

INFORMAL ADVISORY OPINION NO. 2007-1

The Hawaii State Ethics Commission (“Commission”) received a sworn charge filed against a legislator (“legislator A”) by a fellow legislator alleging that legislator A had violated Hawaii Revised Statutes (“HRS”) section 84-13, the “Fair treatment” section of the State Ethics Code. The State Ethics Code is set forth in chapter 84, HRS. HRS section 84-13 prohibits state legislators and state employees from using, or attempting to use, their state positions to grant to themselves or to others any “unwarranted privileges, exemptions, advantages, contracts, or treatment” HRS section 84-13 reads, in its entirety, as follows:

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

- (1) Seeking other employment or contract for services for oneself by the use or attempted use of the legislator's or employee's office or position.
- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of the legislator's or employee's official duties or responsibilities except as provided by law.
- (3) Using state time, equipment or other facilities for private business purposes.
- (4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom the legislator or employee inspects or supervises in the legislator's or employee's official capacity.

Nothing herein shall be construed to prohibit a legislator from introducing bills and resolutions, serving on committees or from making statements or taking action in the exercise of the legislator's legislative functions. Every legislator shall file a full and complete public disclosure of the nature and extent of the interest or transaction which the legislator believes may be affected by legislative action.

The charge filed against legislator A alleged that legislator A had violated HRS section 84-13 by using, or attempting to use, his position as a legislator for “potential financial gain” for the “benefit” of his “business associates and himself.”

The charge was based on legislator A’s involvement in proposing to officials of an executive branch department (“Department”) that the officials consider land owned by a company (“company A”) for a land exchange for land owned by the Department. At the time, legislator A was a member of the board of directors of company A, and also had a substantial ownership interest in company A.

One purpose of the proposed land exchange was to provide another company (“company B”) with ownership of land owned by the Department for the purpose of building a facility. If the Department had agreed to the land exchange, company A would have sold land it owned to company B, and then company B would have exchanged the land purchased from company A for the Department’s land, resulting in company B owning the Department’s land. The other purpose of the land exchange was to help pass a bill (“bill”) pending in the Legislature at the time. The bill provided for certain benefits for investors of facilities like the one contemplated by company B. It was understood that without having land at hand for the type of facility envisioned by company B, the bill had little chance of survival. Thus, the land exchange and the bill were, for all intents and purposes, tied together.

At the time that the charge was filed, it was known that legislator A had attended a meeting during the prior legislative session in another legislator’s (“legislator B”) office at the Legislature in order to consider land possibly available for a land exchange. The director of the Department attended this meeting with his deputy. Others present were legislator B and legislator A. A land exchange for certain land owned by the Department was deemed critical at the time in order for the Legislature to pass the bill referred to above, which was facing a critical legislative deadline that made the acquisition of certain land owned by the Department urgent.

At the meeting in legislator B’s office, the conversation first focused on other land that company B and the Department had previously agreed to exchange, but this agreement had been, for all intents and purposes, rescinded by the Department in the summer prior to the legislative session referred to above, due to various problems with the land. At the meeting in legislator B’s legislative office, after the prior-agreed-to land had been discussed and determined not to be an option, legislator A informed those present at the meeting that he had land that might be used for the land exchange. The Department officials present stated that they would give this land consideration, which they did. The land was owned by company A, in which legislator A held a substantial financial interest. After the meeting, legislator A had one of company A’s business partners send a letter and a DVD to the Department discussing the attributes of company A’s land. The date of the letter indicated that the meeting in legislator B’s office occurred on that day or earlier.

When legislator A's personal financial interest in company A became known to legislators later during the legislative session, legislator A contacted the Department and withdrew his proposal of company A's land. Around the same time, legislator A re-committed the bill referred to above to committee, thus in effect "killing" the bill. This action was supported by legislator A's fellow legislators.

In accordance with the State Ethics Code, a copy of the charge was forwarded to legislator A for his response. Legislator A filed a response to the charge with the Commission, denying the allegations in the charge. Legislator A further stated that the last paragraph of HRS section 84-13, which deals with "legislative immunity," was "dispositive" of the charge, and thus the charge was "therefore invalid on its face." Legislator A also contended that the charge was "frivolous," stating that the filer of the charge knew that the charge was frivolous because the filer of the charge had previously acknowledged legislator A's immunity from the application of the State Ethics Code. In legislator A's response, legislator A asserted that the charge was made "in bad faith" and "solely for political purposes." Legislator A stated that it was an "appalling use of state resources" for the filer of the charge to bring a charge that the filer previously "admitted" was baseless. Legislator A asked that the Commission take action "to discourage further abusive political tactics" by the filer of the charge.

A second sworn charge regarding this same matter was filed with the Commission a few months later by two individuals on behalf of an organization. This second charge was essentially the same as the first charge, and legislator A's response to it was essentially the same as his response to the first charge.

After reviewing these two charges and conducting further investigation, the Commission filed its own charge against legislator A. The Commission's charge incorporated by reference the two charges previously filed with the Commission. The Commission's charge set forth four counts: a count alleging a violation of HRS section 84-13; a count alleging a violation of HRS section 84-13(3), and two counts alleging violations of HRS section 84-14(d). Legislator A responded to the Commission's charge with an answer denying that he had violated any of the provisions of the State Ethics Code.

After receiving legislator A's answer to its charge, the Commission conducted further investigation in light of legislator A's answer and concerns about certain facts in this case. The Commission's staff attorneys subpoenaed documents from the Department, and interviewed under oath, before a court reporter, legislator B and officials of the Department.

In accordance with HRS section 84-31(b), the Commission may resolve a charge by issuing an "informal advisory opinion" rather than proceeding to a formal, contested-case hearing. The Commission decided, in this case, to issue an informal advisory opinion to legislator A. The Commission chose this means of resolving this case

because it believed that the primary statute of the State Ethics Code pertaining to this case was HRS section 84-14(d). While the Commission had done education with respect to HRS section 84-14(d), the Commission believed that further education by virtue of this informal advisory opinion was needed. The Commission noted that an informal advisory opinion was not an adjudication of a matter, but an opinion issued by the Commission to explain the application of the State Ethics Code in a particular case.

The Commission believed that HRS section 84-14(d) was pertinent to the case at hand, and was the primary statute applicable to legislator A's situation with respect to the land exchange and the bill relevant to the land exchange. HRS section 84-14(d) reads, in its entirety, as follows:

(d) 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 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. [Emphasis added.]

HRS section 84-14(d) has two restrictions applicable to legislators. The first restriction is that a legislator is prohibited from assisting or representing a person or business for compensation on a matter before the Legislature. The second restriction is that a legislator is prohibited from assisting or representing a person or business for compensation on a matter that the legislator will participate in as a legislator or has participated in as a legislator.

From its inception, governmental ethics has been concerned about legislators and public employees assisting or representing private interests before agencies of the same government that employs them. Restrictions in some jurisdictions have barred all such assistance and representation. Restrictions in other jurisdictions allow for uncompensated assistance or representation, or compensated assistance or representation for certain professions, such as a lawyer-legislator representing clients before a labor department. The evil envisioned by various prohibitions is that legislators and public employees will "peddle" for their own enrichment their "influence," or access to "inside" information, or at least the perception of such will be created. Further, certain persons or businesses would benefit in an unfair way by such assistance or representation based solely on the ability to pay.

HRS section 84-14(d), written by the Hawaii State Legislature pursuant to Article XIV of the Constitution of the State of Hawaii, is, the Commission noted, a sensible restriction for the legislators of our State. Hawaii State legislators in essence cannot be paid to lobby before the Hawaii State Legislature, or to assist or represent for

compensation persons or businesses on specific matters legislators have worked on as legislators, or will work on as legislators.

In the case at hand, it was beyond dispute that legislator A had assisted and represented company A both (1) before the Legislature, and (2) on a matter that legislator A had worked on and would work on as a legislator. The fact that legislators may not have known initially of legislator A's connection to company A was not relevant to the application of HRS section 84-14(d).

In his interview with the Commission's investigator in this case, the head of company B stated that, in either January or February of the legislative session pertinent to this case, legislator A told him that he, legislator A, would propose to the Department that it consider land owned by company A. Had legislator A contacted the staff of the State Ethics Commission for advice at the time, the Commission's staff would have advised legislator A that he could not be involved in the matter, but any other person from company A could make a proposal to the Legislature or to the Department, and provide assistance or representation. This is standard advice that staff of the Commission gives legislators and state employees in these types of situations.

After informing the head of company B that he would make a proposal to the Department regarding land for a land exchange, legislator A met with officials of the Department and legislator B in legislator B's legislative office in the latter part of March during the relevant legislative session. Because it was legislator A's intention to propose company A's land, as legislator A had communicated to the head of company B previously, legislator A's actions at a minimum constituted "assistance" before both the Legislature and the Department, on a legislative matter that legislator A had worked on as a legislator, and would work on as a legislator. The fact that legislator B did not, at the meeting in his office, understand that legislator A had a financial interest in company A, and that legislator A was assisting company A, was not relevant. HRS section 84-14(d) barred assistance, whether anyone at the time knew of legislator A's personal financial interests or not.

Legislator A had expected, according to the head of company B, and in line with common sense, that the Department would get back to legislator A with an answer after legislator A made his proposal to the Department. Further, with respect to the application of HRS section 84-14(d), a letter on official legislative letterhead, dated in late March of the legislative session, was circulated for signature by legislators. This letter asked that the bill referenced in this opinion be given a hearing by either of the the Legislature's finances committees. Legislator A personally asked the filer of the first charge to sign this letter, which she did. Legislator A's request to this legislator constituted assistance before the Legislature. At the time, legislator A's proposal was under consideration by the Department, until the time legislator A withdrew his proposal a few weeks later.

In March of the legislative session prior to the legislative session pertinent to this opinion, the bill referenced in this opinion was heard by two legislative committees in joint session. One of these committees was chaired by legislator B, while legislator A chaired the other committee. Thus, legislator A had heard the bill referenced in this opinion in his capacity as a legislator. Legislator A signed the hearing notice for the joint hearing, as did legislator B. Thus, there was little doubt that legislator A was providing assistance to his company with respect to a specific bill that legislator A had acted on and would act on.

During the legislative session pertinent to this opinion, a finance committee of the Legislature did give the bill relevant to this opinion a hearing, in early April of the legislative session referenced in this opinion, in response to the March legislative letter, which had been signed by approximately 40 legislators, with members from both Houses and both political parties. The head of company B testified at the hearing with respect to the bill, and mentioned company A's land in connection with the land exchange for the Department's land. The head of company B was asked by a legislator at the hearing about company B's business partners or investors, but the head of company B refused to provide this information, on the ground that legislators would then seek out the involved individuals for campaign contributions. The fact that the head of company B testified about company A's land was evidence that use of company A's land was still a possibility, i.e., the Department had not rejected legislator A's proposal. Legislator A's proposal concerning his company's land and the Department only ended when legislator A called the Department around the middle of April of the legislative session relevant to this case and withdrew his proposal.

Legislator A was quoted in a newspaper article, following the withdrawal of his proposal to the Department, that he was not really "serious" about the Department using his company's land as part of the land exchange. However, legislator A's comment in this regard did not square with the head of company B's testimony before a legislative committee about company A's land or legislator A proposing his company's land to the Department in legislator B's office at the Legislature.

With regard to the application of HRS section 84-14(d), the Commission understood that there can be legitimate differences of opinion as to whether legislator A was "compensated" by his company for his assistance for the purposes of HRS section 84-14(d), since the land sale did not occur. Obviously, the payment by an entity to an individual of a fee or other compensation for assistance makes the fact of "compensation" for purposes of HRS section 84-14(d) clear. However, to the Commission's mind, there seemed to be no real distinction as to whether an individual receives compensation in some manner because an individual is part of a company that may receive monies after a sale, or receives, in the alternative, compensation because one is a hired agent or sales person. Though compensation after land is sold may be contingent on the sale of the land itself, the Commission believes that attempting to

effectuate the sale of land is “for” compensation, in that this is a normal mode of compensation in real estate transactions. Otherwise, if legislator A’s assistance was not “for” compensation in regard to his company’s land, legislator A’s attempt to sell land in a case such as this would be barred by HRS section 84-14(c), which states that no legislator “shall assist any person or business or act in a representative capacity before any state or county agency for a contingent compensation in any transaction involving the State.” [Emphasis added.]

Further, with respect to the issue of compensation, the Commission noted that HRS section 84-1 mandates that the statutes set forth in the State Ethics Code are to be “liberally construed” to “promote high standards of ethical conduct in state government.” Thus, in applying the provisions of the State Ethics Code, the Commission has an obligation to interpret the provisions of the State Ethics Code in accordance with the usual principles of statutory construction, and, where appropriate, in accordance with the legal principle of the “liberal construction” of statutes. The Sixth Edition of Black’s Law Dictionary defines “liberal construction” as follows:

Liberal (or equitable) construction, on the other hand, expands the meaning of the statute to meet cases which are clearly within the spirit or reason of the law, or within the evil which it was designed to remedy, provided such an interpretation is not inconsistent with the language used. It resolves all reasonable doubts in favor of the applicability of the statute to the particular case. It means, not that the words should be forced out of their natural meaning, but simply that they should receive a fair and reasonable interpretation with respect to the objects and purposes of the instrument. [Emphasis added.]

In accordance with HRS section 84-1, the Commission believed that compensation that is received after a successful sale does not mean that during the time one is involved in attempting to make a sale, one is not working “for” compensation. The Commission believed that compensation was involved in this case in that, after investigation, the Commission had not seen any evidence or anything to suggest that legislator A would not have received compensation if his company’s land had been sold. The Commission believes that compensation would include either a profit or loss, since the decision to sell would be for a financial benefit.

The Commission believes that legislators and state employees must keep in mind the restrictions set forth in HRS section 84-14(d), and when situations arise that involve the possible assistance or representation of persons or businesses where compensation may be involved, it may be necessary to contact the Commission for advice.

Finally, it was the Commission's opinion that the charges filed in this case were not frivolous. Further, the Commission noted that in this opinion, the Commission did not address actions protected by Article III, Section 7, of the Constitution of the State of Hawaii. The Commission in this opinion focused on the application of HRS section 84-14(d).

Dated: Honolulu, Hawaii, November 7, 2007.

HAWAII STATE ETHICS COMMISSION

Robert R. Bean, Chairperson
Maria Sullivan, Vice Chairperson
Jerrold A. Fuller, Commissioner
Mark E. Brasher, Ph.D., Commissioner
David J. Randell, M.D., Commissioner