

## ADVISORY OPINION NO. 88-2

The State Ethics Commission ("Commission") received a request for an advisory opinion from a newly appointed deputy director of a state agency ("agency A") who wished to know whether he had violated any of the provisions of the State Ethics Code, chapter 84, Hawaii Revised Statutes ("HRS"), when applying for and being appointed to the position of deputy director of agency A. At the time of his application for and appointment to the position of deputy director, the deputy director had been a member of a state board ("board") that oversaw the operations of agency A. The board also oversaw the operations of another related state agency ("agency B").

In order to establish the relevant facts of the case, the deputy director appeared before the State Ethics Commission on two occasions to provide information and to respond to questions. The deputy director also had extensive discussions about the case with the Commission's executive director, and the Commission's executive and associate directors had also met with the deputy director and the director of agency A to discuss the facts of the deputy director's case. Further, the chairperson of the deputy director's former state board and the director of agency A had attended a Commission meeting to provide the Commission with information pertinent to the deputy director's request for an advisory opinion. The deputy director had also been assisted in this matter by an attorney, who accompanied the deputy director when he initially appeared before the Commission. The deputy director's attorney had also discussed this case on a number of occasions with the Commission's executive director.

### 1. Facts

In 1987, bills were introduced in the Legislature seeking an appropriation for the position of deputy director of agency A. According to the deputy director and the director of agency A, neither the deputy director's former board nor the director had a role in introducing these bills; rather, the impetus for the bills originated elsewhere. The director and the board, however, did testify in support of the bills. It did not appear that the full board was apprised of these bills while they were before the Legislature. Instead, a board member designated as the legislative liaison person testified on behalf of the board in support of the appropriation for the position of deputy director of agency A. In due course, the appropriation was granted and provided a salary range for the position of deputy director of agency A.

Because the position of deputy director was the second highest position in agency A, the Commission initially thought it unusual that board members did not know that an appropriation for the position was being sought. However, this in fact appeared to be the case. The deputy director indicated that to the best of his recollection he had no knowledge while he was a board member of the bills providing for an appropriation for the position of deputy director; therefore, although his former board testified on these bills, he apparently had no direct involvement himself in securing the appropriation.

During a meeting held a number of months after the end of the legislative session, the board was informed, apparently for the first time, that funds for the position of deputy director had been appropriated by the Legislature. At that meeting, the director of agency A asked the board to set the salary of the deputy director position at the maximum level available in the appropriation. The deputy director, as a board member, attended this board meeting and voted in the affirmative on the salary recommendation made by the director. The salary set by the board was comparable to that of a deputy department head.

The deputy director indicated to the Commission that it had been a board policy to set the salaries of the top positions in the two state agencies the board oversaw at maximum levels. The deputy director pointed out, therefore, that setting the salary of the position of deputy director at the maximum level was not a debated matter, but more of a *pro forma* one. Thus, although the deputy director as a board member had participated in setting the salary of the deputy director position at a high level, the deputy director's involvement appeared to have been more ministerial in nature, since prior policy was followed.

At the board meeting referred to above, the director of agency A also indicated that the deputy director position would be advertised at the maximum salary level if the board approved. The matter was voted on and the motion carried.

Because the deputy director voted as a board member at this meeting on the salary of the deputy director position and to advertise the deputy director position, the Commission believed that the deputy director had thus authorized the expenditure of funds for the deputy director position and had authorized the initiation of a search process for filling the position.

At a board meeting held about a week later, board members and the director of agency A discussed how the deputy director slot was to be filled. The deputy director attended this meeting as a board member and participated in the discussions. At this meeting, it was determined that the director would select someone for the position of deputy director and present his recommendation to the board for final approval.

At a later board meeting, the director of agency A informed the board that he would advertise the position of deputy director both locally and nationally. The chairperson of the board at the time noted that the board had given the director "total discretion" in terms of how he would select his deputy, and also noted that this discretion included where the director chose to advertise.

Because the deputy director participated at these board meetings as a board member, he had been involved as a board member in determining to what extent the board would be involved in selecting a deputy director and to what extent the director of agency A would be involved in selecting the deputy director. The board voted to delegate to the director the nature of the process he would use in selecting a person to recommend to the board. Because as a board member the deputy director was involved in determining the roles the board and the director would play in selecting a deputy director, the Commission believed that the deputy director had played a part in determining the nature of the selection process that he would ultimately subject himself to. The deputy director informed the Commission, however, that the wide discretion given to the director was consonant with board policy established for the head of agency B when the head of that agency selected members of his management team. Thus, although the deputy director participated in establishing the role of the board and the director in the selection process to be used for selecting a deputy director, the Commission believed that the deputy director's involvement again appeared to have been ministerial in nature, because again prior established policy had been followed.

A number of weeks later, the first advertisement for the position of deputy director appeared in The Honolulu Advertiser and the Honolulu Star-Bulletin. The minimum qualifications set forth in the advertisement for the position of deputy director called for a graduate degree in a certain area and a number of years of a particular kind of work experience. No other qualifications were mentioned, nor was equivalent substitute education or experience permitted. The advertisement also established a deadline for applications.

The director of agency A stated that on the first two days following the publication of the advertisement, he received calls from potential applicants requesting that equivalent substitute education and experience be allowed. The director stated that within the first week after the initial advertisement, he received about four such calls, and decided during the week that he would re-advertise the position to allow for equivalent substitute education and experience. The second advertisement ran in the newspapers a number of weeks after the first advertisement, and allowed applicants two weeks to submit resumes.

The board met again two days after the first advertisement. The director of agency A informed the board at this meeting that the deputy director position had been advertised two days before. The director stated that the deadline for applications had been set and that his recommendation for appointment would be brought to the board at its first meeting after the deadline. Apparently, the director did not mention to the board anything about calls requesting a modification of the initial advertisement.

Although the minutes of this board meeting indicated that the deputy director attended the meeting, the deputy director stated that he was absent during the time the director updated the board on the deputy director position. The deputy director stated that at the time he was attending an evening class, and produced a letter showing that after the class he had difficulty with building security officers who would not permit him to re-enter the building so that he could return to the board meeting.

The deputy director stated to the Commission that he had never considered applying for the position of deputy director until after he saw the reannouncement of the position. He stated that he had not seen the initial advertisement for the position, nor had heard anything about the position after it was initially advertised and prior to the reannouncement of the position. Although he had known about the deputy director position for a number of months, he indicated that prior to the reannouncement it had not crossed his mind to apply for the position. However, upon seeing the second advertisement, the deputy director stated that he took an interest in the position, and concluded that he was qualified for the position and had something to contribute if appointed. Thus, he submitted his resume and was interviewed for the position.

The State Ethics Commission was unaware of any information that would lead it to believe that the deputy director was interested prior to the second advertisement in applying for the position of deputy director. The deputy director stated that prior to submitting his resume he never discussed the matter with the director of agency A. The director likewise stated that he had never discussed the position with the deputy director prior to the time he received the deputy director's resume after the second advertisement. Although it had been suggested that the reannouncement of the position was made so that the deputy director could apply for the position, the Commission had seen no evidence of this. The deputy director stated that he could not have qualified for the position as it was described in the first advertisement. The deputy director stated, however, that he felt that he had equivalent substitute education and experience, and thus felt qualified to apply for the position after seeing the second advertisement.

In responding to the deputy director's request for an advisory opinion, it was also necessary for the Commission to examine the relationship between the board and the director of agency A. According to a section in the Hawaii Revised Statutes, the board had the duty to manage the director's agency, as well as agency B. The deputy director had indicated as well that both agencies A and B were under the control of the board, although the two agencies operated independent of each other.

Another section in the Hawaii Revised Statutes provided that the director of agency A was appointed by the board and served at the pleasure of the board, and was under the direction of the board. The by-laws of the board stated that the directors of agencies A and B were required to administer their respective agencies under the direction of the board and were also required to meet with the board in executive session for the purpose of being evaluated. The deputy director also stated that in the past the directors of the two agencies were slated for evaluation twice each year, but that the board had established a new policy by which evaluations would take place every few months. In light of the sections from the Hawaii Revised Statutes and the board's by-laws and practice, the Commission believed that the director of agency A was subordinate to the board and that the board supervised the director in the performance of his duties.

## 2. Application of the State Ethics Code

The State Ethics Code is found in chapter 84, Hawaii Revised Statutes. Section 84-2 provides that chapter 84 shall apply to all employees of the State, and section 84-3 defines "employee" to include members of state boards. The State Ethics Code thus applied to the deputy director while he served as a board member and applied to him in his new capacity as deputy director of agency A.

Section 84-31(a)(2) of the State Ethics Code provides that the Commission shall render advisory opinions to present or former state employees who request advisory opinions as to (1) whether action they have taken as a state employee has violated the ethics code or (2) whether action they will take as a state employee will violate the ethics code:

It [the Commission] shall render advisory opinions upon the request of any legislator, employee, or delegate to the constitutional convention, or person formerly holding such office or employment as to whether the facts and circumstances of a particular case constitute or will constitute a violation of the code of ethics.

Based on the above, it was appropriate for the Commission to render an advisory opinion in this case.

The Commission believed that a number of the substantive sections of the State Ethics Code were relevant in this case. These were sections 84-14(a)(1), 84-13, and 84-13(4). The Commission's discussion of the application of each of these sections of the State Ethics Code is set forth in the remainder of this opinion.

Section 84-14(a)(1), part of the conflicts-of-interests section of the State Ethics Code, provides 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 ....

Section 84-3 defines the term "financial interest" to include an employment interest, and defines "official action" as a "decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority."

With respect to the deputy director's request for an advisory opinion, a question arose as to whether his involvement as a board member (1) in authorizing the expenditure of funds for the deputy director position, (2) in authorizing the initiation of a search process for the deputy director position, (3) in setting the salary for the position, and (4) in deciding upon a selection process for filling the position created a conflict of interest. The Commission, however, saw no evidence that would indicate that the deputy director was interested in applying for the position of deputy director while undertaking any of these actions. Therefore, the Commission concluded that the deputy director had not violated the conflicts section of the ethics code, because he took no action as a board member that directly affected any employment interest of his at the time the action was taken. The Commission noted that a number of months had passed between action the deputy director had taken as a board member affecting the position of deputy director and his decision to apply for the position of deputy director.

The Commission next considered the application of the first paragraph of section 84-13, the fair treatment section of the State Ethics Code. Section 84-13 provides in pertinent part as follows:

**§84-13 Fair treatment.** No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others; including but not limited to the following:

- (1) Seeking other employment or contract for services for oneself by the use or attempted use of the legislator's or employee's office or position.
- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of the legislator's or employee's official duties or responsibilities except as provided by law.
- (3) Using state time, equipment or other facilities for private business purposes.
- (4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom the legislator or employee inspects or supervises in the legislator's or employee's official capacity.

With respect to the initial paragraph of this section of the law, the Commission first considered whether the deputy director had acquired any "unwarranted advantages" by participating as a board member in authorizing the expenditure of funds for the deputy director position, authorizing the initiation of a search process for the position, setting the salary for the position, establishing the nature of the selection process for the position, then applying for the position and being appointed. However, because the deputy director's involvement in each of these actions was not substantial, the Commission believed that the deputy director had not received any unwarranted advantages. The Commission noted again that the deputy director had no involvement as a board member in originally establishing the position, and that the salary and selection process were established in conformance with prior board policy.

With respect to section 84-13, the Commission also considered whether the deputy director misused his position as a board member in any manner to better his chances of being appointed

to the position of deputy director. The Commission, however, found no evidence that the deputy director had discussed the position with the director of agency A prior to applying for the position. Therefore, it seemed apparent that the director had not reannounced the position for the deputy director's benefit, but because others had contacted the director to ask him to include equivalent substitute education and experience as part of the qualifications for the deputy director position. The facts also indicated that the deputy director had not solicited the support of other board members, nor was there any evidence indicating that the deputy director intentionally used his position as a board member to pressure or coerce the director. Thus, the Commission believed there had been no violation in this case of the initial paragraph of section 84-13.

The Commission also considered the application of section 84-13(4) to the deputy director's situation. This section of the ethics code prohibits a state employee from:

Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom the legislator or employee inspects or supervises in the legislator's or employee's official capacity.

The Commission considered whether this section of the ethics code prohibited the deputy director from applying to the director of agency A for the position of deputy director while remaining on the board. After examining the language of section 84-13(4), the legislative intent behind the statute, and the facts of this case, the Commission concluded that section 84-13(4) prohibited the deputy director from applying to the director of agency A for the position of deputy director while remaining on the board.

Section 84-13(4) was passed into law in 1972 in order to prohibit substantial financial transactions between a state employee and a subordinate, or someone the state employee supervises or inspects. In passing section 84-13(4) into law, the Legislature apparently concluded that subordinates or individuals supervised or inspected would generally have unequal (i.e., lesser) bargaining power when dealing with a superior, supervisor, or inspector. This impaired bargaining ability was likely to result in an unwarranted advantage accruing to a superior, supervisor, or inspector.

In the past, the Commission has applied section 84-13(4) to prohibit a supervisor from soliciting \$200 loans from subordinate employees, from soliciting those supervised to enroll in a course taught by the supervisor, from selling encyclopedias to those supervised, from contracting with those supervised for catering and photographic services, and from selling weight-loss products to those supervised. In Advisory Opinion No. 431, the Commission also treated applying for employment to a subordinate or one supervised as a substantial financial transaction prohibited by section 84-13(4).

It has been argued that section 84-13(4) was not intended to be applied in a *per se*, or automatic, fashion to prohibit *all* substantial financial transactions between an employee and a subordinate, or someone supervised or inspected. Rather, it has been argued, the prohibition should apply only upon a showing of an actual misuse of position by a superior, supervisor, or inspector.

The Commission believed, however, that the four subsections to section 84-13 were meant to be construed as prohibited activities; otherwise, it would have made little sense to specify a few areas of potential misuse of position, since an employee may misuse his or her position in numerous ways and in numerous settings. The Commission believed that the four subsections,

therefore, were meant to delineate specifically a number of situations where it was likely that a state employee would receive an unwarranted advantage. In Advisory Opinion No. 290, the Commission specifically stated that section 84-13(4) was intended to be applied in a *per se* fashion:

HRS §84-13 of the ethics code states that an employee may not use his position to secure an unwarranted advantage for himself or for others. Because the drafters of that section were aware that it is sometimes difficult to determine if one has used his State position for unwarranted advantages, they listed four representative types of activities which if engaged in would be *per se* violations of this section. One of these, stated in part (4), is "[s]oliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom he inspects or supervises in his official capacity."

Advisory Opinion No. 290 is supported by Standing Committee Report No. 670-72, page 2, which discusses the four subsections added to the fair treatment section in 1972:

3. The fair treatment section under chapter 84 was amended to delineate, without limiting thereto, *the following proscribed activities*:

a. Seeking other employment or contract for services for himself by the use or attempted use of his office or position.

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

c. Using state time, equipment or other facilities for private business purposes.

d. Soliciting, selling, or otherwise *engaging in a substantial financial transaction with a subordinate or a person or business whom he inspects or supervises in his official capacity*. [Emphasis added.]

It should be borne in mind that many sections of the ethics code (for example, the conflicts section) operate in a *per se* manner. Whether there is actual wrongdoing is not an issue; rather, certain activities have been prohibited by the ethics code because they are more likely to result in unethical activity or are likely to raise serious questions of propriety.

The deputy director argued that he did not believe that the director of agency A should be considered his subordinate or someone he supervised while he served as a board member. The deputy director stated that only the board could take action affecting the director, and that any board action required a majority of votes. Thus, the deputy director believed that it was the board that was the "supervisor" of the director, and for that reason the deputy director believed that section 84-13(4) should not apply in his case. The deputy director stated that he believed that section 84-13(4) would have applied if he had been the director's sole supervisor, or had sat on a board that had significantly fewer members than his former board had.

While the Commission understood the deputy director's point, the Commission still believed that a member of the deputy director's former board had sufficient power and authority with respect to the position of the director of agency A to pose a serious problem under the ethics code. The director served at the pleasure of the board and was evaluated by the board frequently. Thus, it

was the duty of every board member to be evaluating the director's performance and communicating his or her opinion to other board members for the purpose of taking any corrective action. The Commission concluded that there was sufficient reason to believe that the director of agency A was subordinate to the board members and was supervised by the board members.

The Commission also believed that the deputy director was in fact "engaging" in a "substantial" financial transaction with the director. Because the salary of the position of deputy director was high, the Commission believed that the transaction was indeed substantial. Secondly, the director had a significant role to play in the transaction since he had almost total discretion in selecting a deputy director.

It had also been argued that section 84-13(4) was intended to apply only to "private" financial transactions between an employee and a subordinate. An example of such a "private" financial transaction would be an employee selling insurance to a subordinate. The subordinate uses his or her own money in the transaction. In the deputy director's case, however, the director was not involving his own funds in determining to hire the deputy director. Rather, he was making a decision on behalf of the State.

The Commission believed, nevertheless, that the Legislature when enacting section 84-13(4) did not intend to distinguish types of financial transactions as being private or State, or a mixture of the two. The Commission believed that the source of the funds is immaterial so long as the subordinate or person supervised is substantially involved in the transaction with the superior or supervisor. The Commission believed that whether the source of the funds is private or State, the reality is that in either case the subordinate is likely to be unable to deal with his or her superior or supervisor in an objective manner. The Commission further noted that it believed that when a subordinate is making a decision involving state funds, there is even a greater risk than when private funds are involved, since subordinate employees might be inclined to commit the State's funds with less hesitancy than their own when dealing with a supervisor or superior.

The Commission noted that this was not the first time the Commission had considered the applicability of section 84-13(4) when a subordinate or one supervised would be making a decision involving the State's--as opposed to his or her own--funds. In Advisory Opinion No. 477, a board member who owned an office building wished to lease office space to the state agency his board administered. In negotiating the lease, the board member would have had to enter into lease negotiations with a subordinate staff member employed by the board. Although the board member was prohibited from entering into the lease agreement because of other sections of the ethics code, the Commission indicated that section 84-13(4) might also have prohibited the board member from negotiating the state lease with his subordinate.

In applying section 84-13(4), the Commission kept in mind the mandate set forth in section 84-1 of the State Ethics Code. Section 84-1 provides that chapter 84 "shall be *liberally construed* to promote high standards of ethical conduct in state government." [Emphasis added.] Further, the Preamble to the State Ethics Code states that the purpose of the State Ethics Code is to preserve the public's confidence in its public servants. The Commission believed that its application of section 84-13(4) in this case was consonant with both the purpose of chapter 84 and the legislative mandate to liberally construe chapter 84 to "promote high standards of ethical conduct."

The deputy director informed the Commission that he did not seek an advisory opinion from the Commission when applying for the position of deputy director because he believed that advice the Commission had given to another board member when that board member applied, while

serving as a board member, for the head position of agency B was applicable to his situation as well.

Although the other board member's situation had some similarities to the deputy director's case, the Commission noted that there were important differences. The other board member did not apply to a subordinate, but to the board itself. Thus, there was no need for the Commission to consider the application of section 84-13(4) in the prior case. Although in the deputy director's case the board approved the director's recommendation, the board intended to give the director practically unfettered discretion in making his selection of a deputy director. When the director made his recommendation to the board, it was done orally. The deputy director's resume was not given to the board, nor were other top candidates presented to the board for comparison or consideration. The board clearly intended to give the director of agency A almost total discretion in making his selection of a deputy director. In contrast, candidates for the head position of agency B were interviewed by the board itself.

There were other factors as well in the deputy director's case that distinguished it from the other board member's situation. First, the position of deputy director was a newly created one. Second, the board itself established the salary for the position within the amount appropriated for the position by the Legislature. These factors, as well as the involvement of the director, the Commission believed, should have led the deputy director to contact the Commission earlier for an advisory opinion.

The Legislature had given the State Ethics Commission the sole authority to issue advisory opinions so that problems such as the deputy director's could be avoided. State employees and board members do not have to guess at how the State Ethics Code applies to them, or make risky decisions. An advisory opinion can be obtained in advance so that a state official or employee can know that action he or she takes will not violate the State Ethics Code. Further, the Commission's advisory opinions are binding on the Commission itself.

Because the State Ethics Code is law, the Commission noted that it is unwise for a state official or employee to make assumptions about the interpretation or application of the State Ethics Code. The Commission employs a staff of attorneys who are available to advise state employees and officials.

The Commission believed that in order for the deputy director to have avoided a violation of section 84-13(4) in this case, it would have been necessary for him to have resigned from the board when he applied for the position of deputy director, since the director of agency A had substantial authority for selecting a deputy director.

Because the Commission concluded that the deputy director had violated section 84-13(4) under the circumstances of this case, the Commission believed that the selection process for the deputy director position was tainted to an impermissible degree. The Commission therefore believed that the results of the first selection process had to be voided and a second selection process instituted. The Commission stated that the second selection process, of course, would have to be carried out in compliance with all applicable state law, and be fair. Because the deputy director was no longer a board member, the Commission stated that it saw nothing that would prevent the deputy director from reapplying for the position of deputy director.

The Commission asked that the deputy director respond in writing within thirty (30) days of the date of this opinion indicating the measures he had taken or would take in response to this

opinion. The Commission stated that it would determine whether additional action by the Commission would be necessary in this case, based on the action taken or to be taken by the deputy director.

The Commission stated that this advisory opinion was based upon the facts discussed above and was valid only to the extent that representations made to the Commission in this case were accurate and complete. The Commission also noted that this advisory opinion addressed only those issues discussed in the opinion and was not meant to preclude the Commission from addressing other issues that may have arisen or might arise with respect to this case.

Finally, the Commission told the deputy director that it appreciated his candor and cooperation in discussing the facts of this case, and commended him for seeking an advisory opinion in this case when it became evident to him that his situation raised ethical concerns.

Dated: Honolulu, Hawaii, April 8, 1988.

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

Note: Vice Chairperson Arnold J. Magid was not present during the discussion and consideration of this opinion.