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# HAWAI'I STATE ETHICS COMMISSION

State of Hawai'i · Bishop Square, 1001 Bishop Street, ASB Tower 970 · Honolulu, Hawai'i 96813

## ADVISORY OPINION NO. 2020-1

January 16, 2020

The executive officer of a state board (“Board”) requested an advisory opinion on behalf of the Board from the Hawai'i State Ethics Commission (“Commission”). The executive officer asked whether the State Ethics Code, Hawai'i Revised Statutes (“HRS”) chapter 84, permits three Board members to vote on the approval of online continuing education courses and administrative rules pertaining to those courses in light of the members' personal connections to the president (“President”) of a professional association (“Professional Association”). As discussed below, the Commission believes that the Board members may participate in those matters going forward but must not provide any unwarranted benefits to the Professional Association or its President.

### I. Facts

The Commission understands the facts to be as follows:

#### A. The Board

The Board is established by statute and regulates a profession in Hawai'i. The Board consists of five members, three of whom must be licensed members of the profession and two of whom must be members of the public. The Board's duties include administering professional licensing requirements and adopting rules regarding continuing educational requirements to promote professional competence. The Board has promulgated administrative rules requiring licensees to complete a minimum number of continuing education hours biennially. Course sponsors must apply for Board approval of continuing education courses, and courses are evaluated to determine whether they contribute to the professional competence of licensees.

The Professional Association is a private non-profit corporation that represents the profession in Hawai'i, and its members must be licensed practitioners. The Professional Association provides its members with updates about the profession and lobbies on bills affecting the profession. The President of the Professional Association is a private practitioner and is not a member of the Board.

The three Board Members who are the subject of this opinion were appointed in early 2019. Board Member 1 was appointed as a public member of the Board and has received professional services from the President of the Professional Association.

Board Member 2 was also appointed as a public member of the Board. Board Member 2 is married to the President of the Professional Association and was employed as the office manager of the President's private practice until 2017.

Board Member 3 was appointed as one of the three "professional" members of the Board – that is, those members required to have professional licenses by statute. Board Member 3 also has been involved in, and has served as a member of the board of directors of the Professional Association, for approximately ten years. Board Member 3 served on the Professional Association's Board of Directors until resigning from that board in December 2019.

#### B. 2019 Continuing Education Course Approvals

The President of the Professional Association attended a meeting of the Board in March 2019. At that meeting, the President of the Professional Association testified that the Board's administrative rules did not permit online continuing education classes and that online classes lacked adequate monitoring to ensure attendance. The President of the Professional Association recommended that the Board amend its rules governing continuing education. The Board discussed the matter but did not take any formal action regarding the President of the Professional Association's recommendation.

The Board next met in July 2019, which was the first Board meeting for Board Member 1, Board Member 2, and Board Member 3. The Board discussed amending the administrative rules pertaining to continuing education courses and voted to create a permitted interaction group ("PIG") to recommend possible amendments. Board Member 1 seconded the motion to create a PIG and the Board unanimously voted in favor of the motion. The President of the Professional Association – who, again, was not a member of the Board – asked to be appointed to the PIG along with two additional members of the Professional Association, and the Board unanimously approved that request. The Board also discussed a program to review and approve continuing education courses, and the Board members participated in those discussions.

The Board discussed the approval of specific continuing education courses at a meeting in September 2019. The President of the Professional Association attended the meeting and provided testimony to the Board on behalf of the Professional Association. According to the Board's minutes, Board Member 1, Board Member 2, and the President of the Professional Association expressed concern about potential abuse of online courses and recommended that the Board deny approval of a specific online continuing education course under consideration. Nevertheless, the Board voted to approve that course, with Board Member 1 and Board Member 2 voting "no." The Board also unanimously approved the continuation of the PIG regarding the administrative rules.

### C. Request for Guidance and Subsequent Resignations

In November 2019, the Board contacted the Commission to obtain informal guidance as to whether Board Member 1 and Board Member 2 had conflicts of interests due to their relationships with the President of the Professional Association and the President's private practice. In December 2019, the Commission's staff issued informal guidance that Board Members 1 and Board Member 2 should avoid taking any action affecting the President of the Professional Association or the President's private practice. This analysis was based in part on information provided to the Commission's staff that both Board members were employees of the President's private practice.<sup>1</sup>

Shortly thereafter, the Board informed the Commission's staff that Board Member 3 was a director and officer of the Professional Association, and requested guidance as to whether Board Member 3 was required to recuse from Board discussions about continuing education courses because of the Professional Association's testimony to the Board. The Commission's staff issued informal guidance that Board Member 3 should recuse from these matters but that the Board was welcome to seek an advisory opinion in light of the complex issues presented by this case.

In December 2019, the Board – through its executive officer -- requested an advisory opinion from the Commission. Shortly thereafter, Board Member 3 resigned as a director and officer of the Professional Association, and the President of the Professional Association resigned as President.

## II. **Application of the State Ethics Code**

As state employees, the Board members are subject to the requirements of the State Ethics Code.<sup>2</sup> As discussed below, although the Ethics Code does not prohibit the Board members from participating on matters involving the Professional Association going forward, they should exercise caution to avoid violating the Fair Treatment law (HRS § 84-13).

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<sup>1</sup> Board Member 1 and Board Member 2 are both still listed as employees of the private practice on its website, but the President of the Professional Association and both Board members confirmed that they are not currently employees of the President's private practice.

<sup>2</sup> See HRS § 84-2 ("This chapter shall apply to every nominated, appointed, or elected officer, employee, and candidate to elected office of the State and for election to the constitutional convention . . ."). The Ethics Code defines an "employee" to include members of state boards, commissions, and committees. HRS § 84-3.

A. HRS § 84-14(a) Does Not Prohibit the Board Members from Taking Action Affecting the Professional Association

The Conflicts of Interests Law, HRS § 84-14(a),<sup>3</sup> prohibits state board members from taking any official action directly affecting any business or entity in which the board member or the board member's spouse has a substantial financial interest. Under the State Ethics Code, a financial interest includes an employment interest or a directorship or officership in a non-profit organization.<sup>4</sup> "Official action" means a decision, recommendation, approval, disapproval, or any other action which involves the exercise of discretionary authority.<sup>5</sup>

The Commission does not believe that the Conflicts of Interests law prohibits Board Member 1 from taking official action as a Board member affecting the Professional Association. Board Member 1 has received professional services from the President of the Professional Association, but has no financial interest in the Professional Association and therefore is not prohibited from taking official action affecting it.

Board Member 2 had a financial interest in the Professional Association prior to December 2019, because Board Member 2's spouse was the President of the Professional Association. Generally, the Conflicts of Interests law prohibits a state employee (including a board member) from taking official action directly affecting an organization in which the employee's spouse is an officer, director, or employee.<sup>6</sup> However, because Board Member 2's spouse resigned as President of the Professional Association, Board Member 2 no longer has such a financial interest, and the Conflicts of Interests law does not prohibit Board Member 2 from taking official action affecting the Professional Association going forward.<sup>7</sup>

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<sup>3</sup> HRS § 84-14(a)(1) states: "(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 . . . ."

<sup>4</sup> HRS § 84-3 defines a "financial interest" as including an "employment, or prospective employment for which negotiations have begun," as well as "a directorship or officership in a business."

<sup>5</sup> HRS § 84-3.

<sup>6</sup> By way of this Advisory Opinion, the Commission is providing the Board with prospective ethics guidance. The Commission is not making any findings or conclusions as to whether any individual violated the Ethics Code through past conduct.

<sup>7</sup> The Conflicts of Interests law prohibits Board Member 2 from taking any official action affecting Board Member 2's spouse's private practice. For example, if the Board were to consider taking disciplinary action against Board Member 2's spouse's license, Board Member 2 would be required to recuse from any official action – including any Board discussions, deliberations, or vote – concerning the matter.

The Conflicts of Interests law has a limited exception for board members who are mandated by statute to possess particular qualifications. These board members are sometimes referred to as “mandated” board members. Mandated board members are allowed to take official action affecting their industries or professions as a whole; they are only prohibited from taking official action directly and specifically affecting their own businesses. Board Member 3 was appointed to the Board as a professional licensee pursuant to a provision of the Hawai‘i Revised Statutes. Board Member 3 is, therefore, a “mandated” board member and as such, Board Member 3 is allowed to take action directly affecting the profession as a whole but cannot take action directly and specifically affecting Board Member 3’s own professional license or business.

The Commission considered whether Board Member 3’s status as a mandated member of the Board would allow Board Member 3 to take action affecting the Professional Association if Board Member 3 were to re-join the Professional Association’s board of directors; however, the Commission concluded that the exception for mandated board members would not allow Board Member 3 to take official action affecting the Professional Association if Board Member 3 were to serve on the Professional Association’s board. Although the Conflicts of Interests law allows “a person whose position on a board . . . is mandated by statute,” such as Board Member 3, to take action directly affecting that person’s financial interests if the financial interest “is related to the member’s particular qualifications,” HRS 84-14(a), the Commission has interpreted this exception narrowly. In Advisory Opinion 86-11, the Commission concluded that the chairperson of a state licensing board was prohibited from taking any action affecting educational and training requirements for licensure because he owned and operated a professional school in the same field, even though the chairperson was a “mandated” board member. Advisory Opinion No. 86-11, 1986 WL 1362022, at \*1. The Commission observed that the qualifications for mandated members were “prescribed by a state statute establishing that board and providing that three members of the board shall have at least three years of practical experience as licensed therapists in the profession regulated by the board.” Id. at \*2. The Commission concluded that, although the chairperson could take action affecting his career as a therapist, he could not take action affecting his school because the board’s governing statute did not mandate that he own a school to participate on the board.

Similarly, Board Member 3’s membership on the Professional Association is not mandated by statute, and the Conflicts of Interests law would therefore prohibit Board Member 3 from taking any official action directly affecting the Professional Association while serving as a member of the board of directors of the Professional Association. In light of Board Member 3’s resignation from the Professional Association’s board of directors, Board Member 3 no longer has a financial interest in the organization and the Conflicts of Interests law does not prohibit Board Member 3 from taking action affecting it.

B. HRS § 84-13 Prohibits Board Members from Providing the President or the Professional Association with Preferential Treatment

The Fair Treatment Law, HRS § 84-13, prohibits state employees from using their state positions to obtain unwarranted advantages or benefits for themselves or others; this law prevents employees from obtaining special perks or treatment for themselves or others as a result of their state employment.<sup>8</sup> In this case, the Board members have private relationships with the Professional Association and its President. Under the Fair Treatment law, they must not use their state position to provide those individuals unwarranted benefits or preferential treatment due to their relationships.

**III. Conclusion**

The Commission expresses no opinion nor draws any conclusions regarding the Board members' past conduct. However, for the reasons discussed above, the Commission believes that, going forward, the Conflicts of Interests law does not prohibit the Board members from taking official action affecting the Professional Association. Due to their relationships with the Professional Association and its President, the Commission cautions the Board members that they must not provide unwarranted benefits or preferential treatment to those individuals. The Commission thanks the Board for seeking guidance from the Commission.

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<sup>8</sup> HRS § 84-13(a) states that: "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 . . . ."