OPINION NO. 484

The chairperson of an elected state board requested an advisory opinion regarding the possibility of conflicts of interest arising by the participation of another board member, who was also the head of a private institution. The board, pursuant to a department rule, sets standards and regulations for a group of private institutions operating in the State of Hawaii. At the time of the request, the board had been discussing its authority to license the private institutions that wished to operate in the State. At one of the board's meetings last year, the head of the department had recommended that the board continue to require the private institutions to be licensed by the department. After the department head's presentation, the board member had moved that the board allow a member of the private institution group to present his argument for the discontinuation of licensing of the private institutions. This motion did not carry; nevertheless, there had been an inquiry as to whether the board member's motion raised a conflicts-of-interests question. In addition, the chairperson and the board member had requested guidelines on appropriate action regarding potential conflicts of interest.

The board member appeared before the Commission to present his view of the situation. He shared his thoughts about the board's functions, responsibilities, and decision-making process. When speaking about his participation in past board decisions, the board member emphasized that his primary responsibility was to set policies and guidelines for the state institutions that were administered by the department. The board member also stated that he felt that some members of his constituency expected him to represent their views regarding the board's policy governing private institutions. When the perspectives had conflicted, the board member explained that he had carefully pondered the effects on both sides and, at times, he had felt compelled to disqualify himself.

The relevant section of the ethics code was HRS §84-14(a), which states in part:

> (a) 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.

The conflicts-of-interests section governs the relationship between governmental interests and private financial interests. The section does not apply to conflicts that simply arise from a difference in viewpoints. A conflict of interests, therefore, exists only when a particular perspective is coupled with a financial interest as set out in the State Ethics Code; the mere

holding of a particular opinion is not sufficient. The board member was employed as the head of a private institution, and, pursuant to HRS §84-3(6)(B), his employment was included as a financial interest. Further, the Commission, in past opinions, had determined that an employment interest was a substantial financial interest for purposes of the ethics code. Finally, the Commission noted that "official action" means a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority. Accordingly, the Commission determined that the board member would be prohibited from participating in any board decision that directly affected the private institution.

The scope of the prohibition presented the Commission with a difficult question: whether action affecting all private institutions was action that directly affected the particular institution the board member worked for. In coming to its decision, the Commission noted that the conflicts-of-interests section also contains an exemption to the disqualification requirement for board members whose positions are mandated by statute, resolution, or executive order to have particular qualifications. These members represent particular perspectives, professions, or industry groups on state boards. Because of this representation, these board members only are required to disqualify themselves from taking action that directly and specifically affects their financial interests; they are not required to disqualify themselves from taking action that generally affects their professions or industries. Mandated board members, therefore, are allowed to participate in discussions and vote on policies or rule-making decisions that affect their professions or industries.

Members of the board were elected to office and there was no mandate in the Constitution of the State of Hawaii or in the statute governing the board for board members to possess any specific qualifications or to represent particular perspectives. As a consequence, the exemption in HRS §84-14(a) did not apply to the board member; and because he was employed by one of the private institutions, he was required to refrain from having any input into decisions pertaining to the rule governing the private institutions or other board actions that affected the private institutions.

Before coming to this conclusion, the Commission first considered whether this board could be set apart from other state boards. The Commission recognized that the board members were not appointed but were elected to office. Because they were elected, the Commission compared the positions of the board members to those of legislators. The Commission noted that, like legislators, the board members were elected to represent particular constituencies. The Commission, however, found the positions of legislators and these board members to be different. The board was not a legislative body; instead, the board served as a policy-making body in the same fashion as any of the other state boards. Accordingly, the Commission found that the standards set for state board members should apply to the members of this board.

In our opinion, an exemption could not be made unless there was a statutory amendment to include particular qualifications for the board members. The Commission wished to emphasize that we found no evidence of any kind that the board member had used

his position to advantage any groups in an inappropriate way. On the contrary, we were impressed by the sensitivity exhibited by the board member to the ethical issues presented.

The Commission wished to express its appreciation to the board member for his candid presentation. We commended both the chairperson and the board member for the concern they had shown to the ethical issues involved in this matter.

Dated: Honolulu, Hawaii, February 7, 1983.

STATE ETHICS COMMISSION
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