

## **ADVISORY OPINION NO. 94-4**

The chair of a state council requested an advisory opinion from the State Ethics Commission. In his private capacity, the council member was the director of a private non-profit corporation. The corporation provided services under several state contracts awarded by the state department to which the council was attached. The council member asked whether these contracts would create a conflict of interests between his role on the council and his employment with the non-profit corporation.

### **I. Background**

The state council was established by the legislature. Its duties included developing and submitting a state plan for the provision of services to a certain population; monitoring, reviewing, and evaluating the implementation of the plan; and coordinating activities with other state offices. The council was established within a state department. A division within the department provided clerical and administrative support to the council.

The council was not exclusively a creature of state law. It was created pursuant to a federal act. The federal act provided for funding to the states to establish statewide councils of this type. The Hawaii council was created as a result of this federal law. The federal act set forth certain conditions that had to be met in order for a state council to receive federal support. In order to receive the funding, federal law mandated that the state council not be located within a state agency. According to information provided to the Commission, this provision was apparently misread when the Hawaii State legislature created the Hawaii council. The council was placed in the department by mistake. The Ethics Commission was told that the department would introduce a bill in the next legislative session to move the council out of the department. In the meantime, the council did not have extensive contact with the department. One division of the department provided administrative support but did not provide any input into decisions made by the council. The council did not interact with any other division of the department.

The council consisted of nineteen members appointed by the governor. The legislative act creating the council required that the membership include at least one director of a certain type of company. This requirement was rooted in federal law. The federal act set forth this condition. As director of a certain non-profit corporation, the council member who requested this opinion was the person on the board who satisfied this condition. Indeed, because that non-profit corporation was the only one of its kind in the State, it appeared that the council member was the only one in the State who could fulfill the condition. If the council member was not a member of the council, its funding and existence would have been in jeopardy.

The federal act not only provided funding for state councils, it also provided funding for the maintenance of private statewide companies such as the one that employed the council member. In some cases, federal law required that there be a state plan in place before this money may be released. Much of the money would then be channelled from the federal government through the state government and then to the company in the form of a contract from the state.

Companies had to meet certain requirements before they were eligible to receive the federal money. The council member informed the Commission that his company was the only organization that met the requirements to receive federal funding. For this reason, it had been awarded a number of contracts from the department to which the council was attached. The council member explained that his company had five contracts from the department. Three of these contracts resulted from federal funding channelled through the department. In each case, the federal act had specified the type of company that could receive the federal dollars. The council member's company was the only one in the State that met the federal specifications.

The two other contracts between the company and the department were funded by the legislature. The first of these provided funds that matched federal funds given to the company to

maintain its services. The state funds allowed the company to provide these services statewide. The second provided funds to establish a program. The company already had a similar program in place and lobbied the legislature for funds to expand this program. The council member asked whether the existence of all of these contracts created a conflict of interests between his position on the council and his employment with the company.

## II. The Second Prohibition of Section 84-14(d)

The Commission initially noted that the State Ethics Code, chapter 84, Hawaii Revised Statutes ("HRS") section 84-3 defines the term "employee" as including members of state boards, commissions, and committees. For purposes of the ethics code, the council member was a state employee by virtue of his position on the council. As a state employee, the council member was required to abide by the conflicts of interests laws located in the ethics code. HRS section 84-14(d) of the conflicts of interests section reads:

§84-14 Conflicts of interests. (d) 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 second prohibition of this section forbids a state employee from being compensated to assist or represent anyone on a matter before his own agency. The State Ethics Commission has interpreted this section as forbidding a state employee from being compensated to assist anyone on a matter that comes before the employee's department. In Advisory Opinion No. 369, the Commission explained the reasoning behind section 84-14(d):

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 agencies that employ them.

Section 84-14(d) prohibits assistance or representation before an employee's own department in order to avoid the appearance that those assisted by the employee are receiving an improper advantage because of the relationship between the employee and his department.

The Commission noted that, in some situations, it has held that the relationship between a board and a department is such that the board functions independently of the department. In these cases, the Commission has treated the board as a separate agency from the department for purposes of section 84-14(d). The Commission has held that section 84-14(d) would only forbid the employee from being compensated to assist or represent another before the employee's board, but would not forbid him from assisting or representing another on a matter before the rest of the department. For example, in Advisory Opinion No. 89-4, the Commission stated:

Based upon the evidence acquired ... the boards were separate and independent from the department and each other, and that the boards received only certain administrative services from the department. Under these circumstances, it appeared to the Commission that the boards should be treated as separate and independent agencies from the department and from each other for the purposes of HRS §84-14(d).

Thus, if a board was very independent from a department, it could be treated as a separate agency for purposes of section 84-14(d).

In this situation, the Commission believed that the council should be treated as a separate agency from the department. According to information received by the Commission, the council received only administrative services from a division of the department. It had no connection to any other division of the department. The council independently reached its own decisions; the department did not tell the council what to do and did not recommend any course of action. The council created its own plan and then asked the division to implement it. Most significantly, the presence of the council within the department was the result of an error. In order to continue to receive federal funding, the council had to be moved out of the department. A bill would be introduced in the next legislative session to move the council out of the department.

For these reasons, the Commission believed that the council should be treated as a separate agency from the department. HRS section 84-14(d) would, therefore, forbid the council member from assisting or representing his company before the council only. It would not forbid him from assisting or representing the company on a matter before any other subdivision of the department. The Commission's conclusion was conditioned on its understanding that the council would be moved out of the department. If the council was not moved out of the department, the Commission stated that this matter should be brought back to it for further consideration.

### III. First Prohibition of Section 84-14(d)

The first prohibition of section 84-14(d) forbids a state employee from being paid to assist or represent anyone on a matter in which he has participated or in which he will participate. The council member participated in formulating a state plan for providing services to a certain population. The existence of a state plan was a prerequisite to the receipt of certain federal funds under the federal act. Some of the money received by the council member's company under contract was released by the federal government because a state plan was in place. At issue was whether, by assisting the company on these contracts, the council member was assisting them on a matter in which he had participated as a member of the council.

The state plan formulated by the council set only general goals. Specific uses of the federal money were largely dictated by federal law. The council member's company was the only organization that fulfilled the federal requirements for receiving funds once a state plan was in place. The council had no role beyond setting the general goals in the state plan. The council did not award any of the contracts to the company. Because the council did not play a substantial role in the awarding of contracts to the company, and because federal law essentially determined the recipient of the contract, the Commission did not believe that HRS section 84-14(d) prohibited the council member from assisting or representing his company on contracts funded by federal money that was released because of the existence of a state plan.

### IV. Section 84-14(a)

The Commission noted that a second relevant section of the ethics code was section 84-14(a), which reads:

§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...

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 qualifications.

Section 84-14(a)(1) states that a state employee may not take any official action directly affecting a business in which he has a substantial financial interest. The term "official action" is defined by the ethics code as any action involving the use of discretionary authority. As an employee of the non-profit corporation, the council member had a substantial financial interest in that organization.

The Commission noted that the final paragraph of this section refers to board members whose positions are mandated by statute. The council member was one of these mandated board members. Both state and federal law required that a director of one of these types of companies must serve on the state council. The council member filled this mandated position. Section 84-14(a) provides that mandated board members may not take discretionary action directly and specifically affecting a business in which they have a substantial financial interest provided that interest is related to the mandated qualifications. In this case, the council member's financial interest was his position as director of the non-profit corporation. This was also the mandated requirement for his serving on the council. Thus, section 84-14(a) prohibited him from taking discretionary action directly and specifically affecting his company. This meant that the council member could not take action that, without any intervening factor, specifically and individually affected the non-profit corporation.

The role of the state council was to develop a state plan for the provision of certain services. The council member explained that it was possible that this work could have an effect on some of the services required under the contracts. He explained that the council would prioritize different services and this could possibly have an effect on what the contracts would require. However, the council's effect on the contract was not likely to be very great because in most cases the federal government stipulated what kinds of services were required under the contracts. In addition, the actual issuance of the contracts was done by a division within the department. The division determined whether an organization met the requirements and then implemented the contract. The council had no role in this. The council member's action on the state plan appeared to have only an indirect effect on his company. For this reason, the Commission believed that section 84-14(a) did not forbid the council member from acting on the state plan.

#### V. Other Sections of the Ethics Code

Aside from the conflicts of interests section, the Commission believed that the council member should be aware of several other sections of the ethics code. The Commission called the council member's attention to HRS section 84-12, which refers to confidential information:

§84-12 Confidential information. No legislator or employee shall disclose any information which by law or practice is not available to the public and which the legislator or employee acquires in the course of the legislator's or employee's official duties or use the information for the legislator's or employee's personal gain or for the benefit of anyone.

The council member could possess information that was not available to the public. Section 84-12 would forbid him from using or disclosing this information for his own benefit or the benefit of anyone else.

HRS section 84-13 was also pertinent. In relevant part, this section reads:

§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.

The fair treatment section generally prohibits the use of one's official position to gain or grant an unwarranted benefit. The subsections of this law refer to specific violations. The Commission reminded the council member to be particularly aware of section 84-13(3), which forbids the use of state resources for private business purposes.

The council member presented the Commission with a unique situation. In this case, federal funding requirements were tightly entwined with state law. Certain relationships between the council member, his company, the council, and the department appeared to be necessary in order to ensure that the legislature's intentions were carried out. The Ethics Commission did not believe that the conflicts of interests law should be applied to thwart the council's statutory mandate. However, the Commission stated that if the council was not transferred out of the department, or if the council was faced with taking action that directly and specifically affected the non-profit organization, then the Commission would need to examine this matter further.

The Commission thanked the council member for bringing this situation to its attention. The Commission appreciated the cooperation the council member had shown during the review of this matter.

Dated: Honolulu, Hawaii, October 12, 1994.

STATE ETHICS COMMISSION  
Cassandra J. L. Abdul, Commissioner  
Don J. Daley, Commissioner  
Carl T. Sakata, Commissioner

Note: Chairperson K. Koki Akamine and Vice Chairperson Sharon "Shay" Bintliff were not present during the discussion and consideration of this opinion.