

## ADVISORY OPINION NO. 99-2

A state board member serving on a state board ("Board") requested an advisory opinion from the Hawaii State Ethics Commission ("Commission") on the question of whether his vote in favor of the award of a particular contract violated the State Ethics Code, found in chapter 84, Hawaii Revised Statutes ("HRS"). On a particular date, the board member's Board voted in favor of a contract to a company, company "A". Prior to the vote to award the contract, a question arose as to whether two members of the Board had a conflict of interests in the matter. The board member was one of these two members. After the vote on the contract, serious questions were raised as to whether the contract was awarded in violation of the conflicts of interests law and favoritism law contained in the State Ethics Code. Because of these concerns, the board member requested an advisory opinion from the Hawaii State Ethics Commission as to whether his conduct in regard to the vote comported with the requirements of the State Ethics Code.

Because of the seriousness of the allegations of conflict of interests and favoritism that arose after the vote, the Hawaii State Ethics Commission initiated its own investigation into the matter, in accordance with HRS section 84-31(a)(3). In carrying out this investigation, staff attorneys of the Commission, including the Commission's executive director, interviewed all board members serving on the Board at the time and who voted on the matter. At the time of the vote, there were two vacancies on the Board. The Commission's staff attorneys also interviewed the Board's administrator, and subpoenaed documents, and reviewed corporate documents relating to company A and its affiliated organizations. Further, the financial disclosure statements of board members, which were on file with the Commission, were reviewed, as well as documents pertaining to the Request for Proposals concerning the award of the contract, and assessments of bids submitted by the Board's hired consultant. Upon review of the information gathered during this investigation in the context of the State's ethics laws contained in chapter 84, HRS (the only pertinent laws over which the Commission has jurisdiction) the Commission found insufficient evidence to establish any violation of the State Ethics Code's conflicts of interests law or favoritism law. The Commission noted that any violation of the provisions in the State Ethics Code must be established on the basis of "competent and substantial evidence," in accordance with HRS section 84-31(c). In the following paragraphs, the Commission will discuss the reasons why it believes that there was an insufficient basis to find any violation of the conflicts of interests law or favoritism law contained in the State Ethics Code in regard to the board member's own actions with respect to this case.

In the board member's letter requesting an advisory opinion, the board member asked whether he had a conflict of interests with respect to his vote for company A. In his letter, the board member stated that he was employed by organization "A" as one of its higher ranking employees. The head of organization A (and thus the board member's "boss") was also a member of the board of directors of company A. In the board member's letter requesting an advisory opinion, the board member stated that he, his

spouse, and dependent children had no financial interest in company A, as that term is defined in the State Ethics Code.

The board member was appointed to his Board by Governor Cayetano as one of the representatives on the Board of a group of organizations, in accordance with the qualifications of the various board members as set forth in the state statute that set forth the qualifications of the members of the Board. Ethics issues arose basically because the board member's "boss" at organization A happened to be a member of the board of company A, which was awarded the contract by the Board.

The State Ethics Commission is empowered to issue advisory opinions under HRS section 84-31(a)(2) "upon the request of any . . . employee . . . as to whether the facts and circumstances of a particular case constitute or will constitute a violation of the code of ethics." In accordance with HRS section 84-3, the term "employee" is defined to include state board members.

The first statute in the State Ethics Code relevant to the board member's situation was HRS section 84-14(a), a part of the State Ethics Code's conflicts of interests law, which requires recusal in certain situations. HRS section 84-14(a) 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.

. . . .

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 particular qualifications.

HRS section 84-14(a) prohibits a state employee or state board member from taking "official" action (i.e., discretionary action) if such action "directly" affects a business or other undertaking in which the employee or board member has a substantial financial interest. HRS section 84-3 defines the term "financial interest" as follows:

"Financial interest" means an interest held by an individual, the individual's spouse, or dependent children which is:

- (1) An ownership interest in a business.
- (2) A creditor interest in an insolvent business.
- (3) An employment, or prospective employment for which negotiations have begun.
- (4) An ownership interest in real or personal property.
- (5) A loan or other debtor interest.
- (6) A directorship or officership in a business.

Although the board member's "boss" served on the board of directors of company A, the board member himself had no "financial interest," as defined in the State Ethics Code, in company A. The board member himself was not a member of the board of directors of company A, nor was he employed by company A. Thus, HRS section 84-14(a) did not require his abstention or recusal from taking official action affecting company A, despite the fact that his "boss" sat on company A's board of directors. Thus, the Commission found that the board member's voting to award a contract to company A was not violative of HRS section 84-14(a).

The Commission also noted for the record that the board member was a "mandated board member," as that term is defined in the following paragraph from HRS section 84-14(a):

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 particular qualifications.

"Mandated" board members are accorded an even less stringent recusal standard than other state officials, employees, or board members. Recusal is only required when their actions "directly and specifically" affect their own businesses. The rationale behind this part of HRS section 84-14(a) is that certain board members are placed on boards to represent the viewpoints of specific groups of individuals or segments of the community. In this case, the board member was appointed to the Board because he was a representative of an organization that was one of a group of such organizations. Thus, the board member was on the Board to represent the viewpoint of these organizations, in accordance with state statute.

The Commission noted that when recusal is not required by the State Ethics Code, state officials, employees, and board members at times voluntarily recuse themselves when situations arise that create questions of conflicts of interests. The decision to voluntarily recuse oneself, however, is a personal decision, and must be weighed in light of one's official obligations, and problems with such matters as having a sufficient number of decisionmakers, in the case of state boards. The Commission raised the issue

of voluntary recusal for the sake of completeness because it was an alternative that state officials at times utilize. The Commission believes that every state official and employee should keep voluntary recusal in mind as an alternative in determining the best course of action to take when faced with a situation where recusal is not required by law, yet circumstances may create a significant appearance of impropriety that may undermine public confidence in government. At the same time, the Commission again pointed out that there may be factors that weigh against voluntary recusal, including the burden voluntary recusal may place on fellow decisionmakers.

Although the Commission found no conflict of interest under HRS section 84-14(a), the fact that the board member's "boss" sat on company A's board of directors as a director also raised a concern under the "favoritism" law of the State Ethics Code, HRS section 84-13. HRS 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.

HRS section 84-13 bars a state board member from using his or her position to grant any person or business preferential treatment or favoritism, or any unwarranted advantages or privileges.

In applying HRS section 84-13, the State Ethics Commission believes it must establish clear evidence of a misuse of position for the purpose of according preferential treatment. The Commission believes that a differing point of view or even poor judgment, assuming such exists, does not constitute a violation of HRS section 84-13.

With regard to the matter under consideration, four board members voted in favor of the award of the contract to company A, while three board members voted against the award. The dissenting board members strongly believed that company A's chief competitor in the award of the contract, company "B", had submitted a proposal that was so clearly superior to company A's that a vote for company A could not be justified. Hence, a general concern of possible improper motive on the board member's part arose. The dissenting board members chiefly noted that company B's proposal was substantially less costly and provided for a superior type of benefit, benefit "A". The dissenting board members found little merit in the counterargument that company A seemed to be able to provide better service because it was a local company. However, according to those board members voting for company A, company B's presence in Hawaii (to the extent known at the time) appeared minimal, resulting primarily in service by way of telephone calls to the mainland via a 1-800 telephone number.

The votes in favor of company A were also based on other factors, such as providing jobs in Hawaii, stimulating Hawaii's economy, and the fact that company B had not set a firm price for the last year of its proposal. Those voting in favor of company A also took issue with the supposed superiority or even importance of company B's type of benefit A. After listening to all the board members, the Commission's staff attorneys were left with a strong conviction that a vote for company A was not entirely indefensible.

With respect to the board member's own participation in the vote, the Commission's executive director and two staff attorneys personally interviewed the board member. During this interview, the board member stated that as a board member he had been informed that cost alone in awarding the contract was not determinative. The board member pointed out that he believed that company A was clearly in a position to provide better service. The board member also noted that the last year of company B's proposal did not contain a fixed rate, as did company A's proposal. The board member also stated that company A was a local company, and because of this, was likely to offer better service by way of person-to-person contact. Company B's proposal seemed to provide service only by way of telephone calls to the mainland. The board member also noted that company B had no representative at an important Board meeting, and thus the board member believed that this was indicative of the fact that the company lacked a local presence to properly perform its contract obligations. The board member also stated that the type of benefit A offered by company B was not all that clearly superior to that offered by company A, because the individual desires of those utilizing this benefit could be quite various.

The issue in this case was not whether the board member's views showed better judgment or not with regard to the vote for company A, but whether his vote was based on factors that appeared to have merit. This case arose because a vote for company A was alleged to have been indefensible. Yet, the Commission believed that there were reasons why a board member might vote for company A. The Commission found that

there was insufficient evidence to conclude that the board member's vote was cast to accord company A preferential treatment. Hence, the Commission did not find any violation of HRS section 84-13 on the board member's part.

Again, the Commission believed that there must be sufficient evidence of a misuse of position to substantiate a violation of HRS section 84-13. A differing point of view or poor judgment, even assuming such existed, is not a violation of HRS section 84-13. Further, mere speculation as to motive will not support a violation of HRS section 84-13. It should be noted again that board members were specifically informed that cost alone was not the only factor that could be considered. Further, company A's higher cost was still below the amount the State currently pays for the same service provided under the contract.

With respect to conflicts of interests, while the Commission found, as stated above, no violation of HRS section 84-14(a) because the board member did not have a financial interest in company A as the term "financial interest" is defined in the State Ethics Code, the Commission nevertheless believed that having state officials, employees, or board members taking official action directly affecting companies run by boards on which their "bosses" sit, raised a matter of concern. Certainly public confidence in government decisionmaking may be undermined in such situations. Subordinates may be placed in an awkward position if they must make decisions affecting the interests of their bosses in other companies. For this reason, the State Ethics Commission has decided to conduct research to see if an amendment to HRS section 84-14(a) might be warranted.

The Commission informed the board member that it appreciated his bringing this matter to the Commission for its consideration, and appreciated his assistance in regard to the Commission's review of this case.

Dated: Honolulu, Hawaii, March 15, 1999.

HAWAII STATE ETHICS COMMISSION  
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