

OPINION NO. 540

A state board member asked the Commission whether a board member may be a provider of services and concurrently submit proposals to the agency the board advises or is affiliated with. The board member submitted her request for an advisory opinion after she had contacted the Commission's staff by telephone to ask whether she would have to resign her board membership in order to allow her employer to submit a grant-in-aid proposal to the legislature. The board member had been told that she would not have to resign but that two subsections of the conflicts-of-interests section of the State Ethics Code, HRS §84-14(a) and (d), and a portion of the contracts section, HRS §84-15(b), would be applicable.

Because the wording of the board member's request for an advisory opinion differed slightly from her original telephone inquiry, the Commission staff contacted her for clarification. It became clear that the board member's request was in regard to a matter then being considered in the legislature and was not in regard to possible future proposals. In addition, the board member acknowledged that she had been the one who had put together the proposal for the grant-in-aid request and had been responsible for it and all follow-up on behalf of her employer. As a result, the Commission believed it had a responsibility to review the circumstances surrounding the request for funding and the subsequent award of funds to the board member's employer in light of the State Ethics Code.

One of the difficulties the Commission encountered in its review was establishing exactly what had occurred from the time the request for grant-in-aid proposals was issued in midsummer of 1983 to the ultimate designation of funds to the company that employed the board member and the appropriation of funds for additional services at the end of the 1984 legislative session. As the Commission understood it, letters were sent to all previous applicants for fee-for-services contracts, and the board member's employer was one of the organizations solicited. In her private capacity, the board member had written and submitted a proposal in response to the request for proposals. This proposal had been based in part on previous submittals to the State. It was not clear to the Commission whether these proposals had been transmitted to the agency to which the board was attached for consideration in a possible supplemental appropriation request or if there had been a separate submission. In any case, because the agency had decided it would not submit a supplemental budget request, none of the proposals was reviewed by the agency at that time. Thereafter, the proposals were transmitted to the legislature upon the request of the legislative committee chairmen, who in turn asked the agency to review the proposals and make recommendations. So that its recommendations would be based on identical information in regard to all of the proposals, the agency sent out questionnaires and had a panel consisting of its staff members and county staff members interview the applicants. There were two proposals presented to provide similar services, one submitted by the board member's employer and the other by another private organization. The board member represented her employer at the panel interview, answering questions in a session that lasted approximately a half hour. Thereafter, the agency recommended to the legislature that both proposals be funded in full.

The Commission believed that it was around this time that questions about the board member's possible conflict of interest were raised by others. Not only had the board member been listed as the contact person for her employer in the proposal, but she also had continued

to perform her responsibilities as chairman of the board. For example, the board member and the staff of the agency had met with the chairmen of the legislative subject matter committees to discuss the agency's legislative priorities, the board member had presented testimony in support of the bill related to the kind of services her employer provided, and the board member had had at least one private discussion on those kinds of services with the chairman of the senate subject matter committee. In addition, the board member had attended about eighty percent of the board's legislative subcommittee meetings, which were held once a week during the legislative session. The Commission also had received some comments from governmental staff members that the board member had lobbied heavily in her private capacity in favor of her employer's proposal. The Commission, however, was unable to verify this and therefore accepted the board member's statement that most of her lobbying efforts had been on behalf of the board.

The Commission noted that the funds for fee-for-service contracts to provide services on Oahu had been appropriated in an unusual manner. Because of executive spending limits, the agency had decided not to submit a request for supplemental appropriations in its budget, and the agency did not include any figures for proposed projects. Additionally, bills regarding these grant-in-aid proposals were not introduced in the legislature, and consequently no hearings were held on the proposals. Nevertheless, the legislature chose to appropriate, as a part of the agency's budget, almost \$30,000 of a \$35,000 proposal made by another private organization and \$25,000 to the board member's employer from its proposal of almost \$60,000. Thereafter, another \$25,000 for services was appropriated in another bill. Although this amount was not specifically designated for the board member's employer in the bill or the committee reports, the board member and the agency's staff initially believed that this \$25,000 also had been intended for that organization. The Commission understood that the disbursement of funds appropriated by the second bill had been reviewed by the Office of the Attorney General, and a preliminary determination had been made that a contract to provide the additional services would have to be awarded through a competitive bid process.

After reviewing the situation, the Commission determined that the most applicable section of the code was HRS §84-14(d), a portion of the conflicts-of-interests section, which states in part as follows:

(d) No ... employee shall ... assist any person or business or act in a representative capacity for a fee or other compensation on ... [a] bill, contract, claim, or other transaction or proposal before the ... agency of which he is an employee

"Employee" includes members of boards and commissions, pursuant to HRS §84-3(4). In the Commission's opinion, the board member violated this subsection by preparing her employer's proposal and appearing before the agency's review panel. The Commission considered the view proposed by the board member's attorney that the agency and the board were two separate entities, and therefore the board member could not have been in violation of this section. The Commission believed, however, that the perspective presented to the Commission by the executive director of the agency was a more accurate reflection of the relationship between the agency and the board, namely, a close, supportive relationship, with

the agency taking overall responsibility for implementation of projects and with the board proposing policy and priorities.

The Commission noted that this view was widespread and had been vocalized by others interviewed by the Commission staff. The Commission believed that this impression was based on a number of factors. First, the Commission had been told that both the agency and the board were part of the same chapter in the Hawaii Revised Statutes and that the board was mandated to advise the director of the agency in a number of areas. Second, the board did not have its own staff but relied completely upon the agency's staff to provide all support services. Third, the Commission noted that there were no formal transmittals between the board and the agency but that the communication flowed smoothly because the agency's staff was also the board's staff. In addition, the Commission had been told that the executive director and other agency staff members always attended the board meetings. Finally, the Commission noted that the staff support extended not only to the board meetings but also to assistance at the board's subcommittee meetings and the drafting of testimony for the board. Accordingly, the Commission did not believe that the agency and the board could reasonably be considered two separate entities under the ethics code. In making this determination, the Commission was cognizant of its statutory mandate to liberally construe the ethics code to promote high standards of ethical conduct in state government. The board member's attorney also had suggested that the Commission recognize the board member's participation in a structured interview on her employer's proposal before the panel as involving ministerial, not discretionary, action. The Commission noted, however, that HRS §84-14(d) does not refer to discretionary action but simply prohibits representation for compensation before one's own agency. Furthermore, the Commission believed that the board member had been seeking a recommendation from the panel, and the Commission accordingly concluded that HRS §84-14(d) had been transgressed.

The Commission also considered the application of HRS §84-12, HRS §84-14(a), the first portion of HRS §84-14(d), and HRS §84-13 to the board member's situation but found no further violations. The Commission did comment, however, on the application of the fair treatment section, HRS §84-13. The Commission noted that this section prohibits employees from using or attempting to use their official positions to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for themselves or others. Although the Commission did not believe that the board member had acted deliberately to acquire any unfair advantage or treatment for herself or her employer, in the Commission's opinion, the board member's delay in seeking the Commission's advice once questions of possible conflicts had been raised certainly gave rise to an appearance of impropriety. The Commission commented that the standards of conduct contained in the ethics law had been adopted to promote and ensure public confidence in State government. The Commission noted that when an employee ran afoul of the ethics code, even if the action was inadvertent, it was difficult to rebuild public confidence in that employee or agency.

The Commission was aware that none of the organizations that may have been affected or involved in this situation believed that the board member had deliberately sought to acquire any unfair advantage or treatment for herself or her employer. Nevertheless, the Commission believed that because the board member had been primarily responsible for the

proposal by the company, had assisted the company in putting the proposal together, and had appeared before the panel, the \$25,000 appropriation designated for a fee-for-service contract with the company was tainted. The Commission believed that the additional \$25,000 appropriation in the second legislative bill also was derived from the company's original proposal. Because of the board member's participation on behalf of her employer regarding the proposal, the Commission concluded that a direct award of a fee-for-service contract to the company would be inappropriate. As a consequence, the Commission advised the agency that the \$25,000 appropriation designated for the company in the agency's budget should be subject to a competitive bid process. The Commission noted that the Office of the Attorney General was likely to advise that the second \$25,000 also be awarded through a competitive bid process. The Commission considered, pursuant to HRS §84-15(b), prohibiting the agency from entering into a contract with the company because of the board member's participation. However, because the Commission did not believe that the transgression of the ethics law was deliberate, and any possible unfairness or bias that resulted from the violation of HRS §84-14(d) was likely to be cured by the drafting of independent specifications and a competitive bid process, the Commission did not preclude the company from submitting proposals in response to solicitations for bids. The Commission wished to emphasize, however, that if the board member's employer decided to submit a proposal in response to solicitations for bids, the board member would not be able to participate in any way nor assist the company in its proposals. Conversely, the board member would not be able to participate in any review or discussion by the agency or the board regarding the specifications for the contract or the review of the proposals. The Commission emphasized that this restriction on the board member's participation, in both her private and state capacities, applied not only to these two contractual matters, but also to any future proposals, contracts, or other discretionary action that might be sought by the company that might involve her agency.

The Commission brought to the board member's attention HRS §84-14(a), which prohibits employees from taking any official action directly affecting a business or other undertaking in which they have a substantial financial interest or a private undertaking in which they are engaged as legal counsel, advisor, consultant, representative, or other agency capacity. "Official action," as defined in HRS §84-3(7), means a decision, recommendation, approval, disapproval, or any other action, including inaction, which involves the use of discretionary authority. Accordingly, the Commission cautioned the board member to disqualify herself from taking any discretionary action that might directly affect her employer or its competitors. The Commission also noted that HRS §84-12, the confidential information section, precludes employees from disclosing information which by law or practice is not available to the public. Finally, the Commission wished to bring the board member's attention again to HRS §84-13, the fair treatment section. The Commission recognized that if the board member continued in her position as chairman of the board, or simply as a member of the board, and her employer continued to seek funds or other discretionary action from the State, the board member might be faced with other difficult situations. Accordingly, the Commission urged the board member to seek its advice at an early time.

The Commission also determined that copies of this advisory opinion should be forwarded to the board member's attorney, the executive director of the agency, and the Office of the Attorney General.

Dated: Honolulu, Hawaii, September 11, 1984.

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