

OPINION NO. 534

A member of a state board requested an advisory opinion from this Commission on a possible conflicts-of-interests situation. He had explained that he was a partner in a business that was interested in developing a project with the board's agency. Because the project had to be approved by the board and would also require its support, the board member wished to know the application of the State Ethics Code to his situation.

Because the Commission was aware that the statute governing the agency allowed an exemption from the competitive bid laws when selecting its partners or contracting for any services or materials for its purposes, the Commission found it necessary to review the agency's procedures and decision-making process before answering the specific question the board member had posed. Given that circumstance, the Commission believed that serious ethical problems might arise if the board approved a project proposed by a business that included one of its own members as a partner. Therefore, in addition to participating in extensive discussions with the Commission's staff, the executive director of the agency and the deputy attorney general who advised the agency met with the Commission to discuss the agency's policies and procedures. The Commission was told that the existence of the agency and the services it provided were well-known throughout the community. Further, as a matter of practice, anyone who expressed interest in working with the agency was given an application and copies of the agency's statute and rules. The executive director stated that the criteria for a qualified applicant and a qualified project were specifically laid out in the agency's statutes and rules. He also outlined the steps followed by the agency's staff from receipt of a project application to final disapproval or approval by the board, emphasizing that whenever possible, the staff assisted the applicant in correcting deficiencies. After reviewing the agency's statute, rules, and the comments made by the executive director and the deputy attorney general, the Commission determined that the procedure followed by the agency in approving a project was an open, public process.

The board member had asked whether he would be permitted under the ethics law to participate in a proposed project as a partner. The most applicable section of the code was HRS §84-14(a), which prohibits employees from taking official action directly affecting a business in which they have a substantial financial interest. The board member was included in the definition of "employee" for purposes of the ethics code, and his partnership interest was considered a substantial financial interest. Accordingly, he was told that he must disqualify himself from all participation in any decisions by the agency directly affecting the partnership. The Commission noted that this disqualification included refraining from any discretionary input into the decision-making process. For example, the board member was told that he was prohibited not only from voting in these matters but also from taking part in any preliminary discussions with his fellow board members or contacting staff members about the project.

The Commission also stated that in the event that the partnership should submit a proposal to the agency, the ethics code would not only prohibit the board member from participating in the matter in his state capacity but also would prohibit him from assisting the

private organization with its proposal, in accordance with HRS §84-14(d). This section states as follows:

No legislator or employee shall assist any person or business or act in a representative capacity for a fee or other compensation to secure passage of a bill or to obtain a contract, claim, or other transaction or proposal in which he has participated or will participate as a legislator or employee, nor shall he assist any person or business or act in a representative capacity for a fee or other compensation on such bill, contract, claim, or other transaction or proposal before the legislature or agency of which he is an employee or legislator.

Consequently, the Commission determined that the board member was prohibited from assisting the partnership or any other private organization that required discretionary action by the agency.

Because the Commission concluded that the partnership could submit a proposal to the agency so long as the board member did not participate in the matter as a board member or in his private capacity, the Commission wished to draw the board member's attention to two other sections of the ethics code. The Commission noted that the first, HRS §84-12, would prohibit the board member from disclosing to his partners or business associates any information which by law or by practice was not available to the public. Second, HRS §84-13, the fair treatment section, would prohibit the board member from using his position to secure unwarranted privileges or treatment for the partnership. The Commission stated that it had seen no evidence of any kind that the board member had used his position to intentionally give an advantage to his private interests in an inappropriate way.

The Commission also was aware that a new limited partnership might be formed if the proposal was approved by the agency. As the Commission understood it, the partners would consist of the original partnership members except that the board member would serve as a limited partner, not a general partner. The board member and the deputy attorney general had stated that the new limited partnership had been proposed to alleviate the possibility of further ethical questions being raised. As a limited partner, the board member would clearly be an investor in the project but would not participate in the management or in any decisions made by the new limited partnership concerning the project. Because this limited partnership would be a new financial interest of the board members, the Commission found that HRS §84-14(b) was applicable. This section of the code prohibits employees and non-mandated board and commission members from acquiring financial interests that may place them in a position of conflict. The statute governing the agency did not call for mandated board members, that is, members who possessed particular skills or qualifications related to the agency's work. The Commission understood, however, that it was not necessary for a limited partnership to be formed and that there were no barriers to the original partnership itself proceeding with the proposal. In light of this, the Commission recognized that the formation of the new limited partnership in which the board member's participation was limited to that of an investor was not a prohibited acquisition but a demonstration of the board member's intention to remove himself from any input or assistance in the management of the proposed project in his private capacity as required by HRS §84-14(d). The Commission understood that the board member

and the deputy attorney general believed that the new arrangement would diminish the possibility of others later raising questions of unfair influence.

The Commission emphasized that the sensitivity displayed by the executive director to the ethical issues in this matter played a large part in the Commission's decision to allow the board member to participate as a partner in the proposed project. In the Commission's view, when a state agency takes significant discretionary action affecting one of its own board members private financial interests, it is extremely difficult for the agency to diminish the negative effect of public criticism and the loss of credibility that may occur. The Commission noted that it was the Commission's responsibility to preserve public confidence in public servants and to promote high standards of ethical conduct in state government; nevertheless, the Commission also recognized that the State Ethics Code did not absolutely prohibit transactions between state agencies and members of their boards. In the Commission's view, the balance between the possible damage to a department's credibility and the benefit to the State and the general public by proceeding with a transaction was an administrative decision that ultimately must be made by the agency. Therefore, while the Commission advised the board member to consider refraining from participating in this project as a partner, limited partner, or in any other capacity, the Commission believed that the board member's participation, following the guidelines of HRS §84-14(a) and HRS §84-14(d), was permissible under the ethics code.

Finally, the Commission appreciated the commitment made by the agency's staff to carefully monitor the situation so that inadvertent violations of the ethics code would not take place and noted that the staff intended to take active steps to preserve the agency's credibility. The Commission commended the board member, the executive director, and the deputy attorney general for candid discussions of this matter and thanked the board member for seeking the advice of the Commission at an early time.

Dated: Honolulu, Hawaii, July 9, 1984.

STATE ETHICS COMMISSION

Allen K. Hoe, Chairperson

Tim S. Farr, Commissioner

Mildred D. Kosaki, Commissioner

Rabbi Arnold J. Magid, Commissioner

Note: Vice Chairperson Edith K. Kleinjans was excused from the meeting at which this opinion was considered.