



HAWAII STATE ETHICS COMMISSION

State of Hawaii • Bishop Square, 1001 Bishop Street, ASB Tower 970 • Honolulu, Hawaii 96813

INFORMAL ADVISORY OPINION NO. 2010-1

A member of the public (“Complainant”) filed a charge with the Hawaii State Ethics Commission (“State Ethics Commission” or “Commission”) against a member of a state board (“Respondent”). Pursuant to the procedures of the State Ethics Commission, a copy of the charge was sent to Respondent and Respondent filed an answer with the Commission. The State Ethics Commission reviewed this matter and concluded its review with the issuance of this Informal Advisory Opinion.

Respondent was an appointed member of a state board (“Board”) that was administratively attached to a state agency (“Agency”). The Board and the Agency, on occasion, took action affecting the property of landowners. The charge alleged that Respondent violated several sections of Hawaii Revised Statutes (“HRS”) chapter 84, the Hawaii State Ethics Code, by accepting payment for performing private services for a landowner while Respondent was periodically being called upon to take official state action affecting the landowner’s property.

Board:

The Board was attached to the Agency. Membership on the Board included regional representatives who had knowledge of the relevant subject matter. Respondent was a regional representative for a particular region.

The Board’s primary duty was to determine the appropriate course of action to take concerning a condition of the land that affected certain landowners. There were basically two courses of actions that could be taken when the condition existed. The decision of which course to take sometimes had a significant impact upon the landowner.

In many cases, the actionable condition of the land was known to the landowner prior to development of, or construction on, the land. In cases where the condition of the land was previously known, the Board would make the decision regarding the appropriate course of action. In other cases, however, the existence of the condition would come to light at a later time (a “later finding”). In those instances the Agency, and not the Board, would make the decision. In this “later finding” circumstance, a regional representative member of the Board might make a recommendation to the Agency, but the final decision would rest with the Agency.

Events in this Case:

Some years ago a landowner (“Landowner”) was in the process of developing its property. The property was located within the district that Respondent represented on the Board. The Landowner was aware of the presence of the condition on Landowner’s property and had disclosed the existence of the condition to the Board. The Board was therefore presented with the issue of which of the two courses of action to take with respect to Landowner’s property.

The Landowner first appeared before the Board several years ago at a Board meeting (“first board meeting”), and informed the Board of the existence of the condition on the property. The Landowner requested that a certain course of action be taken. At this meeting, Respondent expressed reservations about Landowner’s requested course of action. Complainant was also present at this meeting. Complainant asked that the Board adopt a course of action that differed from the course of action requested by Landowner. The Board did not vote on the matter at this meeting. Instead, the Board asked Landowner to return at a later board meeting and to present further options appropriate for the property.

At another board meeting (“second board meeting”), about a month following the first board meeting, the Board again took up the issue of Landowner’s property. There was an initial motion to take a course of action that differed from Landowner’s requested course of action. This motion failed. Respondent voted with the minority on the matter. After discussion, the Board decided to defer a decision until the next meeting, when more information would be available from Landowner. Respondent voted with the majority to defer a decision until Landowner provided the further information.

At yet another board meeting (“third board meeting”), a few months following the second board meeting, Landowner again appeared before the Board. The Landowner’s representatives told the Board that they had re-examined the issue. Because of certain concerns that were disclosed and explained to the Board, Landowner renewed its request for a certain course of action. There was a motion to adopt Landowner’s recommendation. This motion carried. Respondent voted with the majority on this motion. Once the Board made this decision, Landowner had no further business before the Board on this matter.

In Respondent’s private capacity, Respondent performed certain private services on request. About two and a half months after the Board’s vote at the third board meeting, Respondent received a request for Respondent’s private services from an employee of a professional services company (“Professional Services Company”). Professional Services Company provided certain professional services for Landowner. Respondent and this employee of Professional Services Company (“Employee A”) had been personal friends for many years. Both Respondent and Employee A belonged to the same private organization. At the time of these events, that organization was

headed by a respected expert in matters related to Respondent's private services.

Employee A asked Respondent to perform private services relating to Landowner's property. Employee A explained to the Commission's staff that Employee A had selected Respondent to conduct the private services because of their friendship and because Respondent was one of only a small number of knowledgeable people who Employee A believed could capably perform such private services. Employee A noted that Respondent was one of only a handful of people who had received specialized training in this area from the expert leader of their private organization.

Employee A also stated that the idea to ask that the private services event be held came from another mutual acquaintance, then acting as a consultant to Landowner. This mutual acquaintance asked Employee A for a recommendation of a knowledgeable person who could perform the private services. Employee A recommended Respondent.

The private services event relating to Landowner's property took place approximately two and a half months after the third board meeting. Immediately after the private services event, Employee A gave Respondent a check for \$300 from the Landowner. Both Respondent and Employee A stated to the Commission's staff that payment for Respondent's services had never been discussed. Both persons informed the Commission's staff that those who performed these types of services never demand payment or set any fees. Essentially, if offered compensation they would accept. If they were not offered compensation, that was also fine. Respondent stated that Respondent did not think of the private services as a business, but more as an opportunity to share Respondent's specialized knowledge. Respondent estimated that Respondent had performed approximately six to eight private services events per year. Compensation in connection with the private services events was never discussed with the requestor of such services. Respondent stated that the range of compensation that Respondent had received for private services events had been from \$0 to \$1,500. Respondent also mentioned that Respondent frequently did not keep the money offered for the private services. For various reasons it was often shared with others or donated.

A second private services event, also relating to Landowner's property, took place approximately four months after the first private services event. This time, a different friend of Respondent requested the private services event. This friend was an employee (Employee B) of another company with business dealings with Landowner.

Respondent was given a check for \$800 from Professional Services Company's account for this second private services event. Employee A recommended this amount. Payment was not discussed with Respondent. Respondent was assisted in this private services event. Consistent with Respondent's past practices, Respondent split the payment with the assistant.

One day after this second private services event, a later finding of the condition on Landowner's property came to light. Because this condition came to light as a later finding, the Agency, and not the Board, had the jurisdiction to decide which of the two courses of action should be taken. The director of the Agency (Agency Director) was contacted. Pursuant to the Agency's rules, Agency Director contacted Respondent, as the Board's regional representative, and others. Respondent recommended that a certain course of action be taken. This action was consistent with the Board's earlier decision. Respondent reasoned that the Board had already determined a course of action to take. Respondent informed the Commission's staff that Respondent believed that, in making the recommendation, Respondent should follow the Board's earlier determination. The Agency did, in fact, determine that the course of action previously taken by the Board should also be followed by the Agency as to this later finding.

Over the next few days, several other later findings came to light regarding Landowner's property. These later findings required further Agency decision. Again, Agency Director was contacted. Agency Director consulted with Respondent and Respondent recommended that the same course of action be taken. The Agency decided on the course of action that was consistent with Respondent's recommendation.

Approximately ten months later, Respondent was once again asked to provide private services at another event in connection with a tenant of Landowner's property. Immediately after the private services event, Respondent was handed a check for \$800 from the tenant's account. Again, Respondent did not discuss compensation with anyone.

The Charge:

The charge was filed over a year and a half after the first private services event. The charge essentially outlined the events discussed above and pointed out that Respondent received payment for the three private services events. The charge also stated that, as a member of the Board, Respondent participated in the discussion and voted on the question of the proper course of action to take as it related to Landowner's property. The charge then claimed that Respondent may have violated HRS sections 84-11, 84-13, and 84-14. The charge did not advance any specific theories as to how these sections of the State Ethics Code may have been violated.

The Answer:

In Respondent's answer, Respondent stated that Respondent's actions as a member of the Board were not influenced by any payments from Landowner or any related entities. Respondent also attached documents that maintained, among other things, that Respondent was not influenced by any payments; that the timing of the payments and Respondent's vote argued against any influence; and, that the decisions

regarding the later findings of actionable conditions were made by the Agency and not by Respondent or the Board.

HRS Section 84-14(b):

The charge recited the basic facts of the case and then claimed that these facts showed that Respondent might have violated the State Ethics Code, HRS sections 84-11, 84-13, and 84-14. HRS section 84-14 is the conflicts of interests section of the State Ethics Code. It did appear to the Commission that Respondent's actions raised some concerns under the conflicts of interests section. In particular, Respondent's actions raised issues primarily under HRS section 84-14(b). This section reads:

§ 84-14 Conflicts of interests. (b) No employee shall acquire financial interests in any business or other undertaking which he has reason to believe may be directly involved in official action to be taken by him.

The term "employee" is defined by the State Ethics Code to include members of state boards and commissions, such as members of the Board. The term "financial interests" is defined by HRS section 84-3 as:

an interest held by an individual, the individual's spouse, or dependent children which is:

- (1) An ownership interest in a business.
- (2) A creditor interest in an insolvent business.
- (3) An employment, or prospective employment for which negotiations have begun.
- (4) An ownership interest in real or personal property
- (5) A loan or other debtor interest.
- (6) A directorship or officership in a business.

The term "employment" is defined by HRS section 84-3 as "any rendering of services for compensation." Finally, the term "official action" is defined by HRS section 84-3 as:

a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.

The Commission noted that, among other things, HRS section 84-14(b) prohibits a state employee from acquiring employment with a business if the employee has reason to believe that he will be called upon to take discretionary state action directly affecting that business. For example, a state restaurant inspector could not start moonlighting at a restaurant if he knew he would be periodically called upon to inspect that restaurant. This law essentially prohibits state employees from acquiring new private financial interests that would create conflicts with their state duties.

In this situation, HRS section 84-14(b) would have prohibited Respondent from acquiring employment with a business if Respondent had had reason to believe that, as a member of the Board, Respondent would have been called upon to take discretionary state action directly involving that business. The facts in this situation were not disputed. For purposes of HRS section 84-14(b), these facts gave rise to two main issues: first, by accepting payment for the private services events did Respondent acquire employment interests in the companies that paid Respondent; and second, if so, did Respondent have reason to believe that Respondent would be called upon to take discretionary state action directly involving those companies.

The first issue that the Commission considered was whether or not Respondent had acquired employment interests in the companies that paid Respondent for the private services events. Respondent was paid by Landowner, Professional Services Company, and Landowner's tenant. In each case, Respondent was asked to perform a single task with no promise of payment or discussion of payment. In addition, both Respondent and Employee A informed the Commission's staff that there was no expectation that there would be multiple private services events resulting in any continual relationship with any of these companies.

The Commission believed that Respondent's relationships with Landowner and the two other companies fell within the State Ethics Code's definition of the term "employment." The Commission noted that the State Ethics Code defined this term broadly to mean any rendering of services for compensation. Although Respondent did not specifically charge for private services or set any fees, Respondent did accept the compensation that was offered by the companies. Respondent accepted varying amounts from Landowner, Professional Services Company, and Landowner's tenant. Respondent reported these amounts as income for tax purposes. For purposes of the State Ethics Code, the acceptance of the payments was sufficient to create employment relationships with the companies. The existence of these employment relationships created financial interests in the companies.

The second issue the Commission considered was whether or not, at the time Respondent accepted employment from these companies, Respondent had reason to believe that Respondent would be called upon to take discretionary state action directly involving the companies. All three of these companies were involved in or connected with Landowner's property. The Commission believed that action affecting that property would have affected each of the companies.

The first private services event that Respondent performed occurred approximately two and one half months after the Board's approval of Landowner's requested course of action as it related to Landowner's property. At this time, Landowner would have had no further business before the Board regarding this property. As the Board's regional representative, Respondent could have foreseen that

Respondent would be called up to take action affecting the Landowner, if Respondent had reason to believe that Respondent would be asked by the Agency for a recommendation on any later findings of the presence of the condition on the property. Thus, whether Respondent had reason to believe that Respondent would be called upon to take action affecting the Landowner depended on whether or not Respondent had reason to believe that any later findings would come to light.

The Commission noted that it had previously opined on the meaning of the phrase “reason to believe” as it appears in HRS section 84-14(b). The Commission had consistently interpreted this phrase as meaning more than a possibility. For example, in Advisory Opinion No. 150, the Commission interpreted the phrase as:

being in possession of facts which would strongly point to the probability of the occurrence rather than the mere possibility of the occurrence.

The phrase “strong probability” was used in other advisory opinions as well (for example, Advisory Opinion No’s. 283, 329, 361). In Advisory Opinion No. 93-1, the Commission applied HRS section 84-14(b) when an event was “likely” to occur. Thus, the Commission had historically interpreted the phrase “reason to believe” as meaning more than a mere possibility. The Commission had applied HRS section 84-14(b) to situations in which there was a strong probability or likelihood that the subject state employee would be called upon to take official state action.

At the time of the first private services event, Landowner’s property had already been subjected to a professional study that had revealed the presence of the condition on the property. However, the full extent of the condition’s presence was unknown. More information came to light some four months after the date of the first private services event. These facts indicated to the Commission that, at the time of the first private services event, there was no particular reason to believe that any later findings of the condition would be made. On the other hand, the Commission acknowledged that Landowner’s property was located in an area where it would not be surprising to discover that the condition existed on the property. Respondent informed the Commission’s staff that numerous later findings did occur.

Despite the fact that it would not have been surprising to learn of later findings, and despite the fact that later findings did actually come to light, the Commission believed that, at the time of the first private services event, Respondent did not have reason to believe that Respondent would be called upon to take discretionary state action affecting Landowner’s property. At the time of the private services event, any later findings of the condition were speculative. A professional study of the Landowner’s property had been completed. The previously identified presence of the condition discovered pursuant to the professional study had been identified to the Board. The Board had made its decision. Other later findings of the condition had not yet occurred. The first later finding would not occur until some months after the date of

this first private services event. For these reasons, the Commission believed that, at the time Respondent accepted compensation from Landowner, Respondent did not have reason to believe that Respondent would be called upon to take discretionary state action affecting Landowner. Consequently, it appeared that, in this instance, Respondent's actions did not violate HRS section 84-14(b).

A similar analysis applied to the second private services event. This private services event took place about four months after the first private services event. At this time there had not yet been any later findings of the presence of the condition on the property. Respondent accepted payment of \$800 from Professional Services Company for the private services. A later finding of the condition was made the next day. Further later findings were made in the following days. Again, however, at the time of the second private services event, the Commission believed that, for purposes of HRS section 84-14(b), Respondent did not have reason to believe that later findings of the condition would soon occur.

The third private services event required a different analysis. This third private services event occurred nearly a year after the second private services event. By this time, numerous later findings of the presence of the condition on Landowners' property had come to light. After the third event, Respondent accepted a check for \$800 from Landowner's tenant. Given the frequency of the discoveries, at this point, the Commission believed that Respondent might have had reason to believe that Respondent would be called upon to make further recommendations to the Agency on later findings of the condition. Respondent's recommendations could have affected Landowner's property and, consequently, Landowner's tenant. Thus, the Commission believed that Respondent's acceptance of payment from Landowner's tenant raised significant concerns under HRS section 84-14(b).

HRS Section 84-14(a):

The Commission noted that HRS section 84-14(b) was the conflicts of interests provision that was chiefly applicable in this situation. Other sections of the State Ethics Code were also relevant, however. In particular, a second provision of the conflicts of interests law, HRS section 84-14(a), was important. In pertinent part, this section reads:

§ 84-14 Conflicts of interests. (a) No employee shall take any official action directly affecting:

- (1) A business or other undertaking in which he has a substantial financial interest. . . .

This section prohibits a state employee, including a member of a state board, from taking discretionary action directly affecting a business in which the employee has a substantial financial interest. For example, if a board member worked for a company,

then that board member could not take discretionary state action affecting that company.

Respondent first took state action affecting Landowner's property a number of months prior to the first private services event. At that time, Landowner was appearing before the Board regarding the presence of the condition that was identified in the professional study. The charge appeared to allege that Landowner may have approached Respondent at this time to solicit Respondent's later services. However, there was simply no information to support this. Instead, the facts indicated that Respondent was not asked to perform the first private services event until two and a half months after the Board's final decision. For this reason, the Commission believed that Respondent did not have a financial interest in Landowner, or in any of the other companies, at the time that Landowner was appearing before the Board. Thus, the Commission believed that Respondent did not violate HRS section 84-14(a) by taking action at the board meetings.

Respondent was first consulted by the Agency on later findings of the presence of the condition following the second private services event. HRS section 84-14(a) would have required recusal from providing recommendations on the later findings if, at the time Respondent was being consulted by the Agency, Respondent had a financial interest in any of the companies involved in Landowner's property.

The Commission did not believe that Respondent had a financial interest in Landowner, Professional Services Company, or Landowner's tenant at the times Respondent was being consulted by the Agency. As noted above, Respondent's relationships with these companies were not employment relationships that stretched over a period of time. Instead, in each case, Respondent was asked to perform a single task. When the task was completed, the relationship ended. Respondent was not on retainer to perform work for any of the companies. Both Respondent and Employee A told the Commission's staff that there was no expectation that there would be multiple private services events. Each private services event was a discrete event. Based on this information, the Commission believed that, at the time Respondent was consulted by the Agency on the later findings, Respondent had no financial interest in any of these companies. Thus, HRS section 84-14(a) did not require Respondent's recusal when Respondent was asked by the Agency for recommendations as to the later findings.

HRS Section 84-13:

Aside from the conflicts of interests section of the State Ethics Code, the charge also cited concerns under HRS section 84-13, the fair treatment section. In relevant part, this section reads:

§ 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. . . .

This section generally prohibits a state employee, including a member of a state board, from using his state position to grant himself or anyone else any special or preferential treatment. This section would have been violated if Respondent had used Respondent's position on the Board to grant preferential treatment to any of the companies involved in Landowner's property.

The charge appeared to claim that Respondent initially violated HRS section 84-13 during the Board's deliberations on Landowner's property. The charge pointed out that, at the second board meeting, when presented with Landowner's plan, Respondent voted to take the course of action not requested by Landowner. At the third board meeting, however, Respondent voted to take the course of action requested by Landowner. The charge speculated that there may have been communication from Landowner to Respondent that caused Respondent to change Respondent's vote and thus grant preferential treatment to Landowner.

The Commission did not find any information to support the charge's claim. Respondent offered an explanation of the votes that was supported by the minutes of the Board meetings. Respondent explained to the Commission's staff that Respondent had an initial preference that lead to Respondent's first vote at the second board meeting. Respondent had another, higher, concern, however. At the second board meeting, Respondent did not have necessary information from Landowner to address this concern. Without this information, Respondent voted in opposition to Landowner's request. This motion failed. Respondent then voted with the majority to defer a decision until Landowner returned with more information.

The Landowner returned to the Board at the third board meeting. At this time, Landowner provided the Board with information that addressed Respondent's concern. With this information, Respondent voted with the majority to take Landowner's requested course of action. Respondent's statements to the Commission's staff were consistent with the Board's minutes.

The Commission also reviewed the selection of Respondent to perform the private services events in order to determine whether or not Respondent's selection was an attempt to curry favor with a member of the Board. Employee A informed the Commission's staff that Employee A selected Respondent to perform the private services, not because Respondent was a member of the Board, but because Employee A and Respondent were personal friends, because Employee A and Respondent belonged to the same private organization, and because Respondent was one of a handful of people who were trained by the respected expert of the private organization. There was no information to the contrary and nothing to indicate that Respondent was selected because Respondent was a member of the Board.

Finally, the timeline did not support an allegation that Respondent voted to take a certain course of action in order to grant preferential treatment to Landowner. The final vote on the issue involving Landowner's property, at the third board meeting, occurred two and one half months before Respondent was asked to perform at the first private services event. The fact that the first private services event occurred some time after the final Board vote indicated to the Commission that, at the time of the vote, Respondent had no reason to grant any preferential treatment to Landowner. Based on these facts, the Commission believed that there was not sufficient information to maintain that Respondent changed Respondent's vote at the Board in order to grant an unwarranted benefit to Landowner.

The same issue of preferential treatment also arose with respect to Respondent's recommendations to the Agency on the later findings of the presence of the condition. At the time of the later findings cited by the charge, Respondent had performed two private services events relating to Landowner's property. When consulted by the Agency on each later finding, Respondent made recommendations consistent with the Board's earlier decision and in line with Landowner's request to the Board. The charge appeared to claim that Respondent's recommendations amounted to preferential treatment in violation of HRS section 84-13.

Again, the Commission believed that there was not sufficient information to support the charge's contention. Respondent informed the Commission's staff that Respondent had a primary concern about the property. This concern was addressed by taking the course of action requested by Landowner. Respondent also stated that Respondent's recommendations were based on the Board's earlier decision. Respondent explained that Respondent was following that decision when making later recommendations to the Agency. The Commission also noted that the decisions to have Respondent perform the private service events were not made by Landowner. Employee A was the one who selected Respondent for the first private services event. Employee B selected Respondent for the other two private services events. Both individuals were personal friends of Respondent. The information indicated to the Commission that Respondent's selection was based more on personal relationships and expertise than on any attempt to curry favor with Respondent as a member of the Board. For these reasons, the Commission believed that Respondent's actions with respect to the later findings of the presence of the condition did not violate HRS section 84-13.

HRS Section 84-11:

Finally, the charge alleged possible violations of HRS section 84-11, the gifts section of the State Ethics Code. This section reads:

§ 84-11 Gifts. No legislator or employee shall solicit, accept, or receive, directly or indirectly, any gift, whether in the form of money,

service, loan, travel, entertainment, hospitality, thing, or promise, or in any other form, under circumstances in which it can reasonably be inferred that the gift is intended to influence the legislator or employee in the performance of the legislator's or employee's official duties or is intended as a reward for any official action on the legislator's or employee's part.

The charge did not advance any theories as to how the gifts law was violated. It appeared to allege that the payments made to Respondent were in the nature of gifts and that these gifts were intended to influence or reward Respondent for state action.

The Commission believed that the payments to Respondent were not gifts, but instead were intended as compensation to Respondent for performing the private services. In each case, the payment was given to Respondent at the private services site, immediately after Respondent had concluded the private services event. The amounts given to Respondent were not out of proportion in relation to the services performed. Respondent informed the Commission's staff that Respondent had received compensation of up to \$1500 for past private services events. The payments Respondent received for the private services events relating to Landowner's property were well within the range of typical compensation received by Respondent. In addition, the Commission noted that Respondent reported these amounts as income for tax purposes. Thus, it appeared that these payments were not intended as gifts. For this reason, the Commission believed that the gifts law had little relevance in this case.

The Hawaii State Ethics Commission concluded its review of this matter with the issuance of this Informal Advisory Opinion, and with its advice as to the application of the Hawaii State Ethics Code to this situation. The Commission wished to stress its analysis of the third private services event hosted by Landowner's tenant. As discussed above, it appeared that Respondent's acceptance of compensation for this private services event raised concerns under HRS section 84-14(b).

The Commission very strongly recommended that, in the future, if these types of situations occur, affected state officials should seek advice from the State Ethics Commission. The Commission stressed that, had Respondent sought advice, this situation could have been avoided.

The Commission appreciated Respondent's candor and cooperation during its review of this matter.

Dated: Honolulu, Hawaii, January 13, 2010.

HAWAII STATE ETHICS COMMISSION

Maria J. Sullivan, Chairperson
Jerrold A. Fuller, Vice Chairperson
Mark E. Brasher, Ph.D., Commissioner
William H. Montgomery, M.D., Commissioner
David J. Randell, M.D., Commissioner