specify procedures for the submission, distribution, review, and acceptance or nonacceptance of a full appraisal; (d) specify procedures for the applicant to appeal the non-acceptance of a full appraisal to the board; (e) specify criteria to determine whether a full appraisal was acceptable or not; (f) specify procedures whereby specific types of actions, because they would probably have minimal or no significant effect would be declared exempt from the preparation of an initial appraisal; and (g) specify procedures for informing the public of determinations that a full appraisal was either required or not required, for informing the public of the availability of full appraisals for review and comments, and for informing the public of the acceptance or nonacceptance of a full appraisal.

Besides giving the board the responsibility for formulating rules for the implementation and administration of the appraisal law, that law also specified that the board had the authority to make recommendations regarding the acceptability of a full appraisal. Furthermore, the appraisal law provided that an applicant could appeal the nonacceptance of an appraisal directly to the board.

Finally, another section of the appraisal law provided that the board would have the right to institute judicial proceedings to enforce the appraisal law. The subject of such judicial proceedings included (a) the lack of preparation of an initial appraisal required by law; (b) the determination that a full appraisal was or was not required; and (c) the acceptance of a full appraisal required by law.

The rules of the board, with respect to both the appraisal law and the board's practice and procedure, further implemented the board's duties as set out in the appraisal law and the law establishing the board. The board's rules of practice and procedure provided that the board could issue declaratory orders regarding the appraisal law when so petitioned. Another section of those rules provided that the board "on its own motion" could issue declaratory orders respecting the appraisal law.

The board member requesting the advisory opinion also provided further clarification of the board's role with respect to the appraisal law. The board member stated that the board would accept, review, and act on complaints filed with the board from members of the public regarding whether appraisals complied with the law. The board member also stated that the board would issue declaratory rulings regarding compliance with the appraisal law when asked or on its own motion. The board member also stated that the board generally reviewed a state or city agency's

determination that a full appraisal was deemed unnecessary. The board member also stated that only a small percentage, approximately ten percent, of appraisals actually became the subject of specific board action.

As stated above, the question for the Commission to determine was whether the appraisals were matters "before" the board in its administration of the appraisal law. The board member stated that it was his belief that the appraisals were not "before" the board while they were being prepared or while they were being reviewed by the public or other state or county agencies, but were "before" the board only when the board chose to act on an appraisal or was specifically asked to do so by someone.

After a review of the pertinent law, rules, and comments made by the board members and their deputy attorney general, the Commission disagreed with the contention that the appraisals were matters not "before" or pending before the board. The Commission made this determination for the reasons set forth in the following paragraphs.

First of all, it was the specific and one of the major duties of the board to administer, interpret, and enforce the appraisal law. At any time, anyone preparing an appraisal had the right under the appraisal law to ask the board to review the matter to assure compliance with the law. At any time, a state or city agency that would review an appraisal also had the right under the appraisal law to ask the board to review an appraisal for compliance with the law. At any time, any member of the public also had the right under the law to file a complaint with or to ask the board to review, for compliance with the law, an appraisal or determination that a full appraisal was not needed. Furthermore, under the appraisal law, the board itself on its own motion had the authority and right to review for compliance with the law any appraisal or determination that a full appraisal was not needed. The board could also institute judicial proceedings to enforce the requirements of the appraisal law. That law also provided that one who prepared a full appraisal could appeal its nonacceptance to the board. Under these circumstances, the Commission concluded that the appraisals were matters "before" the board because they were the subject of, and were subject to, board action until the requirements of the appraisal law were satisfied.

The board member argued that because only ten percent or so of all appraisals became the specific subject of board action, the appraisals were not generally matters pending before the board. The Commission believed, however, that the actual percentage of appraisals subject to specific action by the board was irrelevant to the question of whether these matters were "before" or were pending before the board while compliance with the appraisal law was in question. The Commission noted that tomorrow public scrutiny might increase or new problems might be discovered, causing more people to go to the board or causing the board itself to specifically address more appraisals or determinations that full appraisals were not necessary. Furthermore, the Commission noted that how the board chose to enforce the appraisal law was discretionary with the board. It could, for example, audit on a random basis or other basis all appraisals to foster compliance with the appraisal law, much the same way the tax department fosters compliance with the tax laws. The Commission noted that just because the board, in its discretion, chose at the moment not to be involved directly on its own motion with every appraisal did not remove these matters from its enforcement jurisdiction. Finally, the board had no control over which appraisals would be brought to it for specific action whether or not it decided on its own motion to randomly or otherwise audit these matters. In short, the Commission concluded that because the appraisals were specific matters explicitly and specifically subject to action by the board, they were matters "before" the board for purposes of the second restriction found in section 84-14(d).

In construing the second restriction found in section 84-14(d), the Commission believed that although it was not necessary to rely on a liberal construction of section 84-14(d), the Commission noted that section 84-1 of the State Ethics Code requires that chapter 84 be construed liberally:

**§84-1 Construction.** This chapter shall be liberally construed to promote high standards of ethical conduct in state government.

The Commission believed that high standards of ethical conduct in state government would not be fostered if board members were paid in a private capacity to prepare parts of appraisals when these matters were specifically subject to the board's own enforcement jurisdiction. As a worst-case scenario, the Commission saw a board member put in the awkward situation of having to defend, in a private capacity, before the board work he or she had done on an appraisal. Similarly, the board might sue in court and find its own members called as witnesses to defend an appraisal on behalf of a company.

The board member accompanying the chairman stated that the kind of assistance that a consultant provided when preparing part of an appraisal was so scientifically mechanical that it should not be construed as "assistance" for purposes of section 84-14(d). The chairman of the board, however, had almost the opposite view, stating that consultants were often hired to present facts in a particular way. The Commission agreed with the chairman's view of the situation, noting that these matters were not so cut-and-dried as to preclude different interpretations or analyses.

The Commission has previously upheld the underlying rationale for the second restriction imposed by section 84-14(d). In Advisory Opinion No. 369, the Commission stated the following:

We think the rationale for this restriction is clear and reasonable. Your representation and assistance of persons before the department that employs you would create an appearance of impropriety and an advantage to the persons you assist or represent. Such an advantage would be unwarranted and would accrue irrespective of any efforts you took to prevent it. The public would not be persuaded that favorable results in cases in which you were involved did not result from your employment in the department. For this reason, among others, the legislature determined that employees should not be privately involved in matters that come before the agencies that employ them.

The Commission continues to support this rationale and believed that it was applicable in this particular situation.

**b. Application of the First Restriction in Section 84-14(d).**

The Commission believed that the first restriction in section 84-14(d) also prohibited board members from working in a private capacity for compensation on appraisals. The first restriction in section 84-14(d) prohibits board members from assisting or representing anyone for compensation on a matter the board member had acted on or would act on as a board member.

Since the board members in this case had a duty to enforce the appraisal law, the Commission believed that at any time they were made aware of the preparation of a particular appraisal, they had an affirmative duty as a board member to consider whether the matter complied with the appraisal law. Thus, each board member had a duty as a board member to scrutinize

every appraisal he or she became aware of. The Commission believed that it was therefore not possible for a board member to work on an appraisal in a private capacity and *not* participate on the matter in an official capacity, since the board member would have notice of the matter and had an official duty to determine one way or the other whether the appraisal law was being complied with.

Besides having the affirmative duty as a board member to assess for compliance with the appraisal law any appraisal the board member became aware of by virtue of working on the matter in a private capacity, the Commission noted that the board member never knew whether in fact that particular appraisal would eventually be the subject of more specific action by the full board, either on its own motion or when solicited by the public, a city or state agency, or by the company required to submit an appraisal. The Commission believed, therefore, that both restrictions in section 84-14(d) prohibited board members from working in a private capacity for compensation on appraisals. The Commission believed that the terms "transaction" and "proposal" used in section 84-14(d) were broad, general terms and would thus include appraisals.

## **2. Application of Section 84-13(2).**

In addition to section 84-14(d), the Commission determined that section 84-13(2), part of the fair treatment section of the ethics code, also had application. Section 84-13(2) provides 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; including but not limited to the following:

....

- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of his official duties or responsibilities except as provided by law.

This section of the ethics code prohibits board members from being compensated in any manner not provided for by law when performing their official duties. Thus, under this provision of the law, the Commission noted that board members could not accept compensation for advising anyone about the requirements of the appraisal law.

The board member stated that when he worked in a private capacity on appraisals, he might feel the need to advise his employer as to the advisability under the appraisal law of preparing a "full appraisal" rather than initially seeking a determination that one was not warranted. The Commission believed that as a private consultant the board member could not be compensated for advice to anyone as to how to comply with the appraisal law, since rendering such advice was part of his official duties as a board member.

### 3. Interpreting the State Ethics Code.

At the Commission's meeting held on December 17, 1986, the board member accompanying the chairman referred to part of a 1972 standing committee report that accompanied amendments to the ethics code in 1972 to support her view that section 84-14(d) was too far-reaching or that the Commission's interpretation of it in this case was overzealous. The part of the standing committee report referred to reads as follows:

At the outset, certain observations, which your Committee considered, should be noted for an understanding of the spirit and intent which underlie the amendments. In drafting a conflict-of-interest statute it is easy to become overzealous and to forget the impact which a broad restriction may have. *A statute clearly should prohibit conflicts of interests which are most damaging to the standards of good government* and yet not prohibit so much that competent people will be discouraged from serving or that legislators and employees are deterred or restricted from freely carrying out their intended functions and duties. For example, the state would be hurt more than helped by a statute which barred experts from serving on regulatory boards and commissions. Similarly, a statute which barred (or is construed to bar) a union member-legislator from serving on the labor committee or a lawyer-legislator from being a member of the judiciary committee would be a disservice. Notwithstanding the apparent conflict in such instances, it would be foolish for the legislature to place all union members on the judiciary committee and all attorneys on the labor committee simply to avoid the possibility that an unethical conflict of interest might arise. Thus, it would be unwise to proscribe all instances in which a conflict of interest might arise. It is not necessarily the conflict of competing interests which should be prohibited, but any unethical actions arising out of them. [Emphasis added.]

Standing Committee Report No. 670-72, Senate Committee on Public Employment, 1972 Senate Journal, Regular Session, 1034 at 1035.

This section of the committee report stands for the proposition that not each and every conceivable conflict of interest is to be prohibited by a law in the ethics code--only those conflicts of interest that "*are most damaging to the standards of good government*" [emphasis added]. Thus, the Commission noted that it was obvious that the Legislature construed the activities barred by section 84-14(d) to be of the "most damaging to the standards of good government" by specifically prohibiting those activities in the ethics code, while lesser problems were omitted from ethics code coverage.

In construing the ethics code, the Commission stated that it had no desire to be overzealous; the Commission only seeks to interpret and apply the ethics law within the bounds of legislative intent, keeping in mind that the Legislature intended that the ethics code be *liberally construed*. The Commission stated that it too believes that an overzealous ethics code or the overzealous application of ethics code provisions would have the undesirable effect of discouraging competent people from state service. The Commission also stated that it should be noted that sections 84-14(a) and (b) cover conflicts of interest in the standard and narrow use of the term, while sections 84-14(c), (d), and (e) involve problems relating to assisting and representing clients before state and city agencies. The Commission stated that these are fairly distinct matters.

The board member accompanying the chairman also made particular reference to the last two sentences of the quoted committee report, which read as follows:

Thus, it would be unwise to proscribe all instances in which a conflict of interest might arise. It is not necessarily the conflict of competing interests which should be prohibited, but any unethical actions arising out of them.

The board member appeared to argue that, in accordance with these sentences, "assisting" or "representing" paying clients on matters before the board or on matters board members would be acting on as board members should not be prohibited *per se*, just any unethical action arising in conjunction with such assistance or representation. The Commission believed that this was a misapplication of these two sentences, since the last sentence simply stated that *all* conflicts need not be prohibited by law. In this case, the Legislature had deemed that the activities proscribed by section 84-14(d) were serious enough to be prohibited by law. These prohibitions applied in an across-the-board or *per se* manner, thus eliminating the necessity of considering whether unethical activity had taken place or not. The Commission noted that state employees or board members could theoretically, of course, act in situations of conflict with full integrity; however, with respect to the conflicts law, the Legislature had seen fit to prohibit certain situations in general rather than leaving the matter up to individual integrity. In this way, the public's confidence in its state officials is more easily maintained. The purpose of the State Ethics Code, as stated in its Preamble, is to preserve the public's confidence in its state employees and officials:

The purpose of this chapter is to (1) prescribe standards of conduct for elected officers and public employees of the State as mandated by the people of the State of Hawaii in the Hawaii Constitution, Article XIV; (2) educate the citizenry with respect to ethics in government; and (3) establish an ethics commission which will administer the codes of ethics adopted by the constitutional convention and by the legislature and render advisory opinions and enforce the provisions of this law so *that public confidence in public servants will be preserved*. [Emphasis added].

#### **4. Disqualification Under Section 84-14(d).**

In his request for an advisory opinion, the board member wished to know whether a board member would be disqualified from taking action as a board member if an appraisal the board member worked on for compensation in a private capacity was specifically before the board. The Commission believed that in such cases disqualification was required since section 84-14(d) prohibited the private assistance or representation in the first place. Disqualification was required since state action obtained in violation of the ethics code is voidable under section 84-19, which reads in pertinent part as follows:

**§84-19 Violation.** (a) Any favorable state action obtained in violation of the code of ethics for legislators or employees and former employees is voidable in the same manner as voidable contracts as provided for under section 84-16; and the State by the attorney general may pursue all legal and equitable remedies available to it.

(b) The State by the attorney general may recover any fee, compensation, gift, or profit received by any person as a result of a violation of the code of ethics by the legislator or employee or former legislator or employee. Action to recover under this subsection shall be brought within two years of such violation.

The Commission has for a long time required disqualification when a state legislator, employee, or board member would be required to take official action on a matter he or she worked on for compensation in a private capacity. See Advisory Opinion Nos. 194, 174, and 170.

#### **5. Effect of the State Ethics Code on the Composition of the Board.**

The board member stated that five or six members of board worked on appraisals and that it would be difficult to have a competent board without individuals who work on such matters. The Commission found it difficult to believe, however, that this was so. Furthermore, the Commission noted that the section of the law establishing the board did not specify that members of the board had to be simultaneously involved in the preparation of appraisals.

The Commission stated that it did not see how it would be possible for board members to be paid for working on matters in a private capacity and then turn around and determine, in an official capacity, whether such matters pass muster under the law. The Commission noted that such a situation would seem to constitute one of the most blatant conflicts of interest, generating public complaints. Indeed, within the year two such complaints involving the board member had been brought to the attention of the Commission.

#### **6. Board's Need to Amend Its Ethics Rules.**

Finally, the Commission noted that the board had itself been concerned with similar ethical improprieties and had thus set out prohibitions on particular ethical abuses in its rules of practice and procedure.

The Commission stated that it was certainly praiseworthy for the board to recognize and provide explicit rules for certain ethical improprieties. The rules, however, were in some instances more lenient than the prohibitions in the State Ethics Code. Thus, the Commission stated that the rules had to be revised to comport with chapter 84. While the board's rules could be more stringent than the sections of chapter 84, the rules, of course, could not be more lenient than state law.

The Commission told the board member that it appreciated his seeking an advisory opinion from the Commission on this matter and appreciated the information he provided to the Commission and his candor in discussing the facts of this case.

Dated: Honolulu, Hawaii, January 14, 1987.

STATE ETHICS COMMISSION  
Cynthia T. Alm, Chairperson  
Laurie A. Loomis, Vice Chairperson  
Rev. David K. Kaupu, Commissioner

Note: Commissioner Arnold J. Magid was not present during the discussion and consideration of this opinion. There was also a vacancy on the Commission when this opinion was signed.