



# HAWAII STATE ETHICS COMMISSION

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## ADVISORY OPINION NO. 2015-2

The Hawaii State Ethics Commission (“Commission”) has learned that some members of public charter school governing boards and some employees of public charter schools may also be employed by private non-profit organizations that were established to support the charter schools. This situation creates concerns under Hawaii Revised Statutes (“HRS”) chapter 84, the State Ethics Code. Specifically, the conflicts of interests section of the State Ethics Code prohibits a charter school governing board member or employee in this situation from taking official action on behalf of the charter school affecting the non-profit organization. It also prohibits the individual from assisting the non-profit organization in matters before the charter school, and from acting as a representative for the non-profit organization in its interactions with the charter school. Additionally, as discussed below, a provision of the State Ethics Code may be applicable where a member of a governing board or an employee of a charter school is not currently an employee of a supporting non-profit organization but may be contemplating such employment.

### Members of Governing Boards and Employees of Charter Schools Serving as Employees of Affiliated Non-Profit Organizations

Charter schools are public schools that operate under a contract with the State Public Charter School Commission (“SPCSC”).<sup>1</sup> Each charter school is overseen by a governing board.<sup>2</sup> Each charter school hires its own employees. Public charter schools are state agencies for purposes of the State Ethics Code.<sup>3</sup> Members of governing boards and employees of public charter schools are considered state employees for

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<sup>1</sup> HRS section 302D-4(8)(g).

<sup>2</sup> HRS section 302D-12(e).

<sup>3</sup> In relevant part, HRS section 84-3 reads:

**§84-3 Definitions.** “State agency” includes the State, the legislature and its committees, all executive departments, boards, commissions, committees, bureaus, offices, the University of Hawaii, and all independent commissions and other establishments of the state government but excluding the courts.

purposes of the State Ethics Code and are required to comply with the State Ethics Code.<sup>4</sup>

The Commission understands that there are non-profit organizations established for the specific purpose of applying to the SPCSC for a charter to establish a school, and/or for the purpose of supporting a charter school. Among other things, the supporting non-profit organization may assist in fundraising for the school, may enter into business agreements on behalf of the school, and may seek grants that benefit the school. The non-profit organization has its own officers and directors. Some non-profit organizations may also employ a staff.

A charter school and its supporting non-profit organization may conduct business transactions with each other. For example, a charter school may contract with the non-profit organization for services or property. In these situations, charter school governing board members or employees may be called upon to take action, on behalf of the school, affecting the non-profit organization. Such actions may include: negotiating or approving contracts with the non-profit organization; authorizing payments to the non-profit organization; and participating in meetings with the non-profit organization in order to determine what actions the non-profit organizations should take on behalf of the charter school.

The Commission has discovered that members of charter school governing boards, as well as charter school employees, may also be paid employees of these supporting non-profit organizations. These dual roles may constitute prohibited conflicts of interests under the State Ethics Code.

Application of the State Ethics Code  
HRS Section 84-14(a)

The State Ethics Code prohibits a state employee from taking official action directly affecting a business in which the employee has a financial interest. Specifically, HRS section 84-14(a) states:

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<sup>4</sup> In relevant part, HRS section 84-3 reads:

**§84-3 Definitions.** “Employee” means any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, and employees under contract to the State or of the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices and judges.

Further, HRS section 302D-12(h) states:

**§302D-12 Charter school governing boards; powers and duties. (h)** All charter school employees and members of governing boards shall be subject to chapter 84.

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

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

“Official action” is defined as any action, including inaction, involving discretionary authority.<sup>5</sup> “Financial interest” is defined in HRS section 84-3:

"Financial interest" means 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.<sup>6</sup>

“Business” includes both profit and non-profit organizations.<sup>7</sup>

Under the State Ethics Code, a charter school governing board member or employee who is employed by a non-profit organization has a “financial interest” in the organization and is prohibited by the statute from taking any official action affecting the organization. “Official action” is broadly defined and includes not only final decision-making, but any discretionary action, including making any suggestions or recommendations that affect the non-profit organization. Thus, for example, a member of a governing board who is also employed by a non-profit organization may not: vote to approve payments to the non-profit organization; vote to enter into a contract with the non-profit organization; or recommend or otherwise suggest that the governing board take action affecting the non-profit organization. Similarly, an employee of a charter school who is employed by a non-profit organization may not: issue checks to the non-profit organization; authorize or approve payments or reimbursements to the non-profit organization; or recommend or suggest any action affecting the non-profit organization. In these situations, the governing board member or charter school employee must

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<sup>5</sup> HRS section 84-3.

<sup>6</sup> A “financial interest” includes not only an employment interest, but also an officership or directorship position. The Commission is aware that some members of governing boards and employees of charter schools may be serving as uncompensated officers or directors of affiliated non-profit organizations. The Commission is considering whether this situation also raises conflicts of interests concerns. This Advisory Opinion only addresses the situation in which the individual is a paid employee of the non-profit organization.

<sup>7</sup> HRS section 84-3.

recuse himself or herself from taking any official action affecting the non-profit organization.

HRS Section 84-14(d)

Another section of the conflicts of interests law prohibits a state employee from being compensated to assist or represent a person or business on matters before the employee's own state agency, or on matters in which the employee has participated or will participate. HRS section 84-14(d) provides:

**§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 the legislator or employee has participated or will participate as a legislator or employee, nor shall the legislator or employee 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 the legislator or employee is an employee or legislator.

A charter school governing board member or employee who is also a paid employee of a non-profit organization cannot assist or represent the non-profit organization in any transactions with the school. For example, a governing board member or employee may not: represent the non-profit organization in meetings with school personnel; speak on behalf of the non-profit organization before the governing board; negotiate a contract or agreement with the charter school; assist in drafting any contract or agreement with the charter school; or prepare or submit invoices to the charter school.

Other Provisions of the State Ethics Code

Depending on the facts of a specific situation, other sections of the State Ethics Code may also be applicable. For example, a member of a governing board or an employee of the school who is not currently an employee of a non-profit organization cannot become an employee if the individual will, in the future, be asked to take action affecting the non-profit organization.<sup>8</sup> Thus, a member of a governing board who reviews or approves agreements between the charter school and a non-profit organization cannot accept employment with the non-profit organization. Employees of the school and members of the governing board are also prohibited from using their state positions to grant the non-profit organization, its officers, directors, contractors, or anyone else any special treatment, or unwarranted advantage or benefit. Finally, members of the governing board and employees of a charter school may not use or disclose confidential state information. For example, these individuals may review quotes for goods or services or other confidential procurement information. This

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<sup>8</sup> HRS section 84-14(b).

information may not be shared with a non-profit organization or used to benefit a non-profit organization.

The Commission strongly recommends that members of governing boards and employees of charter schools who also serve as employees of affiliated non-profit organizations contact the Commission's office for further advice.

Dated: Honolulu, Hawaii, August 19, 2015.

HAWAII STATE ETHICS COMMISSION

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