



# HAWAII STATE ETHICS COMMISSION

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

## ADVISORY OPINION NO. 2022-1

January 19, 2022

A state employee (“Employee”) requested an Advisory Opinion from the Hawai'i State Ethics Commission (“Commission”) as to whether the Employee may apply to her state agency (“Agency A”) for a license to operate a private business. Because the Employee is directly involved in regulating this industry, the Commission concludes that the Hawai'i State Ethics Code, Hawai'i Revised Statutes (“HRS”) chapter 84, prohibits the Employee from applying for and obtaining the requested license while employed by Agency A.

### I. Facts

The Employee works for Agency A, which regulates the specified industry to ensure compliance with state laws and regulations. Among other things, Agency A reviews and approves license applications from applicants seeking to operate a regulated facility. As part of her state regulatory duties, the Employee conducts an initial review of all applications that are submitted by applicants in a particular county (“County A”). After reviewing and approving the documents submitted by the applicant, the Employee transfers the matter to another employee to conduct the pre-licensing inspection. The Commission's understanding is that Agency A does not simply rubber-stamp applications: instead, employees conduct a thorough review and exercise independent judgment in determining whether an applicant has met the standards for licensure, and there is typically some communication between the applicant and Agency A while the application is under review. As a result, the application process can take approximately one to two years.

Agency A has a total of nineteen employees. Employee is the only person assigned to County A. If the Employee were to recuse herself from a particular application, the matter would be re-assigned to another staff person.

The Employee is seeking a license to operate a certain type of business that is regulated by Agency A. The Employee indicated that she would like to continue her state employment with Agency A after receiving the license. The Employee, however, also noted that if she decided to leave her state position, she hoped to obtain the license first before formally terminating her state employment.

## II. Application of the State Ethics Code

State employees are subject to the State Ethics Code.<sup>1</sup> The Preamble to the State Ethics Code charges the Commission with administering and enforcing this law “so that public confidence in public servants will be preserved.”<sup>2</sup> Additionally, the law provides that the State Ethics Code “shall be liberally construed to promote high standards of ethical conduct in state government.”<sup>3</sup>

### A. Conflicts of Interests Law – HRS § 84-14(b)

The Conflicts of Interests law, HRS § 84-14(b), prohibits an employee from acquiring a financial interest in any business or other undertaking that the employee reasonably believes may be directly involved in official action to be taken by the employee.<sup>4</sup> A “financial interest” includes an ownership interest, an employment interest, or a directorship or officership in a business. HRS § 84-3. “Official action” is defined as a “decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.” HRS § 84-3.

As the Commission has stated in prior opinions, a state employee is prohibited from acquiring outside business interests that would directly conflict with the employee’s state duties, particularly where the employee’s position involves regulatory and law enforcement functions. See, e.g., Advisory Opinion No. 155 (1973) at 1,<sup>5</sup> 1973 WL 390370, \*1; Advisory Opinion No. 440 (1981) at 1,<sup>6</sup> 1981 WL 762607, at \*1; Advisory Opinion No. 281 (1976) at 2,<sup>7</sup> 1976 WL 452395, \*2. The purpose of this law is to prevent state employees from acquiring financial interests that would limit the performance of their duties and render them ineffective in their jobs.

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<sup>1</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 . . .”).

<sup>2</sup> HRS chapter 84, Preamble.

<sup>3</sup> HRS § 84-1.

<sup>4</sup> HRS § 84-14(b) states that: “No employee shall acquire financial interests in any business or other undertaking which the employee has reason to believe may be directly involved in official action to be taken by the employee.”

<sup>5</sup> Available at <https://files.hawaii.gov/ethics/advice/AO155.pdf>.

<sup>6</sup> Available at <https://files.hawaii.gov/ethics/advice/AO440.pdf>.

<sup>7</sup> Available at <https://files.hawaii.gov/ethics/advice/AO281.pdf>.

The facts in this case are essentially identical to the circumstances considered in Advisory Opinion No. 155. There, the Commission held that HRS § 84-14(b) prohibited a law enforcement officer from applying for a license from his own division since the type of license involved was specifically within the scope of the employee's official duties. As part of its reasoning, the Commission stated:

The financial interest in this case was an ownership interest in a business enterprise, that is, all the rights and interests which accrue to him by virtue of the license and all other properties involved in the exercise of the rights therein. This financial interest may be directly involved in official action by the employee in two ways. First, the employee would have responsibility to take enforcement action with respect to the license itself; that is, ascertaining whether or not the licensee had complied with the laws and regulations relating to the licenses. Secondly, he would have to take enforcement action vis-a-vis his prospective customers. As the only enforcement officer normally in the area, the practical aspects in the case indicated that the employee would be responsible for the enforcement duties as to his own license and enforcement responsibilities as to all of his potential or prospective customers. This type of action, being discretionary, was official action within the meaning of the ethics law. We therefore advised that the employee should not apply for and obtain a license.

Advisory Opinion No. 155 (1973) at 1, 1973 WL 390370, \*1.

In this case, the type of business that the Employee is seeking to establish is regulated by Agency A. As part of her state duties, the Employee is responsible for reviewing all applications from prospective licensees in County A, conducting inspections of licensed businesses, and enforcing all applicable laws and regulations governing the industry. Because the type of license and business involved would be directly affected by the Employee's official action as a state employee, HRS § 84-14(b) prohibits the Employee from applying for and obtaining the requested license.

#### **B. Fair Treatment Law – HRS § 84-13(a)**

The Fair Treatment law, HRS § 84-13(a), prohibits state employees from using their state positions to obtain unwarranted advantages or benefits for themselves or

others. This law is intended to prevent employees from obtaining special treatment for themselves or others as a result of their state employment.<sup>8</sup>

The Commission concludes that if the Employee were to apply for a license while employed by Agency A, this would violate the Fair Treatment law. The Commission previously considered a similar case involving a board member who sought to apply to her own board for a government endorsement. There, the Commission concluded that the Fair Treatment law prohibited this action:

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.

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.

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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 . . . ."

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.

Advisory Opinion No. 2017-03 at 4-5,<sup>9</sup> 2017 WL 3400661 at \*3.

Indeed, over forty years ago, the Commission specifically stated:

[A]n employee shall not use or attempt to use his official position to secure unwarranted advantages or treatment for himself or others. We . . . held specifically in this opinion that an employee who sought official action on his own behalf from the agency he served, created a presumption, under the fair treatment section, that he was using his position in an unwarranted manner. The relationship a board member or employee had to his or her fellow board members and employees was such that a truly objective decision on the action sought by the fellow employee or board member could not be achieved. While we did not hold that all such action was barred, we did state that any board member or employee intending to seek such action must raise such a matter with the Commission for its approval.

Advisory Opinion No. 330 (1978) at 2,<sup>10</sup> 1978 WL 492682 at \*2. See also Advisory Opinion No. 331 (1978) at 1,<sup>11</sup> 1978 WL 492683 at \*1.

The same concerns exist here. The Employee works in a small subdivision – only nineteen employees in total – and the type of work performed by the Employee involves specialized and discretionary judgment of individual license applications. In light of this, the Employee has undoubtedly established relationships with her colleagues, and these relationships may color their review of her application. Furthermore, given Agency A's regulatory role, there may be a perception among other applicants that the Employee's application was treated more quickly, or otherwise more favorably, than theirs. As a result, the Commission concludes that it would be "inherently unfair" for the Employee to apply for the requested license while she is employed by Agency A.

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<sup>9</sup> Available at <https://files.hawaii.gov/ethics/advice/AO2017-03.pdf>.

<sup>10</sup> Available at <https://files.hawaii.gov/ethics/advice/AO330.pdf>.

<sup>11</sup> Available at <https://files.hawaii.gov/ethics/advice/AO331.pdf>.

### **C. Post-Employment Law – HRS § 84-18(c)**

The Commission notes that if the Employee leaves state employment, then the Post-Employment law would apply. Former state employees are subject to certain restrictions upon terminating state employment. For a period of twelve months after leaving state service, former state employees are generally prohibited from representing any person or business in a paid capacity on: (1) matters in which they participated as a state employee, or (2) matters involving official action by the particular state agency or subdivision thereof with which they served. HRS § 84-18(c).<sup>12</sup>

For purposes of the Post-Employment law, the term “represent” means “to engage in direct communication on behalf of any person or business” with a state agency or subdivision thereof, or its employees. HRS § 84-18(g). Under this law, former employees who are representing private employers or otherwise acting in a paid capacity are not permitted to engage in direct communications with their former state agencies – or, in the case of larger agencies, the subdivision for which they worked. See HRS § 84-18(c); Hawai‘i Administrative Rules § 21-9-1.

The Post-Employment law, however, does not prohibit the Employee from applying to Agency A on her own behalf. In other words, the Post-Employment law prohibits the Employee from being paid to represent a private employer or business before Agency A, but it does not prevent her from seeking a license solely for herself. Therefore, as long as the Employee does not hire employees or take on business partners and act in a paid representative capacity for a business entity, the Employee is not prohibited from communicating with Agency A during the one-year period after leaving state service.

### **III. Conclusion**

For the reasons discussed above, the Commission concludes that the State Ethics Code prohibits the employee from applying for the proposed license while she is employed by Agency A. If the employee decides to leave her current position, the employee may apply for the license immediately upon leaving employment with Agency A, so long as she does so in her individual capacity.

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<sup>12</sup> HRS § 84-18(c) provides in relevant part:

(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. . . .

Dated: Honolulu, Hawai'i, January 19, 2022.

HAWAI'I STATE ETHICS COMMISSION

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