

## ADVISORY OPINION NO. 2012-2<sup>1</sup>

A former Working Group member (“Working Group member” or “member”) asked for an Advisory Opinion from the Hawaii State Ethics Commission (“Commission”) on two issues: 1) whether any of the member’s past actions as a lobbyist for a private organization while simultaneously serving as a member of the Working Group constituted a violation of the State Ethics Code, and 2) what future actions on his<sup>2</sup> part as a lobbyist and a former member of the Working Group would constitute a violation of the State Ethics Code.<sup>3</sup>

### **Background**

Based upon information from the Working Group member and information accessible through the Hawaii State Legislature’s website,<sup>4</sup> the Commission understood the relevant facts to be as follows and based the Advisory Opinion on those facts:

1. The Working Group was created by a state law to evaluate a specific area of state law and to recommend legislation to improve that area of law,<sup>5</sup>

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<sup>1</sup> The Hawaii State Ethics Commission and the Working Group member have agreed to resolve any further action by the Commission relating to the member’s lobbying activities while a member of the Working Group described herein. As part of that resolution, the member has paid \$1,000 to the State of Hawaii General Fund.

<sup>2</sup> For ease of reference, the masculine gender is being used herein.

<sup>3</sup> The Commission noted that, in his request for an Advisory Opinion, the member asked the Commission to address nine specific questions that he claimed should be addressed in the Advisory Opinion. A request to the Commission for an Advisory Opinion, however, is not an opportunity for an employee to demand that the Commission respond to questions. The statute limits the scope of a request for an Advisory Opinion to whether, based upon the facts provided, a certain activity violates or will violate the State Ethics Code. Specifically, the State Ethics Code provides:

The ethics commission shall have the following powers and duties:

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(2) It shall render advisory opinions upon the request of any legislator, employee, or other 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.

HRS section 84-31(a)(2) (emphasis added). The questions that the member believed should be addressed did not ask “whether the facts and circumstances of any particular situation constitute or will constitute a violation of the code of ethics” and were not relevant for the Commission’s determination in rendering the Advisory Opinion. Accordingly, the Commission declined to address those questions.

<sup>4</sup> <http://www.capitol.hawaii.gov/>.

<sup>5</sup> The law creating the Working Group mandated that representatives from certain interest groups be invited to participate on the Working Group.

2. The Working Group existed for a specific length of time and was not created as a permanent entity;
3. The member was appointed and served on the Working Group as the representative of a private organization ("Organization") (see supra n. 5) and, concurrently, during the period in which the Working Group's was in existence, was a registered lobbyist for the Organization;
4. In the first legislative session following the creation of the Working Group ("the first legislative session"), the legislature considered a bill or bills recommended by or specifically implementing the recommendations of the Working Group;
5. In the Working Group's Final Report issued after the close of the first legislative session, the Working Group presented certain recommendations to the legislature, including proposed legislation to implement those recommendations;
6. In this second legislative session following the creation of the Working Group ("the second legislative session"), a bill was introduced at the request of the Working Group or based upon the Working Group's recommendations;
7. The bill, as amended, was passed by the legislature and signed into law;
8. In his capacity as a lobbyist for the Organization, the member testified on bills recommended by or implementing the recommendations of the Working Group during the legislative sessions mentioned above;
9. After the first legislative session, and through the first part of the second legislative session, the Commission, through its staff, repeatedly advised the member and the other members of the Working Group that they were subject to the State Ethics Code and that the State Ethics Code prohibited them from, among other things, being compensated to lobby the legislature on behalf of a nongovernmental organization on bills recommended by or implementing the recommendations of the Working Group;
10. Through its staff, the Commission issued this advice orally, by memorandum, and by letter specifically addressed to the Working Group member;
11. Subsequently, the Working Group member, as a lobbyist acting on behalf of the Organization, offered testimonies on at least three occasions during the second legislative session on the bill that became law; and
12. The Organization filed lobbying expenditures reports for the two legislative sessions mentioned above, reflecting that it paid compensation to the Working Group member as its lobbyist.

## Discussion

### **Question One: Whether the Working Group Member's Actions In Lobbying as a Private Individual for the Organization While a Member of the Working Group Constituted a Violation of the State Ethics Code**

The Working Group member's question as to whether his actions as a private individual who lobbied for the Organization while serving as a member of the Working Group may have violated the State Ethics Code involves the application of HRS section 84-14(d), a provision within the Conflicts of Interests section of the State Ethics Code.<sup>6</sup> That section prohibits a state employee from being compensated to assist or represent another on a matter in which the employee has participated or will participate as a state employee. Specifically, HRS section 84-14(d) provides, in relevant part:

No legislator or employee<sup>7</sup> shall assist any person or business or act in a representative capacity for a fee or other compensation to secure passage of a bill . . . in which he has participated or will participate as a legislator or employee[.]

HRS section 84-14(d).

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<sup>6</sup> The State Ethics Code implements Article XIV of the Hawaii Constitution and applies to all employees.

**§84-2 Applicability.** This chapter shall apply to every nominated, appointed, or elected officer, employee, and candidate to elected office of the State and for election to the constitutional convention, but excluding justices and judges; provided that in the case of elected delegates and employees of the constitutional convention, this chapter shall apply only to the enforcement and administration of the code of ethics adopted by the constitutional convention.

<sup>7</sup> "Employee" is defined as:

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.

HRS section 84-3 (emphasis added). The Working Group was created by state law; it was attached to a state department for administrative purposes; it was assigned specific duties and given specific authority; it was provided staff support and assistance by a state agency. Given these facts, the Commission determined that the Working Group was an official state entity, akin to a board, commission, or committee, and, therefore, its members were "employees" for purposes of the State Ethics Code.

The Commission's interpretation of the term "employee" to include members of the Working Group was subsequently confirmed by the legislature's passage of Act 208, Session Laws of Hawaii 2012, which law, prospectively, exempts members of groups similar to the Working Group from certain provisions of the State Ethics Code.

The Working Group offered recommendations and proposals that were incorporated in proposed legislation during the legislative sessions mentioned above. The Commission reasonably presumed that the member participated in formulating those recommendations and proposals while serving on the Working Group.

In his private capacity, the Working Group member offered both written and oral testimonies on behalf of the Organization on the bills that were proposed by or based on recommendations of the Working Group.<sup>8</sup> In defense of his actions, the member asserted that he did not act to “secure passage” of the bills but, rather, was opposing the bills on behalf of the Organization. The Commission, however, did not construe HRS section 84-14(d) so narrowly. Such a narrow construction would yield an absurd and unjust result whereby an employee would be prohibited from lobbying, for private pay, in support of legislation upon which the employee worked, but would be permitted to lobby, for pay, to defeat the proposed legislation.

Nevertheless, it was unnecessary for the Commission, in rendering this Advisory Opinion, to construe the phrase “to secure passage of a bill” because the Commission disagreed with the Working Group member’s characterization of his testimony. Although the Working Group member believed his testimony opposed the bill, the Commission pointed to portions of the member’s written testimony indicating otherwise, i.e., urging revisions to the bill and urging that a legislative committee retain the “defective’ effective date” to allow further discussion.

Lobbying expenditures reports filed with the Commission by the Organization for the two legislative sessions mentioned above indicated that the Working Group member was privately compensated by the Organization for lobbying efforts.

Accordingly, based on the facts recited in this Advisory Opinion, it was the Commission’s opinion that the Working Group member’s actions in submitting testimony on behalf of the Organization on legislative bills that were proposed by or based upon the recommendations of the Working Group violated HRS section 84-14(d).

**Question Two: What Future Actions by the Former Working Group Member as a Lobbyist Would Constitute a Violation of the State Ethics Code**

The former Working Group member also asked that the Advisory Opinion address what future actions as a lobbyist and a former Working Group member would constitute a violation of the State Ethics Code. Former employees of the State, including former members of boards, commissions, and committees are subject to

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<sup>8</sup> The Commission found the Working Group member’s attempts to characterize the testimony that he submitted to be mere “comments” to be unpersuasive. It appeared clear from a plain reading of the testimony that the Working Group member, on behalf of the Organization, was attempting to influence the legislative committees’ consideration of legislation by addressing his client’s concerns about the proposed legislation.

HRS section 84-18, the post employment section of the State Ethics Code.<sup>10</sup> In the instant case, however, the Commission determined that the post employment section of the State Ethics Code would not apply in light of the timely enactment of a law which exempts members of groups -- such as the Working Group in this case -- from certain provisions of the State Ethics Code, including the post-employment provisions of HRS section 84-18.<sup>11</sup>

This Advisory Opinion was issued at the former Working Group member's request pursuant to HRS section 84-31(a)(2). The Commission noted that it was not making any findings, decisions or other conclusions. Rather, the Commission issued the Advisory Opinion based upon the facts provided by the former Working Group

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<sup>10</sup> The post employment section of the State Ethics Code reads:

**§84-18 Restrictions on post employment.** (a) No former legislator or employee shall disclose any information which by law or practice is not available to the public and which the former legislator or employee acquired in the course of the former legislator's or employee's official duties or use the information for the former legislator's or employee's personal gain or the benefit of anyone.

(b) No former legislator, within twelve months after termination of the former legislator's employment, shall represent any person or business for a fee or other consideration, on matters in which the former legislator participated as a legislator or on matters involving official action by the legislature.

(c) No former employee, within twelve months after termination of the former employee's employment, shall represent any person or business for a fee or other consideration, on matters in which the former employee participated as an employee or on matters involving official action by the particular state agency or subdivision thereof with which the former employee had actually served. This section shall not apply to a former task force member who, but for service as a task force member, would not be considered an employee.

(d) This section shall not prohibit any agency from contracting with a former legislator or employee to act on behalf of the State within the period of limitations stated herein, and shall not prevent such legislator or employee from appearing before any agency in relation to such employment.

(e) This section shall not apply to any person who is employed by the State for a period of less than one hundred and eighty-one days.

(f) For the purposes of this section, "represent" means to engage in direct communication on behalf of any person or business with a legislator, a legislative employee, a particular state agency or subdivision thereof, or their employees.

<sup>11</sup> See Act 208, Session Laws of Hawaii 2012. The Act's effective date is July 1, 2012.

member and otherwise stated, which the Commission assumed to be true for purposes of the Advisory Opinion.

Dated: Honolulu, Hawaii, September 28, 2012.

HAWAII STATE ETHICS COMMISSION

Cassandra J. Leolani Abdul, Vice Chairperson  
Les Knudsen, Commissioner  
Susan N. DeGuzman, Commissioner  
Edward Broglio, Commissioner

Note: Chairperson Maria J. Sullivan recused herself from this matter. There also was a vacancy on the Commission when this Advisory Opinion was issued.

Commissioner Les Knudsen participated in the Commission's issuance of the Advisory Opinion to the former Working Group member. Commissioner Knudsen left from the Commission effective December 1, 2012, and he did not participate in the Commission's consideration and approval of this summary of the Advisory Opinion.

Commissioner Edward Broglio did not participate in the Commission's issuance of the Advisory Opinion. Commissioner Broglio participated in the Commission's consideration and approval of this summary of the Advisory Opinion.