

OPINION NO. 519

The Commission received a request for an advisory opinion from the executive secretary of a state board on the following two questions:

- (1) Whether it would be a violation of the State's ethics code for board members who privately instruct candidates for board licensure or have their own schools offering instruction for board licensure to
 - (a) have access to licensing examination questions;
 - (b) participate in the formulation of licensing examination questions; or
 - (c) administer the licensing examination.

- (2) Whether it would be a violation of the State's ethics code for board members who privately instruct candidates for board licensure or have their own schools offering instruction for board licensure to
 - (a) participate in policy decisions affecting the qualifications of instructors of candidates for board licensure or schools offering instruction for board licensure; or
 - (b) participate in policy decisions affecting education and training requirements of candidates for board licensure.

The sections of the ethics code relevant to the questions the executive secretary raised were HRS §§84-12, 84-13, and 84-14(a), which in pertinent part read as follows:

§84-12 Confidential information. No legislator or employee shall disclose information which by law or practice is not available to the public and which he acquires in the course of his official duties, or use the information for his personal gain or for the benefit of anyone.

§84-13 Fair treatment. No legislator or employee shall use or attempt to use his official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for himself or others; including but not limited to the following

§84-14 Conflict of interests. (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.

....

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 Commission understood that the questions the executive secretary raised involved two board members. Both were among a select number of individuals who had received board certification allowing them to privately instruct candidates for board licensure. One of the board members also operated one of two board-approved schools, which began operations prior to the board member joining the board.

With regard to the first question the executive secretary raised, the Commission determined that HRS §§84-12 and 84-13 would prohibit the two board members from participating in the formulation of examinations or having access to examinations. HRS §84-12 prohibits state employees from disclosing confidential information, such as questions on a licensing examination. The Commission believed that it would be very difficult for instructors to prepare candidates for the licensing examination while at the same time not at least inadvertently revealing the nature of the examination itself. As the Commission stated in a similar case, Advisory Opinion No. 143:

We understand that he [the state employee] presently does not have access to questions and/or answers on the examinations conducted by his commission. If, as anticipated, he did have access to such information, it would be most difficult, if not impossible, for him to teach his classes without using it in some way. We noted his recognition of the problem in his answer to one of our questions. He stated, "I believe it would be impossible to stay clear away from such questions, as students will probe such questions." (The word "questions" refers to the commission examination questions.)

The Commission determined that participating in the formulation of the licensing examination or having access to it would also be prohibited by HRS §84-13, the fair treatment section of the ethics code, since others could reasonably assume that students of board members familiar with the examination would have an advantage in the instruction they received. Furthermore, candidates for licensure would no doubt seek out instructors who had access to the examination, which would give those instructors a competitive edge in acquiring pupils. The Commission determined that HRS §84-13 would also prohibit board members from administering the examination if this involved grading students or acquiring a knowledge of the contents of the examination.

With respect to the second question the executive secretary raised, the Commission determined that HRS §84-14(a) would prohibit board members from participating in policy decisions affecting the qualifications of instructors or schools if the board members privately instructed candidates for board licensure or had their own schools offering such instruction. HRS §84-14(a) prohibits board members from taking official action that directly and specifically affects their own businesses. Since the number of instructors and schools was small, the Commission believed that any action the two board members would take involving other instructors or schools would directly and specifically affect their own business interests as instructors. The Commission determined that HRS §84-14(a) would also prohibit the board members from participating in policy decisions affecting education and training requirements for licensure candidates. Again, the Commission concluded that any action the board members would take in this area would directly and specifically affect their occupations as instructors. The Commission believed, however, that the board members could provide the board with information they acquired at seminars or conferences relating to the education or training of candidates, so long as they did not participate in policy discussions or decisions concerning the modification of education or training requirements.

In accordance with section 21-4-2(c), State Ethics Commission Rules, copies of this advisory opinion were forwarded to the two board members. Section 21-4-2(c) provides that a copy of an advisory opinion rendered by the Commission will be sent to a state employee who was involved in, but did not request, the advisory opinion.

The Commission commended the executive secretary for bringing this matter to its attention and told him that it appreciated his sensitivity to the ethical considerations discussed above.

Dated: Honolulu, Hawaii, December 30, 1983.

STATE ETHICS COMMISSION
Edith K. Kleinjans, Chairperson
Allen K. Hoe, Vice Chairperson
Mildred D. Kosaki, Commissioner

Note: Commissioners Gary B.K.T. Lee and Arnold J. Magid were excused from the meeting at which this opinion was considered.