

ADVISORY OPINION NO. 2017-3

May 18, 2017

A member of a state board (“Board Member”) requested an advisory opinion from the State Ethics Commission (“Commission”) as to whether, under the State Ethics Code, Chapter 84, Hawaii Revised Statutes (“HRS”), she may apply to the board she serves (“Board”), or have someone else apply to the Board on her behalf, to receive a government endorsement.¹ The government endorsement would render the Board Member eligible for certain benefits. The Commission determined that the State Ethics Code prohibits the Board Member from either applying to the Board herself or having someone else apply to the Board on her behalf. The Commission advised the Board Member that either scenario is inconsistent with the State Ethics Code because the Board Member would be receiving an unfair advantage due to her status as a member of the Board.

I. Facts

The Commission understood the facts to be as follows:

A. Background

- The Board Member serves on the Board.
- The Board, which is attached to a state department (“Department”), is responsible for considering and approving applications seeking the government endorsement.
- The Department’s staff (“Department Staff”) provides technical and administrative support to the Board.

¹ The government endorsement the Board Member seeks is not something that is routinely granted through a largely ministerial process, such as a marriage license or a driver’s license renewal. Rather, as explained in this advisory opinion, the application for the government endorsement is subject to a strict review process and is approved at the discretion of the Board.

B. Application Process

- Any person may apply to the Board for the government endorsement. There is no requirement that the applicant be the person who would receive the benefits of the government endorsement.
- The Department Staff receives and reviews all applications submitted to the Board. As discussed more fully below, if the Department Staff determines that the applications are accurate and complete, the applications are forwarded to the Board for consideration.
- The identity of the individual receiving the benefits of the government endorsement (hereinafter, the “beneficiary”) need not be specified in the application. However, if the application is advanced to the Board for consideration, the Department Staff must ascertain the beneficiary’s identity (if not specified in the application) in order to provide official notice to the beneficiary. The Department Staff will obtain this information through independent research. Moreover, the Department Staff will copy the beneficiary on any of the Department’s formal communications with the applicant.

C. Review of Applications for Government Endorsement

- The Department Staff reviews all applications for accuracy and completeness. Each application undergoes a rigorous review process and must meet technical requirements.
- If the Department Staff determines that an application is accurate and complete, and that it meets the technical requirements, the application is forwarded to the Board and a public meeting of the Board is scheduled for the Board to consider whether to approve the application.
- Pursuant to state administrative rules, the Department Staff must provide the applicant and the beneficiary with advance notice of the public meeting. A beneficiary (who is not the applicant) may concur with or object to the application. The Department Staff also provides public notice of the meeting and solicits public comments on the application.
- During the course of reviewing the application, the Board may have an opportunity to meet the applicant and/or beneficiary.

- At the public meeting, the Board considers all applications that have been forwarded by the Department Staff. For each application, the Board votes on whether to approve the application.
- Subsequent to the public meeting, the Department Staff officially notifies the applicant and the beneficiary of the Board's decision.

II. Issues Presented

The first issue presented is whether the Board Member, while serving as a member of the Board, may apply to the Board on her own behalf to receive a government endorsement.

The second issue presented is whether the Board Member, while serving on the Board, may have someone else apply to the Board on her behalf. To ensure that the application process is fair, the Board Member proposed the following:

- (1) that the Board Member would arrange for someone else to submit an application on her behalf and that her identity as the beneficiary would not be revealed in the application;
- (2) that the Board Member, if necessary, would arrange for someone else to meet her fellow Board members during the course of the Board's review process; and
- (3) that, if the application pertaining to the Board Member is presented to the Board for consideration, the Board Member would abstain from the voting process and would not disclose her reason for abstaining.²

For the reasons stated below, it is the Commission's opinion that the State Ethics Code prohibits the Board Member, while serving on the Board, from applying to the Board on her own behalf, or having someone else apply to the Board on her behalf, for a government endorsement.

² According to the Board Member, Board procedures do not require Board members to disclose their reasons for abstention. Thus, the Board Member would not disclose to her fellow Board members the reason for her recusal or the fact that she would be the beneficiary of the government endorsement, if approved by the Board.

III. Application of 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.³ The legislature directs that the State Ethics Code “shall be liberally construed to promote high standards of ethical conduct in state government.”⁴

As a member of the Board, the Board Member must comply with the State Ethics Code. HRS section 84-13, the fair treatment law, is particularly relevant to her situation. This provision of the State Ethics Code 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[.]

A. Board Member Applying to Board on Her Own Behalf

The Commission believes that the State Ethics Code prohibits the Board Member from applying to the Board on her own behalf for a government endorsement while she serves as a member of the Board, even if she disqualifies herself from the Board’s decision making process regarding her application. Under the fair treatment law, asking the Board to consider the application of a sitting board member is inherently unfair. The fair treatment law specifically prohibits an employee from using the employee’s official position to secure unwarranted advantages or special treatment for himself or herself.

As a member of the Board, the Board Member has had (and will continue to have) opportunities to build and foster relationships with her fellow Board members through her ongoing interactions with them. Such relationships may place the Board Member in a more advantageous position with regard to Board’s decision on whether to approve her application.

³ The State Ethics Code defines “employee” to include members of state boards, commissions, and committees. HRS section 84-3.

⁴ HRS section 84-1.

Additionally, some of the Board Member's colleagues may feel obliged to grant her application based on relationships she has fostered. And, by the same token, others may feel obliged not to render an adverse decision regarding the Board Member's application because they will have to continue working with her for the duration of her term on the Board.

Finally, from the public's perspective, having a current Board member's application granted by the Board (even though the member was disqualified from the decision making) raises, at the very least, an appearance of impropriety as to the fairness of the process. This appearance of impropriety is problematic regardless of whether the Board Member applies directly to the Board or has another person apply on her behalf.

Consequently, in the Commission's view, HRS section 84-13 prohibits the Board Member, while serving as a member of the Board, from applying to the Board for a government endorsement on her own behalf, even if she disqualifies herself from the Board's decision making process regarding her application.#

B. Board Member Having Someone Else Apply to Board on Her Behalf

The Board Member stated she feels it is important that the evaluation of the application pertaining to her be fair and uninfluenced by any sense of favoritism or obligation by members of the Board. To this end, she does not plan to reveal to the Board that she would be the beneficiary of the government endorsement. The Board Member would arrange to have someone else submit the application to the Board on her behalf and would ensure that her identity as the beneficiary would not appear in the application. The Board Member also would disqualify herself from the decision making process without revealing the reason for her recusal to the other members of the Board. The Board Member believes that her identity as the beneficiary can be kept anonymous during the review process. The Commission disagrees.

The Commission acknowledges the Board Member's proposed efforts to help ensure that the review process is fair. Practically speaking, however, the Commission does not believe that her identity as the beneficiary can be concealed from the Board.

First, the Department Staff will learn that the Board Member is the beneficiary through independent research. As previously discussed, the Department Staff must have this information in order to notify the beneficiary and the applicant of the public meeting if the application is advanced to the Board for consideration.

Although the Department Staff is not the final decision maker in granting an application, the staff is responsible for determining whether the application is accurate and complete, and that it meets certain technical requirements prior to advancing the application to the Board for consideration. Because the Department Staff's role is to

support the Board, the staff may feel pressured to advance the application pertaining to the Board Member because of her status as a Board member and/or to conceal her identity from the rest of the Board. In doing so, the Department Staff themselves may potentially violate HRS section 84-13, by using their official positions to give the Board Member an unwarranted advantage.

If the Board Member explicitly instructs the Department Staff to not reveal that she is the beneficiary, the Board Member's actions may be construed as a misuse of her official position, in violation of HRS section 84-13. In essence, the Board Member would be instructing the Department Staff to withhold information from her fellow Board members and the public concerning the application. Moreover, the Board Member would be placing her fellow Board members in a position of unknowingly taking action affecting the application pertaining to her. In the Commission's opinion, this is inconsistent with the purpose of the State Ethics Code to ensure fairness and transparency in government.

Second, the Commission believes that the Board Member's colleagues will inevitably learn that she is the beneficiary, whether through independent research or other means (such as inquiring with the Department Staff, asking the applicant, or soliciting comments from the public regarding the application).

Once the Board Member's identity as the beneficiary is revealed, some of her colleagues on the Board, as previously discussed, may feel obliged to approve the application based on relationships she has fostered with them since joining the Board, while others may not want to render a decision adverse to her because they will have to continue working with her for the remainder of her time on the Board. Indeed, the Board Member indicated that she would arrange for the application to be withdrawn in the event the Board learns that she is the beneficiary.

Finally, from the public's perspective, having a current Board member's application granted by the Board raises, at the very least, an appearance of impropriety regarding the fairness of the process. This appearance of impropriety is especially problematic where the Board Member engages another person to submit the application on her behalf.

Consequently, in the Commission's view, HRS section 84-13 prohibits the Board Member from having someone else submit an application to the Board on her behalf, even if she disqualifies herself from the Board's decision making process.

IV. Conclusion

Based on the foregoing, the Commission concludes that the Board Member, while serving as a member of the Board, is prohibited from (1) submitting an application to the Board on her own behalf to receive a government endorsement, or (2) arranging

to have someone else submit an application to the Board on her behalf. The Board Member's status as a member of the Board gives her an inherent and unwarranted advantage regardless of whether she submits her own application or arranges for someone else to submit an application for her. In the Commission's view, either scenario is inconsistent with the high standards of ethical conduct required by the State Ethics Code.

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