

ADVISORY OPINION NO. 2017-02

February 16, 2017

The Hawaii State Ethics Commission is publishing Advisory Opinion No. 2017-02 in an unredacted form pursuant to the request of Keli'i Akina, the individual who requested the opinion.

ADVISORY OPINION NO. 2017-2

Keli'i Akina, Ph.D.
Trustee, Office of Hawaiian Affairs

Dear Trustee Akina:

You have requested an advisory opinion from the State Ethics Commission (“Commission”) as to whether you have a “per se conflict of interest” under the State Ethics Code, Chapter 84, Hawaii Revised Statutes (“HRS”) in two situations, and whether such a conflict would prohibit you from serving as a Trustee for the Office of Hawaiian Affairs (“OHA”). The two situations are as follows: (1) in your private capacity, you are a plaintiff in a lawsuit against defendants who include OHA Trustees and the Chief Executive Officer (“CEO”) of OHA; and (2) you are privately employed with Grassroot Institute of Hawaii, Inc. (“Grassroot Institute”) a nonprofit organization, as President/CEO.

The Commission does not believe that the State Ethics Code per se prohibits your dual status as both OHA Trustee and plaintiff in the lawsuit. However, as explained below, the State Ethics Code prohibits you from engaging in certain actions. You have assured the Commission that you intend to recuse yourself from participating in any matters pertaining to the lawsuit, which the Commission believes is appropriate.

The Commission does not believe that the State Ethics Code per se prohibits your dual status as both OHA Trustee and President/CEO of Grassroot Institute. However, as explained below, the State Ethics Code prohibits you from engaging in certain actions, either in your role as OHA Trustee or in your role as President/CEO of Grassroot Institute.

I. Facts

Based on the information you have provided, the Commission understands the facts to be as follows:

- You are a recently elected member of the OHA Board of Trustees. You were elected to this position in November 2016.
- As an OHA Trustee, you are empowered by the Hawaii State Constitution to perform the following functions:¹
 - Manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources

¹ Article XII, Section 6, Hawaii State Constitution.

for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in Article XII, Section 4 of the Hawaii State Constitution, for native Hawaiians;

- Formulate policy relating to the affairs of native Hawaiians and Hawaiians; and
 - Exercise control over real and personal property set aside by state, federal, or private sources transferred to the OHA Board of Trustees for native Hawaiians and Hawaiians.
 - In August 2015, in your private capacity, you and other plaintiffs filed a lawsuit against the State of Hawaii, OHA Trustees and the OHA CEO in their official capacities, and other defendants. The lawsuit, Akina et al. v. State of Hawaii et al. ("Akina v. Hawaii"), challenged certain efforts by native Hawaiians to establish their own government.²
 - On November 30, 2016, Akina v. Hawaii was dismissed without prejudice.³ However, the matter of the payment of attorneys' fees is currently pending with the court.
 - Since March 2013, you have been privately employed with Grassroot Institute of Hawaii, Inc. ("Grassroot Institute"), a nonprofit organization, as President/CEO. You also serve on Grassroot Institute's Board of Directors.⁴
 - Grassroot Institute represents itself as an institution that "seeks to educate and inform Hawaii's policy makers, news media and the public at large on key policy issues."
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- You are registered with the Commission as a lobbyist for Grassroot Institute. The lobbyist registration form you submitted to the Commission indicates that you expect to lobby on the subject of Hawaiian affairs.⁵

² One of the matters at issue was an election of delegates to the functional equivalent of a constitutional convention. The plaintiffs sued the State of Hawaii, OHA Trustees, and others, alleging that the delegate election that had been planned was unconstitutional because the State was intertwined in the process and that participation was limited to those with Hawaiian ancestry.

³ On November 30, 2016, Chief Judge Michael J. Seabright signed an Order Granting Plaintiffs' Motion to Voluntarily Dismiss Complaint. See Akina v. Hawaii, Civ. No. 15-00322 JMS-RLP (D. Haw.), Dkt. No. 146 (Nov. 30, 2016). The Judgment in this case was entered on the same date. Id. at Dkt. No. 147.

⁴ You are also President/CEO of a related nonprofit organization, Grassroot Hawaii Action, Inc. ("Grassroot Hawaii"). You informed the Commission that Grassroot Hawaii is not involved in activities in Hawaii. This Advisory Opinion does not pertain to your activities with respect to Grassroot Hawaii.

⁵ The Lobbyists Law, HRS Chapter 97, requires every lobbyist to file a registration form with the Commission within five days of becoming a lobbyist. HRS section 97-2. A "lobbyist" is defined as any individual who for pay or other consideration engages in lobbying in excess of five hours in any month of any lobbying reporting period

II. Issues

You asked the Commission for an Advisory Opinion on the following issues:

- A. Whether the State Ethics Code per se prohibits your dual status as both OHA Trustee and plaintiff in Akina v. Hawaii; and
- B. Whether the State Ethics Code per se prohibits your dual status as both OHA Trustee and President/CEO of Grassroot Institute.

III. The State Ethics Code

The State Ethics Code arises from Article XIV of the State Constitution, which states: "The people of Hawaii believe that public officers and employees must exhibit the highest standards of ethical conduct and that these standards come from the personal integrity of each individual in government." To this end, the State Constitution directs that the legislature enact a code of ethics that applies to all appointed and elected state officials and employees.⁶ The legislature directs that the State Ethics Code "shall be liberally construed to promote high standards of ethical conduct in state government."⁷

As an OHA Trustee, you must comply with the State Ethics Code. The provisions of the State Ethics Code pertaining to conflicts of interests, fair treatment (misuse of official position), and confidential information are particularly relevant to your situation.

or spends more than \$750 lobbying during any lobbying reporting period. HRS section 97-1(6). "Lobbying" is defined as "communicating directly or through an agent, or soliciting others to communicate, with any individual in the legislative or executive branch, for the purpose of attempting to influence legislative or administrative action or a ballot issue." HRS section 97-1(7). There are three lobbying reporting periods: January through February; March through April; and May through December. HRS section 97-3(b).

⁶ Hawaii State Constitution, Article XIV.

⁷ HRS section 84-1.

A. Conflicts of interests

1. HRS section 84-14(a)

HRS section 84-14(a), part of the conflicts of interests law, prohibits you from taking official action as an OHA Trustee that directly affects a business or other undertaking in which you have a substantial financial interest. HRS section 84-14(a) also prohibits you from taking official action directly affecting a private undertaking in which you are engaged as legal counsel, advisor, consultant, representative, or other agency capacity.⁸

“Official action” is defined in the State Ethics Code as “a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.”⁹ Official action is not limited to final decision making; it includes, among other things, providing input to the decision making process; offering advice, opinions, and comments; performing oversight, supervision, and management functions; and participating in policy development.

HRS section 84-3 defines a “financial interest”¹⁰ as:

- (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.

2. HRS section 84-14(d)

Another section of the conflicts of interests law pertains to assisting or representing others. HRS section 84-14(d) prohibits you from assisting or representing others for

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⁸ HRS section 84-14(a) states in relevant part:

§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; or
- (2) A private undertaking in which the employee is engaged as legal counsel, advisor, consultant, representative, or other agency capacity.

⁹ HRS section 84-3.

¹⁰ An employee’s financial interests include the financial interests of the employee, the employee’s spouse, and the employee’s dependent children. HRS section 84-3.

compensation on matters in which you participate or will participate as an OHA Trustee. HRS section 84-14(d) also prohibits you from assisting or representing others for compensation on matters before OHA, your state agency.¹¹

B. HRS section 84-13 (Fair treatment; misuse of position)

The fair treatment law, HRS section 84-13, prohibits you from using or attempting to use your official position as an OHA Trustee to give yourself or anyone else unwarranted advantages or benefits.¹²

C. HRS section 84-12 (Confidential information)

HRS section 84-12 prohibits you from using or disclosing confidential information you acquire in your OHA capacity to benefit yourself or others.¹³

¹¹ HRS section 84-14(d) states:

(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.

¹² HRS section 84-13 states in relevant part:

§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.

¹³ HRS section 84-12 states in relevant part:

§84-12 Confidential information. No legislator or employee shall disclose information which by law or practice is not available to the public and which the legislator or employee acquires in the course of the legislator's or employee's official duties, or use the information for the legislator's or employee's personal gain or for the benefit of anyone[.]

IV. Dual Status as Both OHA Trustee and Plaintiff

The State Ethics Code does not per se prohibit your dual status as both OHA Trustee and plaintiff in Akina v. Hawaii.¹⁴ The State Ethics Code, however, prohibits you from engaging in certain actions.

HRS section 84-13 prohibits you from using or attempting to use your position as an OHA Trustee to unfairly advantage yourself, the other plaintiffs, and/or others in matters pertaining to Akina v. Hawaii. In addition, HRS section 84-12 prohibits you from disclosing or using confidential information you acquire as an OHA Trustee to benefit yourself, the other plaintiffs, and/or others. Your participation as an OHA Trustee in official action affecting the lawsuit could also raise conflict of interest issues under HRS section 84-14(a). This section prohibits you from taking official action directly affecting an undertaking in which you are engaged as an advisor or representative.

You apparently are already aware of ethics concerns that have been raised regarding your situation and have assured the Commission that you intend to recuse yourself as an OHA Trustee from participating in any matters pertaining to the lawsuit. With this understanding, the Commission does not believe that the State Ethics Code prohibits you from performing work as an OHA Trustee that is unrelated to the lawsuit. Disqualifying yourself from participating in any matters pertaining to Akina v. Hawaii is appropriate.

V. Dual Status as Both Trustee and President/CEO of Grassroot Institute

The State Ethics Code does not per se prohibit your dual status as both OHA Trustee and President/CEO of Grassroot Institute. However, the State Ethics Code prohibits you from engaging in certain actions, either in your state capacity as an OHA Trustee or in your private capacity as President/CEO of Grassroot Institute.

As previously discussed, under the State Ethics Code, a financial interest includes employment and an officership or directorship in a business. Due to your status with Grassroot Institute as employee, President/CEO, and director, you are deemed to have a substantial financial interest in Grassroot Institute. Therefore, the conflicts of interests law, specifically, HRS section 84-14(a), prohibits you as an OHA Trustee from taking any official action directly affecting Grassroot Institute.

For example, if OHA issues a request for proposals ("RFP") for consulting services and Grassroot Institute, in response, submits a proposal to OHA for a consulting contract, HRS section 84-14(a) prohibits you from participating in OHA's selection of the

¹⁴ Akina v. Hawaii was filed over a year before you were elected as an OHA Trustee; thus, the State Ethics Code did not apply to you at that time.

consultant/contractor. To avoid a conflict of interest, you must disqualify yourself from taking such official action.

HRS section 84-14(d) (also part of the conflicts of interests law) prohibits you from assisting or representing Grassroot Institute for compensation on matters before OHA. For example, if OHA issues an RFP for consulting services, HRS section 84-14(d) prohibits you from helping Grassroot Institute prepare a proposal to submit to OHA in response to the RFP, signing the proposal on behalf of Grassroot Institute, or engaging in negotiations with OHA on behalf of Grassroot Institute regarding the proposal.

In addition, HRS section 84-14(d) prohibits you from assisting or representing Grassroot Institute on the same matters in which you participate as an OHA Trustee. For example, if the OHA Board of Trustees decides to introduce certain legislation to the Legislature or to support or oppose certain legislation introduced by others, HRS section 84-14(d) prohibits you from lobbying the Legislature on behalf of Grassroot Institute regarding the same legislation or otherwise assisting or representing Grassroot Institute regarding the same legislation. This means, among other things, you are prohibited from assisting Grassroot Institute with lobbying strategy, performing research for Grassroot Institute to submit to the Legislature, helping to prepare written comments for Grassroot Institute to submit to the Legislature, or testifying on behalf of Grassroot Institute with respect to that legislation.

HRS section 84-13 prohibits you from using or attempting to use your position as an OHA Trustee to secure unwarranted advantages or benefits for yourself, Grassroot Institute, or others. For example, using your position as an OHA Trustee to accord Grassroot Institute preferential treatment in securing a contract from OHA, or using OHA personnel or other OHA resources to perform work for Grassroot Institute, would violate the fair treatment law.

HRS section 84-12 prohibits you from using or disclosing any confidential information that you acquire in your capacity as an OHA Trustee to benefit yourself, Grassroot Institute, or others. For example, if you become privy to any confidential information pertaining to OHA beneficiaries, you are prohibited from disclosing that information to Grassroot Institute.

VI. Conclusion

The State Ethics Code does not per se prohibit your dual status as both OHA Trustee and plaintiff in Akina v. Hawaii. However, the State Ethics Code prohibits you from engaging in certain actions. You have assured the Commission that you intend to recuse yourself from participating in any matters pertaining to Akina v. Hawaii, which the Commission believes is appropriate.

The State Ethics Code does not per se prohibit your dual status as both OHA Trustee and President/CEO of Grassroot Institute. However, the State Ethics Code prohibits you from engaging in certain actions, either in your role as an OHA Trustee or in your role as President/CEO of Grassroot Institute.

Finally, the State Ethics Code is a minimum standard of conduct. A state agency may establish standards that are stricter (but not more lenient) than the State Ethics Code. Therefore, the Commission recommends that you consult with the OHA Board of Trustees as to whether any OHA policies or rules more stringent than the State Ethics Code apply to you.

Dated: Honolulu, Hawaii, February 16, 2017.

HAWAII STATE ETHICS COMMISSION

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