

OPINION NO. 348

We received a request for an opinion from the executive secretary of a state board that had jurisdiction over a certain program for state employees. The program was actually administered by private businesses that charged a set fee, established by the board, to the employees requesting the service.

At the direction of the board, the executive secretary surveyed these businesses to determine the actual cost of providing these services. As a result of the survey, the board was to consider raising the fee. As three members of the board had interests in businesses that would be affected by a change in the fee the board members had directed him to request the Commission to determine the application of the ethics code to their participation in this matter.

The applicable section of the code was HRS §84-14(a) *as amended by Act 245*, effective June 20, 1978. That section states:

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 particular qualifications.

A member of the board was an employee for purposes of the ethics code. (See HRS §84-3(4).) Further, official action is defined as "a decision, recommendation, approval, disapproval, or other action, including inaction which involves the use of discretionary authority." (HRS §84-3(7)) Then, a financial interest is defined to include a "directorship or officership in a business." (HRS §84-3(6)(F)) And, we had in the past found that an officership or directorship in a business is a substantial financial interest because of the fiduciary duties involved. (Opinion No. 300) Therefore, these three members were advised that they might not participate in any action by the board which directly affected the businesses in which they held substantial financial interests unless they should fall within the applicable exception to the conflicts section.

The exception enacted by the Legislature, which is cited above, codified Commission Opinion No. 163. In that opinion we had determined that when the Legislature, in establishing certain boards and commissions, mandated that certain members should represent certain interest groups it made no sense to thwart that objective by requiring these expert members to abstain from taking official action affecting the businesses in which they held their interests. The Commission held that no violation of HRS §84-14(a), as it then read, would be found if the expert member were to abstain from taking action directly and *specifically* affecting his or her mandated interest.

In enacting the exception to the conflicts section, the Legislature noted in conference committee report no. 56-78:

Another purpose of this bill is to limit the application of Section 84-14, Hawaii Revised Statutes, the conflicts of interest provision, as it affects those members of boards and commissions who are appointed as experts. While these members will continue to be restricted from taking action that specifically affects their business interests they will be permitted to take action that generally affects the particular field they have been asked to represent.

It was the Commission's view, therefore, that, in adopting this amendment to HRS §84-14(a), the Legislature had adopted our interpretation of this section as expressed in Opinion No. 163.

The statute which established the board and its composition mandated that one member be appointed to represent a particular business interest.

This individual is the "person whose position on the board ... is mandated by statute ... to have particular qualifications." While the statute did not prohibit the appointment of more than one person with such qualifications, only one such person was mandated to have this expertise. Therefore, that person alone would qualify for the exception to the conflicts section.

The records sent to us from the Governor's office indicated that member A had been appointed as the expert to represent this business interest on the board. Therefore, the statute permitted him to participate in any board action that did not directly and *specifically* affect his business. Because a change in the fee would not specifically affect his business as opposed to all other participating businesses he was permitted to participate in the discussion on this issue and to vote on any motion to alter the fee. In addition, he was permitted to participate in any other actions of the board which affected these businesses generally. He was required to abstain only when his business was affected specifically.

Member B was also a non-state employee, appointed by the Governor, and also held an interest in one of the businesses that provided services to state employees. However, he had not been appointed to fill the position mandated by the statute. Therefore, HRS §84-14(a)(1) applied to him without exception and prohibited him from taking part in any action which directly affected his business. Since this business participated in the benefits program, any action concerning the fee directly affected the business. Therefore, member B was not permitted to participate in any board action on this matter.

Member C, an elected member of the board, was required to be a government employee. He also had an interest in a business that provided these services to employees, as a director, and was therefore governed by HRS §84-14(a)(1). Accordingly, he was required to abstain from taking action which directly affected the business. As this business also participated in the program, any action concerning the fee directly affected this business. Therefore, member C was also advised that he might not participate in board action concerning the fee.

Members B and C were not permitted to take action which directly affected the businesses in which they held their directorship and officership positions.

We emphasized that official action included not only voting but all discretionary action. Therefore, a person who was required to abstain from taking action might not participate in the discussion concerning such action.

We appreciated the board's concern for adhering to the code in this matter and for requesting this timely opinion.

Dated: Honolulu, Hawaii, August 21, 1978.

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

Note: Commissioner Dorothy K. Ching disqualified herself from consideration and preparation of this opinion. Commissioner Audrey P. Bliss was excused from the meeting at which this opinion was considered.