



# HAWAII STATE ETHICS COMMISSION

State of Hawaii • Bishop Square, 1001 Bishop Street, ASB Tower 970 • Honolulu, Hawaii 96813

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## INFORMAL ADVISORY OPINION NO. 2013-5

A member of the public filed a charge against Jane Doe, a state employee, who allegedly took official state action that unfairly benefitted her spouse's private business. Jane Doe filed an answer to the charge denying the allegations. Having investigated the allegations in the charge, the Commission resolved this matter with the issuance of an Informal Advisory Opinion to Jane Doe.

### Facts

Based on its investigation, the Commission understood the following facts to be true. Jane Doe worked for a state agency that provided administrative support to a team comprised of employees from various state agencies. The team was part of a state treatment program established by statute. As coordinator of the team, Jane Doe's state duties included recommending and implementing "best practice" standards for the management of clients in the treatment program. One such practice involved the administering of a specialized examination ("special exam"). Private treatment providers wishing to have the special exam administered to a client in the state treatment program could seek the services of an examiner. However, Hawaii had no qualification or certification requirements for examiners who perform the special exam. Nevertheless, the team, prior to Jane Doe's hiring, had endorsed model standards for examiners adopted by a national professional organization ("organization") of examiners.

Jane Doe's spouse ("Mr. Doe") was the owner of a private business that provided special exam services ("examination business"). At one of the team's public meetings, Mr. Doe stated that he had attended a recent conference sponsored by the organization and also indicated that he was the only examiner in the state certified to administer the special exam.

After the meeting, both Jane Doe and a fellow team member independently emailed the organization, requesting information on certified examiners in Hawaii. The team member received a response from the organization and forwarded it to Jane Doe and to a number of others, including private treatment providers. The organization identified four of its members who were, by the organization's standards, certified to conduct the special exam in Hawaii. Mr. Doe was one of the four members.

In response to the team member (which was copied to all the recipients on the original email), Jane Doe stated that the organization's list of examiners identified those who had completed the original organization training, but not those examiners who were current on their certification. She advised that she would forward more complete

information that she had requested from the organization. She also opined that it was important that examiners be in compliance with the organization's qualification standards.

In a second email to the team member (which again was copied to all the recipients on the original email), Jane Doe provided the information received from the organization which indicated that Mr. Doe was the only examiner in the state who had met the organization's continuing education requirement. She also recommended that those requesting special exam services obtain training and experience documentation from the examiner.

In her answer to the charge and during the Commission's subsequent investigation, Jane Doe indicated that the statements in her emails were consistent with the team's mission to develop best practice standards for the management of clients in the treatment program. Moreover, she maintained that her statements were intended to suggest that treatment providers seeking special exam services inquire into the training and experience of the examiner.

#### Application of the State Ethics Code

HRS section 84-14(a), which is part of the State Ethics Code's conflicts of interests law, prohibits a state employee from taking official action that directly affects a business in which the employee has a financial interest.<sup>1</sup> As defined in the statute, "financial interest" includes, among other things, a business interest owned by an employee's spouse.<sup>2</sup> Jane Doe therefore was prohibited from taking official action

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<sup>1</sup> In relevant part, HRS section 84-14(a) reads:

- §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.

<sup>2</sup> The term financial interest is defined by HRS section 84-3 as:

- an interest held by an individual, the individual's spouse, or dependent children which is:
- (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.

directly affecting her spouse's examination business.<sup>3</sup> The term "official action" is defined as, essentially, any discretionary action and includes recommendations. Based on the information from the Commission's investigation, including statements from Jane Doe, it appeared to the Commission that Jane Doe might have taken official action directly affecting her spouse's business in violation of HRS section 84-14(a).

In her interview with the Commission's staff, Jane Doe explained that as the team's coordinator, she felt that she could not allow inaccurate information in the team member's original email to stand without correction. To address what she believed were inaccuracies, Jane Doe replied to the team member's email. She characterized her communication as part of, and as consistent with, her official duties as coordinator of the team. The Commission believed, however, that Jane Doe's emails could reasonably be construed as recommending that providers hire her spouse in order to adhere to the best practice standards advocated by the team. By sending these emails it appeared that Jane Doe recommended, promoted, or otherwise supported her spouse's private examination business. By doing so, Jane Doe may have violated HRS section 84-14(a).<sup>4</sup>

Based on the totality of the circumstances, the Commission believed it was appropriate to resolve this matter with an Informal Advisory Opinion to inform Jane Doe about the application of the State Ethics Code. The Commission cautioned Jane Doe that HRS section 84-14(a) prohibited her from taking any official state action, including making any recommendations or suggestions, or taking any other discretionary action that directly affects the examiner industry and, consequently, her spouse's examination business.<sup>5</sup> The Commission advised Jane Doe that HRS section 84-14(a) required her to disqualify herself from taking action directly affecting the examiner industry.<sup>6</sup>

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<sup>3</sup> The term "official action" is defined in HRS section 84-3 as:

a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.

<sup>4</sup> Jane Doe's actions also raised some concerns under HRS section 84-13, which, in relevant part, reads:

**§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. . . .

This section of the State Ethics Code prohibits a state employee from using his state position to grant anyone else an unwarranted advantage. This section would generally prohibit a state employee from misusing his position to promote a spouse's business.

<sup>5</sup> For example, Jane Doe could not be involved in promoting or promulgating any standards for examiners.

<sup>6</sup> The facts provided to the Commission indicated that Jane Doe's spouse may periodically testify before the team. If this was the case, then it was likely that Jane Doe needed to recuse herself from considering his testimony. Jane Doe was advised to consult with the Commission about the application of the State Ethics Code if this situation arose.

This redacted public version of the Informal Advisory Opinion that was issued to Jane Doe is published pursuant to HRS section 84-31(f) and is intended to provide information and education on the application of the State Ethics Code.

Dated: Honolulu, Hawaii, November 20, 2013.

HAWAII STATE ETHICS COMMISSION

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