



# HAWAII STATE ETHICS COMMISSION

State of Hawaii · Bishop Square, 1001 Bishop Street, ASB Tower 970 · Honolulu, Hawaii 96813

## ADVISORY OPINION NO. 2019-1

January 31, 2019

A member of a state board requested an Advisory Opinion from the State Ethics Commission (“Commission”) as to whether he may represent the board in collective bargaining negotiations with a union representing the public sector employees within the board member’s state department. The board member’s spouse is employed by the department and a member of the union. Because of the spouse’s membership in the union, it is the Commission’s opinion that the conflicts of interests section of the State Ethics Code, Chapter 84, Hawaii Revised Statutes (“HRS”), prohibits the board member from representing the board in negotiations with the union, such that he must recuse himself from taking action affecting the terms of employment of members of the union.

### I. FACTS

The Commission understands the facts to be as follows. The board member has a strong background in collective bargaining and believes that one of the reasons he was appointed to the board was to assist it in collective bargaining matters. By law, the board has votes in negotiating a collective bargaining agreement (“CBA”). There is a current CBA that governs the terms and conditions of employment of union members. The CBA provides for the re-opening of certain subjects and two subjects are being re-opened for renegotiation, both of which would affect the terms and conditions of employment of the union members. The re-opened items would not involve cost items; board members negotiating with the union would have limited discretion in negotiating any cost items as funding amounts are not determined by the board. The board member has been asked to assist the board in its negotiations on the re-opened items. It is also likely that the board member will be asked to assist on negotiations for a successor CBA.

The board member’s spouse is an employee of the board member’s department and one of many members of the union. The re-opened items would affect the terms of employment for all union members but would not affect the spouse any more significantly than they would any other member of the union. The board member voluntarily sought the guidance of the Commission to address any ethics concerns regarding his service on the board. He indicated to the Commission that he wanted to avoid any appearance of impropriety and to avoid any public concern regarding his service to the State.

## II. APPLICATION OF THE ETHICS CODE

The board member is considered an “employee” for purposes of the State Ethics Code<sup>1</sup> and is subject to the Ethics Code’s restrictions.<sup>2</sup> Two sections of the Ethics Code apply to his situation. First, the Conflicts of Interests law, HRS § 84-14(a), reads in pertinent part:

**§84-14 Conflicts of interests.** (a) No employee shall take any official action directly affecting:

(1) A business or other undertaking in which the employee has a substantial financial interest. . . .

The term “official action” is defined to include any action or inaction that involves the use of discretionary authority.<sup>3</sup> The term “financial interest” is defined as including the employment interests of a spouse.<sup>4</sup> Where the spouse is also a state employee, the Commission has construed this law as prohibiting the subject state employee from taking any discretionary action that directly affects the terms and conditions of the spouse’s employment with the State; for example, a state employee may not recommend or approve a salary increase or promotion for a spouse. In this case, although there are limits on the board member’s discretion and ability to propose or agree to any terms, the Commission concludes that by assisting in the negotiations the board member would be taking official action on behalf of the board. Negotiations would involve making recommendations and suggestions and taking other action that involves the use of discretionary authority. Accordingly, negotiating terms of the CBA amounts to “official action” for purposes of the State Ethics Code.

The Commission recognizes that the board member has a significant amount of experience regarding collective bargaining matters, and that there is a cost to the State in requiring his recusal from these matters: the State loses out on the benefits of the board member’s expertise when he is forced to sit on the sidelines during these negotiations. The Commission also appreciates the fact that the board member sought guidance from the Commission proactively to ensure that his public service comports with the highest ethical standards. However, the Commission believes that HRS § 84-14(a) prohibits the board member from assisting in collective bargaining negotiations when that assistance will affect the terms and conditions of employment of members of the union (such as wages and benefits); this prohibition applies as long as his spouse is a member of the union and employed by the department. Official action that directly affects the financial interests of a group of individuals that includes the board member’s spouse still directly affects the spouse, and the language of HRS § 84-14(a) is clear: the board member is prohibited from taking any official action that affects his spouse’s financial interests.

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<sup>1</sup> HRS § 84-3.

<sup>2</sup> HRS § 84-2.

<sup>3</sup> HRS § 84-3.

<sup>4</sup> Id.

The second applicable provision of the State Ethics Code, HRS § 84-13, the Fair Treatment law, reads in relevant part:

**§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. . . .

The Fair Treatment law prohibits the board member from using his position on the board to grant any favoritism or unwarranted benefit to his spouse or anyone else. Although there is no evidence to suggest that the board member has used his official position to confer unwarranted benefits upon his spouse or himself, the possible appearance of favoritism here warrants his recusal from these matters.

### III. CONCLUSION

The Conflicts of Interests law prohibits the board member from assisting the board in negotiations with the union when those negotiations would affect the terms and conditions of his spouse's employment with the department. In its deliberations, the Commission carefully considered the effect of this Opinion on both the board member and the board. The Commission realizes that this result limits the board member's effectiveness as a member of the board and may make negotiations more difficult. Nonetheless, the Commission believes this result is mandated by the language of HRS § 84-14(a).

The Commission thanks the board member for seeking advice on this matter and commends him for his sensitivity to the ethical considerations of this situation. His proactive request for guidance contributes significantly towards maintaining the highest standards of integrity in state government.

Dated: Honolulu, Hawaii, January 31, 2019

#### HAWAII STATE ETHICS COMMISSION

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