

## ADVISORY OPINION NO. 565

A member of a state council and a state service area board requested an advisory opinion on the application of the State Ethics Code to him because he served in a variety of capacities with private nonprofit organizations that had contracts with a state department and dealt with other agencies of the state government. The board member stated that the role of the council was to advise a department on the allocation of resources and on statewide needs and programs and to review and comment on the state plan. The board member stated that the role of the various service area boards was to advise the state centers serving specific geographical areas on public and industry perspectives. The Commission reviewed the board member's situation and noted that a number of sections of the ethics code might be relevant: HRS §84-14(a) and HRS §84-14(d), portions of the conflicts-of-interests section; HRS §84-15(a), the contracts section; and HRS §84-18 and HRS §84-15(b), the post-employment sections.

The Commission first considered the application of HRS §84-14(a), which states in part:

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 confirmed that this subsection requires employees (board and commission members are included as employees under the ethics law) to disqualify themselves from taking official action in matters that directly affect their substantial financial interests. Additionally, the Commission stated that "official action" means a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority. The Commission also noted that for purposes of the ethics code, the Commission had determined that an employment interest, an officership, and membership on the board of directors of a private organization by an employee, employee's spouse, or employee's dependent child are substantial financial interests. Finally, the Commission noted that there is a limited exception for mandated board and commission members, individuals who serve because of their particular qualifications; mandated board members are required to refrain from participating on matters only if the action of the board may directly and specifically affect their substantial interests.

The Commission concluded that because the board member served as an industry member of the council, the limited exception for mandated board members applied. Accordingly, while the board member could participate in matters of policy and give general advice to the department or to his area center, he had to disqualify himself from taking discretionary action that directly and specifically affected any of his substantial financial interests. In the board member's opinion, the private organization that he worked for was unlikely to be involved in his state responsibilities. It was possible, however, that the council and the area center might consider matters that would affect another organization that he served as a board member. The Commission stated that if this should occur, the board member would be required to refrain not only from voting and participating in a final decision by either the council or the area board but also from participating in any discussions on the matter. The Commission recognized that because the council was newly formed, the line between general policy issues and specific matters was not yet clear. The Commission believed, however, that once the work of the council got underway, discussions by the council, with the department's staff and perhaps this Commission's staff, on the differentiation between general policy and specific matters would clarify the situation.

The board member had expressed some concern that his membership on the council might jeopardize or limit the agencies he was associated with in their relationships with the State. The Commission commented that the ethics law does not prohibit contracts between the State and organizations that state board members are associated with in their private capacities but that it does set out guidelines to ensure fairness in the contract award process. First of all, the Commission noted that if an employee has a controlling interest in a business, HRS §84-15(a) requires a state agency to follow an open, public process if the amount of the contract is more than \$1,000. The Commission emphasized that with respect to board and commission members, this requirement applies only to the department to which the members' boards are attached. For example, the Commission stated that in the board member's case, the restriction would be limited to any contracts between any of his controlling interests and the particular department to which his boards were attached. In Advisory Opinion No. 267, the Commission had concluded that serving as the executive director of a nonprofit organization is a controlling interest because such an individual is charged with the overall operation of the business. Consequently, the Commission advised that the department would have to follow an open, public process before entering into a contract for services with the private organization that employed the board member.

The Commission stated that a second restriction was set out in HRS §84-14(d), which states:

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.

In the Commission's view, council and service area board members were precluded by this section from accepting compensation for seeking or assisting another individual or organization in seeking action from the department. Thus, board members who were employed by organizations that had contractual agreements with the department to provide goods or services could not assist or participate at all in these matters. In the board member's case, he would be unable to seek action on behalf of his employing organization or to assist it in any matter involving the department. However, because the board member received no compensation as a board member of a different organization or as a member of other organizations, the Commission determined that HRS §84-14(d) would not restrict his interaction with the department on behalf of those organizations.

The board member had indicated that as the executive director of a private organization, he had played and would be required to continue to play an active role in securing purchase-of-service contracts with the department. The board member stated that he thought he would have to resign from the council and the area board if he believed after receiving the Commission's opinion that the ethical restrictions would not permit him to carry out his responsibilities with the private organization. The Commission told the board member that if he should resign his state board positions, the post-employment sections of the ethics law, HRS §84-18, which restricts a former board member from seeking action from the department or subdivision with which the board member served, and HRS §84-15(b), which prohibits a state agency from entering into a contract with any person or business which is represented or assisted personally in the matter by a person who had been an employee of the agency within the preceding two years and who participated while in state service on the matter with which the contract is directly concerned, would apply to him. The board member represented that the work of the private organization did not fall within the jurisdiction of the council or the area board and that contracts had not been considered by either board; accordingly, in the Commission's opinion, the board member would not be curtailed by the post-employment restrictions.

Because of the widespread concern expressed by other members of the council and service area boards, the Commission determined that copies of this opinion should be transmitted to the department's director and to a division chief for their information.

The Commission commended the board member for seeking its advice at an early time and appreciated his expressed interest in promoting ethics in state government.

Dated: Honolulu, Hawaii, October 9, 1985.

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

Note: Commissioner Laurie A. Loomis was excused from the meeting at which this opinion was considered.