



HAWAII STATE ETHICS COMMISSION

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

ADVISORY OPINION NO. 2022-3

February 16, 2022

On January 20, 2022, the Hawai'i State Ethics Commission ("Commission") received a written request for an advisory opinion from a member ("Member") of a state Board ("Board") asking whether she may apply for – and, if offered, accept – a position within a certain state department ("Department") while continuing to serve as a member of the Board. As discussed more fully below, the Commission concludes that the Hawai'i State Ethics Code, Hawai'i Revised Statutes ("HRS") chapter 84, prohibits her from applying for the position with the Department while she serves as a member of the Board.

I. Facts

Pursuant to the Hawai'i Constitution, the Board has the power to formulate policy for, and appoint the director of, the Department ("Department Director"). By statute, the Board hires and oversees the Department Director. The Department Director, in turn, oversees the appointment and removal of nearly all Department personnel.

The Department recently advertised an opening for a full-time position in Branch A of the Department. The Administrator of Branch A would make the hiring decision and would supervise the position. The position was first offered internally only – that is, just to current Department employees – but the Member did not apply at that time, and there were no internal candidates. The Department then advertised the position externally (that is, to the general public). The Member is interested in applying for this position and serving in this role if selected; the Member is willing to resign her position as a member of the Board to do so, although she would prefer to remain on the Board while applying for (and possibly serving in) the open position.

II. Application of the State Ethics Code

The State Ethics Code applies to all state employees.¹ The term "employee" is defined by the Ethics Code as including members of boards, commissions, and

¹ 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 . . .").

committees.² Accordingly, as a member of the Board, the Member is subject to the State Ethics Code. 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 prevents employees from obtaining special perks or treatment for themselves or others as a result of their state employment.³ The Fair Treatment law also prohibits state employees from “[s]eeking other employment or contract for services for oneself by the use or attempted use of the . . . employee’s office or position[.]” HRS § 84-13(a)(1).

The Commission concludes that the Member applying for the Department position, while serving as a Board member, would violate the Fair Treatment law. In an opinion issued more than forty years ago, the Commission explained its concerns:

HRS §84-13 provides that an employee shall not use or attempt to use his official position to secure unwarranted advantages or treatment for himself or others. We had implied there and 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. . . . Our ruling here was supported by the language of HRS §84-1 which provides that the ethics code shall be liberally construed to promote high standards of ethical conduct in state government.

Advisory Opinion No. 330 at 2,⁴ 1978 WL 492682 at *2. See also Advisory Opinion No. 2017-03 at 4-5, 2017 WL 3400661 at *3 (“Under the fair treatment law, asking the Board to consider the application of a sitting board member is inherently unfair. . . . [S]ome of

² See HRS § 84-3 (“Employee” means any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees. . .

³ 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”

⁴ Available at <https://files.hawaii.gov/ethics/advice/AO330.pdf>.

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.”). The Commission has also stated – though in a non-binding Ethics Advisory – that “the State Ethics Code requires a board member to resign as a member of the board when he decides to apply for a position that is hired, selected or approved by the board.” Ethics Advisory 2013-03 at 1, available at <https://ethics.hawaii.gov/wp-content/uploads/2013/08/EthicsAdvisory2013-03.pdf>. As the Commission explained:

When a board member applies for a position to be hired, selected or approved by the board, the Commission believes that the board member likely receives an inherent advantage. For example, because of his position, a board member may have “insider knowledge,” i.e., he may be privy to information concerning the qualifications that other board members consider most critical for the position and have access to other information about the selection process that may not be available to other applicants; he may have opportunities to build and foster support for his application amongst the other board members through his ongoing interactions with them as a member of the board; other board members may feel “pressured” or be otherwise influenced, consciously or unconsciously, because they must continue to work with the board member both during the process and, in the event that he is not hired, afterwards.

Id. at 3.

The Commission recognizes that the Member’s request poses a slightly different question because she is not applying to her own board for employment; instead, she is applying to Branch A, for a position within the Department. The Department Director will not be involved in this hiring decision. The Administrator of Branch A is the hiring authority.

Nevertheless, the Commission has the same concerns that she may receive special treatment – even if unintentional – because of her position as a Board member. The Member has a position of power as a member of the Board, and the Department personnel making the hiring decision may feel pressure to offer her the position. Although the Department Director will not be directly involved in the hiring decision, the individual making the hiring decision is a state-wide Department officer who reports to the Department Director. Additionally, the Member has undoubtedly had the opportunity

to form relationships with Department personnel as a result of her Board service – again, raising concerns about possible special treatment. Finally, there may be a perception among other applicants for the position – and among the public – that the Member’s candidacy was treated more favorably because of her position on the Board. As in Advisory Opinion 2017-03, the Commission concludes that it would be “inherently unfair” to apply for a state-wide Department position while serving as a member of the Board. The Commission wishes to make clear, however, that Board members are not *per se* prohibited from applying for employment within the Department: there may be circumstances in which a position is so far removed from the Department Director, particularly those in which hiring is done by individual district-based project managers, rather than state-wide Department staff, that there would be no appearance of impropriety in the dual roles. The Commission leaves that question open for another day.

If the Member decides to resign from her Board position, however, she may apply for the Department position right away – that is, under the Post Employment law, HRS § 84-18, there is no cooling-off period before she may apply for employment with the Department.

III. Conclusion

For the reasons discussed above, the Commission concludes that the Member may not apply for this Department position while serving as a member of the Board. She may, however, apply for the position immediately upon resignation from the Board.

Dated: Honolulu, Hawai’i, March 16, 2022.

HAWAI’I STATE ETHICS COMMISSION
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