

OPINION NO. 397

We received a request for an advisory opinion from a member of a state board. He was also a member and the vice president of an organization that had as its purpose the stimulation of interest in the area regulated by the board. The board was to consider an appeal in the form of a contested case hearing from a decision that affected a particular piece of private property. The organization had presented testimony at the contested case hearing, though it was not a party in the matter. Because he was both a member of the state board and the private organization, he had asked the Commission to determine if these two positions created a conflict of interest that would prohibit him from participating in the decision affecting this property.

The board was established pursuant to state statute to meet the requirements of federal law. The board was responsible for making decisions that affected a particular kind of property in the State.

The requester of the opinion had been a member of the board since 1978 and had been associated with the private organization from its beginnings. He had been a member of its board since the organization was established.

There were two provisions of the code which were of particular relevance to the question he had raised. The fair treatment section, HRS §84-13, and the conflicts of interests section, HRS §84-14(a), provide, in part, as follows:

HRS §84-13. No legislator or employee shall use or attempt to use official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for himself or others

HRS §84-14(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.

We first reviewed the application of the conflicts of interests section and then discussed the fair treatment section. In considering the conflicts question, we noted first that, as a member of a state board established pursuant to state statute, he was an employee for the purposes of the ethics code and subject to all of the provisions of chapter 84. Further, there could be little question but that in his position as a board member he did take official action. Official action was defined by statute to mean a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority. Then, his officership interest in the private organization, while it was not compensated, constituted a substantial financial interest for the purposes of the ethics code. HRS §84-3(6)(F) established directorships and officerships to be financial interests. This Commission had on a number of occasions ruled that an officership in an organization, because of the fiduciary responsibility that goes along with such a position, also constitutes a substantial financial interest.

The critical question then, in the application of the conflicts section, was whether decisions he would make as a board member would directly affect the private organization. It was our ruling that there would be no such effect. Board action in this and other matters directly affected the owners of the property involved in the decisions. Accordingly, in this particular case, it was the owners of the property that were directly affected by the decision. While the organization might be a very interested party, the fate of that organization would not be directly affected by the decision the board would make. The organization was interested in many pieces of property in the State and

was not established solely to present arguments in the particular matter then before the board. Any effect that the decision might have upon the organization would be indirect at best. Accordingly, we ruled that, should he proceed to vote on the matter as a board member, his action would not be in violation of the conflicts of interests section.

We stated that the fair treatment section essentially provides that one may not use the powers of state office to grant an unwarranted advantage to him or herself or others. No financial gain by the state official need be identified in order to find a violation of this section, but an advantage of an unwarranted nature did have to be shown.

We found no such unwarranted advantage here. As we had indicated in our discussion of the conflicts of interests section, the organization had no financial stake in nor was its existence in any way dependent upon the decisions to be made in the matter of this particular property. Certainly, if a decision was made that was consistent with the position the organization had taken, it might receive plaudits from persons sympathetic with its goals and purposes. But this was not the kind of advantage that the legislature had anticipated prohibiting when this provision was enacted, and this was borne out by the four paragraphs to the section which identified examples of what was considered to be improper use of state position. These included seeking employment or contracts for services; accepting additional compensation for state duty; using state time in pursuit of private business purposes; and engaging in substantial financial transactions with persons one supervises. No like advantage was to be found in this case.

In addition, we noted that he had not participated in the organization's discussions or decisions concerning the role it would play in the matter. And, further, it was consistent with the federal legislation in this area, and with the state statute as well, for persons sitting on the board to have a particular interest in the kind of properties that were subject to the board's jurisdiction. If there would be a tendency on his part to favor a point of view, it appeared that such a view would come more from his professional background than from his relationship with the organization. Accordingly, it was our opinion that his participation in this matter would not constitute an unwarranted advantage or an improper use of position with respect to the organization.

As to other cases which might arise in the future that would be of a similar nature, we stated that he should not take action which would directly affect or unfairly advantage the organization. However, it was our view that such violations would only occur where the organization had an identifiable financial stake in a case to be decided by the board. We advised him that if such circumstances arose, he should abstain from participating as a board member on such matters.

We commended him and the chairman of the board for bringing this matter to our attention.

Dated: Honolulu, Hawaii, November 16, 1979.

STATE ETHICS COMMISSION
Gary B.K.T. Lee, Chairman
Edith K. Kleinjans, Commissioner
Robert N. Mitcham, Commissioner

Note: Vice Chairman Paul C.T. Loo was excused from the meeting at which this opinion was considered. Commissioner Dorothy K. Ching disqualified herself from consideration of this opinion.