

OPINION NO. 274

We received a request for an advisory opinion from the chairman of a board that heard appeals from the decisions rendered by a particular state agency. The request concerned potential ethics problems posed by the private employment of a newly appointed board member. The new member was employed by an organization whose business related to the same kind of matters that came within the jurisdiction of the board. The chairman asked the Commission to specifically address itself to two areas of potential conflict and to issue guidelines to govern the participation of the board member in matters relating to these areas of conflict.

As stated, the chairman had two particular concerns. First, as an employee of the organization, the new member had been invited to speak before certain groups in regard to the appeal of decisions to the board. The member had numerous discussions with individuals and groups and provided technical assistance to them. In all of those meetings he had encouraged the filing of appeals. A number of those appeals were now pending before the board.

The chairman's second concern related to the fact that a number of the members of the organization that employed the new board member held certain interests which could conceivably come before the board.

The chairman wished to know if the new member might participate in (1) those appeals in whose filing he may have played an instrumental part, and (2) those appeals that were brought by members of the organization he worked for in a private capacity.

HRS §84-14(a) (Supp. 1975) had most direct application to both of these questions. That section provides:

No employee shall take any official action directly affecting ... [a] business or other undertaking in which he has a substantial financial interest; or ... [a] private undertaking in which he is engaged as legal counsel, advisor, consultant, representative, or other agency capacity.

First, under the definition of employee set forth in HRS §84-3(4), a member of a state board is an employee for the purposes of interpreting the application of the ethics code. Further, there could be little doubt that the new member's participation as a board member in a particular case would have a direct effect on the individual, business, or organization that brought the appeal. However, it was our view that the new member had no substantial financial interest in the assistance he gave to these various groups and individuals. This assistance, granted on a voluntary basis, was primarily given after working hours and as a courtesy to both the employee organization and the groups and individuals that received the assistance. Therefore, it was our opinion that HRS §84-14(a)(1) would not restrict the new member's participation in these appeals.

Nor did we believe that paragraph two of the section would prohibit the new member from taking action on appeals brought by members of these various groups. Again, that advice was granted on a purely voluntary basis. The assistance granted to each group and individual was somewhat limited and fairly widespread in the community as a whole. The chairman had indicated, for example, that it would be nearly impossible to accurately identify those appeals which were brought directly as a result of the new member's influence. The Commission recognized that many appeals were brought in many communities and not only those communities that were assisted by

the new member. Further, this assistance had not been primarily to individuals but rather to communities as a whole. Accordingly, we did not believe that this relationship constituted the engagement of an advisor or consultant in a private undertaking that was envisaged by HRS §84-14(a)(2). We believed that that section required something more formal and specific before its restrictions could be invoked.

The chairman had also indicated that he did not believe that the new member would be biased in his judgments on appeals brought from these communities even where the nature of the appeal indicated that he might have had some input in the matter. Accordingly, it was our view that the new member might participate fully in these matters.

The application of the conflicts section to the chairman's second concern required a brief analysis of the structure of the new member's employer. This organization was private, non-profit, non-partisan, and educational in nature. It was governed by a large board of trustees which was elected by the voting members of the organization. In this regard, we noted that the organization had two classes of members, denoted here as class A and class B. Class A members were those who had pledged substantial support to the organization by entering into membership subscription agreements with it. Only class A members had the power to vote on organization matters and only class A members had the power to vote for members of the board of trustees.

We were advised that a few class A members were considered to be major underwriters of the organization. These members were strongly represented on the board of trustees.

For the purposes of HRS §84-14(a), an employment interest is a financial interest as that term is defined in HRS §84-3(6)(C). Further, the Commission had often noted that an employment interest was generally a substantial financial interest to the individual employee. Therefore, pursuant to HRS §84-14(a), the new member might not take official action directly affecting his employer or employers. While we recognized that he was employed by the organization and that the organization in and of itself did not possess interests that would bring it before the board, we believed that a reasonable analysis of this employment situation required that we look beyond the organization to its primary support. It was our view that the class A members were the actual employers. These members dominated the board of trustees, elected its members, and were the only members that voted on organization matters. The board of trustees had the power to hire and fire staff members, to effect changes in salary, and to establish the guidelines that governed the relationship between the organization and its employees. Accordingly, it was our view that the new member should abstain from taking action on appeals brought in the name of those few class A members that were the major underwriters of the organization. We did not believe, however, that HRS §84-14(a) could apply to class A members of the board of trustees who were not associated with these major underwriters. We also emphasized that this restriction did not apply to the individual interests of employees of these class A members but only to appeals concerning interests held by the class A members themselves.

We also brought the language of HRS §84-13 to the new member's attention. That section prohibits an employee from using or attempting to use official position to secure or grant unwarranted privileges, exemptions, advantages, or treatment, for himself or others. Accordingly, while the conflicts section of the code would not apply to certain members of the board of trustees, as we had noted above, the new member had nevertheless to be careful to avoid granting any unfair treatment to members he was associated with by virtue of his employment with the organization. This advice applied to class A and all other members. Whether he should voluntarily

abstain from taking action affecting those members of the organization with whom he had a close relationship was a matter to be determined by the new member and the board in each individual case.

In addition, because he might have access to confidential information as a member of the board, we advised the new member that he should also be careful, pursuant to HRS §84-12, that he not disclose such information to members or employees of the organization.

We commended the board for its concern for ethics in government and for seeking the advice of the Commission at an early time.

Dated: Honolulu, Hawaii, October 5, 1976.

STATE ETHICS COMMISSION
Paul C.T. Loo, Vice Chairman
Dorothy K. Ching, Commissioner
I.B. Peterson, Commissioner

Note: Chairman Audrey P. Bliss disqualified herself from consideration and preparation of this opinion. Commissioner Gary B.K.T. Lee was excused from the meeting at which this opinion was considered.