



HAWAII STATE ETHICS COMMISSION

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

INFORMAL ADVISORY OPINION NO. 2012-1

The Hawaii State Ethics Commission (Commission) issued Charge No. 11-Cg-9 against a former member of a State board. The allegations in the charge arose from the former board member's actions during and after her service as a member of the board. While a member of the board and for some time immediately after she left the board, she was employed by a private organization and, in that capacity, represented an individual on a matter before the state agency governed by her board. The Commission, through its staff, conducted an investigation of this matter. The Commission concluded its review of this matter by issuance of this Informal Advisory Opinion.

Facts

Prior to serving on the board, the former board member worked for the private organization. Her employment with the private organization ceased before she began her service as a member of the board. Near the end of her term on the board, she was approached by the organization to work in her prior capacity, as a temporary measure following the abrupt departure of another employee. She worked for the organization in this position for several weeks immediately before the end of her term on the board. She continued in the position for approximately four months after her term on the board ended.

When the former board member acquired employment with organization, she informed both the executive director of her agency and the chair of the board. Other employees of the agency were also aware of her employment with the organization. The former board member and the board chair discussed the necessity of recusing herself from matters before the board that involved the organization.

While she was both an employee of the organization and a member of the board, the former board member took part in three board meetings. During two of these meetings, a matter relating to the organization came before the board. Both times, the former board member recused herself from the matter and left the meeting.

During her employment with the organization, the former board member, on behalf of the organization, represented a member of the organization on a matter before the state agency that her former board governed. During her representation, the former board member spoke to and met with employees and officials of the state agency. Her representation occurred both while she was still a member of the board and after she had left the board (and less than 12 months after she ceased being a member of the

board). During the former board member's representation of the individual, there was no evidence that she referred to her position, or former position, as a member of the board.

Charge and Answer

Charge No. 11-Cg-9 contained three counts of alleged violations of the State Ethics Code. Count one of the charge alleged a violation of Hawaii Revised Statutes section 84-14(b). This provision, a part of the conflicts of interests section of the State Ethics Code, prohibits a state employee¹ from, among other things, acquiring employment with a business or organization if the employee has reason to believe that he will be called upon to take official state action affecting that organization.²

Count two of the charge alleged a violation of Hawaii Revised Statutes section 84-14(d),³ another part of the conflicts of interests section of the State Ethics Code. In relevant part, this provision prohibits a state employee from being compensated to assist or represent another person or business on a matter before the employee's own state agency.

¹ For purposes of the State Ethics Code, the term "employee" is defined as including members of state boards and commissions. See Haw. Rev. Stat. section 84-3.

² Hawaii Revised Statutes section 84-14(b) 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 "financial interests" is defined by Hawaii Revised Statutes 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 "official action" is defined by Hawaii Revised Statutes section 84-3 as:

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

³ Hawaii Revised Statutes section 84-14(d) reads:

§84-14 Conflicts of interests. (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 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.

Finally, count three of the charge alleged a violation of Hawaii Revised Statutes section 84-18(c), part of the post employment section of the State Ethics Code.⁴ In relevant part, this provision prohibits a former state employee, including a former member of a state board or commission, for a period of twelve months after leaving state service, from being compensated to represent another person or business on matters involving official action by the former employee's particular state agency.

The former board member filed an answer to the charge in which she stated that she would not challenge the Commission's findings. She explained that her actions were based on a good faith understanding of the State Ethics Code. She stated that she believed that, during her employment with the organization, as long as she did not work on matters that she may have acted on as a member of the board, she would not be in violation of the State Ethics Code.

Application of the State Ethics Code

The State Ethics Code, Hawaii Revised Statutes chapter 84, applies to, among others, members of state boards and commissions⁵ and, therefore, was applicable to the former board member. As conveyed in the charge, her acceptance of employment with the organization raised issues under the conflicts of interests and post employment sections of the State Ethics Code.

Conflicts of Interests

Hawaii Revised Statutes Section 84-14(b)

As discussed above, Hawaii Revised Statutes section 84-14(b) prohibits an employee, including a member of a state board or commission, from acquiring new financial interests in certain circumstances. Among other things, this section prohibits

⁴ Hawaii Revised Statutes section 84-18(c) reads:

§84-18 Restrictions on post employment. (c) No former employee, within twelve months after termination of the former employee's employment, shall represent any person or business for a fee or other consideration, on matters in which the former employee participated as an employee or on matters involving official action by the particular agency or subdivision thereof with which the former employee had actually served.

Hawaii Revised Statutes section 84-18(f) defines the term "represent":

§84-18 Restrictions on post employment. (f) For purposes of this section, "represent" means to engage in direct communication on behalf of any person or business with a legislator, a legislative employee, a particular state agency or subdivision thereof, or their employees.

⁵ Hawaii Revised Statutes section 84-3.

an employee, including a member of a state board or commission, from acquiring employment in an organization if the employee has reason to believe that he will be called upon to take discretionary state action directly involving that organization. In this situation, Hawaii Revised Statutes section 84-14(b) prohibited the former board member from accepting employment with the organization if she had reason to believe that, as a member of the board, she would be called upon to take official action involving the organization. That statutory bar is applicable even where the employee recuses herself or is otherwise excluded from taking official action involving the organization with which the employee is employed.

The Commission's investigation indicated that there was reason to believe that the former board member would be called upon, as a member of the board, to take official action involving the organization. Although the board is not generally involved with the types of matters the individual worked on in her capacity as an employee of the organization, the board does regularly consider other issues involving the organization. Indeed, in two of her last three board meetings that the former board member participated in as a member of the board, the board considered matters involving the organization. Based on this information, it appeared that the former board member's acceptance of employment with the organization while she was a member of the board may have violated this provision of the conflicts of interests section.

The Commission's investigation also indicated that, after acquiring employment with the organization, the former board member recused herself from taking state action involving the organization. She apparently believed that recusal addressed and corrected the conflict of interests created by her employment with the organization. Her understanding of the conflicts of interests law, however, was incorrect. Hawaii Revised Statutes section 84-14(b) prohibits, among other things, the acquisition of employment with a business or organization, i.e., accepting new employment, where that employment will create a conflict of interests with the employee's state duties. Hawaii Revised Statutes section 84-14(b) is intended to limit or prevent conflicts of interests that will then result in a state employee being unable to perform his or her state duties.

Hawaii Revised Statutes Section 84-14(d)

A second relevant provision of the conflicts of interests section concerns the assistance or representation of others. As noted above, Hawaii Revised Statutes section 84-14(d) prohibits, among other things, an employee, including a member of a state board or commission, from being paid to assist or represent another person or business on a matter before the employee's own department. If, while a member of the board, the former board member represented the organization, or its members, before the board or the state agency that the board oversees, then this representation would likely be a violation of this section.

The Commission's investigation of this matter indicated that, while the former board member was still a member of the board, she began work for the organization. She was compensated by the organization for this work. Her duties for the organization involved representing at least one of its members in a matter before the state agency that the board oversees, while still a member of the board. This representation involved meeting and otherwise communicating with the state agency's employees and officials. This information indicated that her actions may have violated Hawaii Revised Statutes section 84-14(d).

Post Employment

Count three of the charge alleged a violation of the post employment section of the State Ethics Code. Hawaii Revised Statutes section 84-18(c) prohibits a former employee, including a former member of a state board or commission, for a 12-month period after leaving state service, from being paid to directly communicate with their former state agency on a matter in which they participated, or on a matter involving official action by his or her former agency.⁶ If, within 12 months after her board term expired, the former board member represented members of the organization or others before the state agency on behalf of the organization, and was paid by the organization to do so, then there likely would be a violation of this section.

Based on the Commission's investigation, it appeared that the former board member, as an employee of the organization, represented one of the organization's members on a matter before the state agency which the board oversees, within twelve months of leaving the board. She several times spoke to an employee of this state agency on behalf of the individual whom she was representing. She also met with officials of the state agency on behalf of this person. This information indicated that the former board member may have violated the post employment section of the State Ethics Code.

⁶ Hawaii Revised Statutes section 84-18(c) reads:

§ 84-18 Restrictions on post employment. (c) No former employee, within twelve months after termination of the former employee's employment, shall represent any person or business for a fee or other consideration, on matters in which the former employee participated as an employee or on matters involving official action by the particular state agency or subdivision thereof with which the former employee had actually served.

The term "represent" is defined in HRS section 84-18(f):

§ 84-18 Restrictions on post employment. (f) For purposes of this section, "represent" means to engage in direct communication on behalf of any person or business with a legislator, a legislative employee, a particular state agency or subdivision thereof, or their employees.

Other Relevant Sections of the State Ethics Code

During its review of this matter, the Commission considered whether the former board member had violated any other provisions of the State Ethics Code. Specifically, the Commission reviewed her actions to discover whether she may have violated Hawaii Revised Statutes sections 84-12, 84-13, 84-14(a), or 84-18(a). The Commission's investigation did not reveal information indicating a violation of any of these sections.⁷

⁷ Hawaii Revised Statutes section 84-12 concerns confidential information. This section prohibits a current state employee, including a member of a state board or commission, from using or disclosing any state confidential information. Similarly, Hawaii Revised Statutes section 84-18(a), a provision within the post employment law, prohibits any former state employee, including a former member of a state board or commission, from using or disclosing any confidential information. As a member of the board, the individual was present during executive session meetings at which matters involving the organization were discussed. The Commission's investigation, however, did not reveal any information that suggested that the former board member had ever used or disclosed any confidential board information.

The Commission also considered whether the former board member may have violated Hawaii Revised Statutes section 84-13, the fair treatment section of the State Ethics Code. This section prohibits a state employee from using his or her state position to grant himself, herself, or anyone else any special treatment or unwarranted advantage. The Commission reviewed this situation to determine whether the former board member had unfairly used her position, or former position, with the board to grant herself, the organization, a member of the organization, or anyone else any special treatment. As mentioned above, through its staff, the Commission interviewed employees and officials of the state agency. All stated that in the former board member's interactions with the state agency on behalf of the organization, she did not mention her position, or former position, with the board, in an attempt to use her position, or former position, to gain any unwarranted advantage.

Finally, the Commission reviewed the former board member's actions to determine whether she was in compliance with Hawaii Revised Statutes section 84-14(a), a provision within the conflicts of interests section of the State Ethics Code. This provision requires a state employee, including a member of a state board or commission, to recuse himself or herself from taking official state action in certain situations. Among other things, this section prohibits a state board member from taking official action directly affecting a business or other organization that privately employs that board member. While she was a member of the board, this section prohibited the former board member from taking official action affecting the organization while she was employed by the organization. As discussed above, through its staff, the Commission interviewed a former member of the board and former and current staff of the board. The Commission also reviewed board's minutes. The Commission's investigation revealed that the former board member disclosed her employment with the organization to the board members and staff. When matters involving the organization arose at board meetings, the individual recused herself and physically left the room. There was no evidence indicating that the former board member had violated Hawaii Revised Statutes section 84-14(a).

Issuance of Informal Advisory Opinion No. 2012-1

In determining whether to issue an Informal Advisory Opinion, or whether instead to proceed with further action, the Commission took into account a number of factors. The Commission's investigation revealed that the former board member was hired by the organization, not because of her position on the board, but because she had previously worked for the organization in the same position and the organization needed to quickly fill an unexpected vacancy in the position. The former board member was employed in the position for less than six months. She made no attempt to conceal her employment with the organization from the board. She immediately revealed her employment with the organization to both members and staff of the board. She met with the then-chair of the board and discussed the necessity of recusing herself from matters involving the organization. When matters involving the organization arose during board meetings, she recused herself and physically left the room. It appears clear that the former board member and others associated with the board either misunderstood or had an incomplete understanding of the State Ethics Code. It also appears clear that the former board member was aware of conflicts of interests issue and affirmatively attempted to prevent those issues by disqualifying herself from taking action affecting the organization, as she believed was required by the statute.

The Commission also took into account that the former board member did not use or attempt to use her position with the board to create an advantage for herself or her client during or after her term as a member of the board. During her representation of a member of the organization, she did not refer to her position with the board. The information received by the Commission reflects that she kept the two roles separate. In addition, there was no evidence that she ever used or disclosed any confidential board information. Under the specific circumstances of this case, the Commission believed that no further action against the former board member was warranted.

The Commission is issuing this Informal Advisory Opinion in order to educate the former board member and others on the application of the State Ethics Code. Specifically, the Commission notes that the State's conflicts of interests law contains several provisions: one which refers to recusal, and others which concern the acquisition of new financial interests, including employment, and the representation of others before the State. All of these provisions, not just the provision concerning recusal, appear to have been applicable to this situation. For that reason, the former board member could not "correct" the conflicts of interest issue by recusing herself from matters involving her private employer. In addition, the Commission is issuing this

opinion in order to stress the post employment section of the State Ethics Code: that provision of the State Ethics Code includes certain restrictions that apply even after an employee terminates his or her state employment. Again, state employment includes service on a state board or commission.

Dated: Honolulu, Hawaii, February 15, 2012.

HAWAII STATE ETHICS COMMISSION

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