

ADVISORY OPINION NO. 547

The chairman of a state board requested the advice of the Commission on whether he would be permitted, under the State Ethics Code, to participate in action to be taken by the board on a petition before the board. The question of the propriety of the board member's participation was first raised by the petitioner's attorney, and, consequently, the board member wished to know whether he was required to disqualify himself from taking action on this petition and on similar ones in the future.

The applicable section of the ethics code was HRS §84-14(a), which states as follows:

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 department head who is unable to disqualify himself on any matter described in items (1) and (2) above will not be in violation of this subsection if he has complied with the disclosure requirements of section 84-17; and

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.

HRS §84-3(4) includes members of boards and commissions in the definition of employee. "Official action" means a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority. The Commission stated that the conflicts-of-interests section required the board member to disqualify himself from taking any discretionary action that directly affected his private business interests. Accordingly, the Commission affirmed that as a partner in a law firm, the board member could not take action as a member of the board that directly affected the law firm or its clients.

In this particular instance, the Commission considered whether action the board took with respect to the petition would directly affect one of the board member's law firm's clients. The board member noted that a representative of the law firm's client would testify at the public hearing to be held on the petition. Additionally, the board member stated that while other entities had filed petitions to intervene as parties to the proceeding, the client had not. Furthermore, the board member had commented that there would be a number of other intervening steps that the petitioner would have to take before the project would be

completed. For example, the board member mentioned that local, federal, and other department approvals would have to be received before the project could begin. Finally, in the board member's view, the impact of the decision made by the board on the petition was speculative and indirect.

The Commission concluded that it did not believe that the conflicts-of-interests section of the ethics law would prohibit the board member from participating in the board's review of the petition. The Commission based its decision on a number of factors. First, the client was not a party nor had it petitioned to become an intervenor in the action. Second, if the board approved the petition, the approval would be only one of a number of other steps that would be required before the project could be initiated. Third, the Commission had not received information on any effect of the board's action on the client and believed that any effect on the client would be indirect and speculative. Accordingly, the Commission concluded that the board member would be permitted to participate in the consideration of the petition under the ethics code. The Commission stated that the application of the law would be the same if similar situations should arise in the future but advised the board member to contact the Commission to confirm its advice in those instances.

The Commission commended the board member for bringing this matter to the attention of the Commission for its review.

Dated: Honolulu, Hawaii, January 9, 1985.

STATE ETHICS COMMISSION
Allen K. Hoe, Chairperson
Edith K. Kleinjans, Vice Chairperson
Tim S. Farr, Commissioner

DISSENT

I agreed with my fellow Commissioners that favorable action by the board on the petition might be viewed as merely one step of many that must be taken before the project is completed. Nevertheless, it was my view that while approval of the petition by the board might only be the first step in the process. In the event that the board denied the petition, the project would end altogether, and I believed that this would directly and favorably affect the client, which conducted a significant amount of business in the area. I believed this factor was significant enough to warrant a different conclusion by the Commission. Thus, I respectfully dissented from the opinion by the majority.

Dated: Honolulu, Hawaii, January 9, 1985.

Rabbi Arnold J. Magid, Commissioner

Note: There was a vacancy on the Commission.