

INFORMAL ADVISORY OPINION NO. 2014-2

On September 24, 2014, the Hawaii State Ethics Commission (“Commission”) issued Charge No. 14-Cg-11 (the “Charge”) against Jane Doe for violations of the conflicts of interests section of the State Ethics Code, Hawaii Revised Statutes (“HRS”) sections 84-14(b) and 84-14(d). On October 15, 2014, Jane Doe filed an answer to the Charge. Having investigated the allegations in the Charge, the Commission is closing its review of this matter with the issuance of this Informal Advisory Opinion.

Facts:

Based on its investigation, the Commission understood the following facts to be true: At the time of the actions that formed the basis of the Charge, Jane Doe was a member of a state board (“Board”) that issued approvals and provided recommendations to applicants who appeared before the Board. Members of the private sector, and others, would submit applications and make presentations to the Board that typically involved an oral discussion and a visual slide show. The presenter would also respond to questions from members of the Board. The Board would then vote on whether to approve and/or provide a favorable recommendation.

In her private capacity, Jane Doe was an employee, officer, and owner of a private firm that periodically assisted clients before the Board. During her tenure on the Board, Jane Doe assisted and/or represented her firm and her clients (i.e., applicants) before the Board on three occasions. On the first occasion, she recused herself from considering the application and then, in her private capacity, presented the application to the Board on behalf of her private client. Prior to her tenure on the Board, she had prepared and submitted the application on behalf of this private client. On the second occasion, in her private capacity, she assisted in preparing another client’s application and then represented that client during the Board’s inspection of the subject of the application. She did not attend the Board meeting at which that application was considered. On the third occasion, Jane Doe’s client was a government agency. On behalf of that agency and her private firm, she assisted in preparing several applications. During the Board meeting, she recused herself from considering the applications and then, in her private capacity, presented the applications before the Board.

Jane Doe's Answer to the Charge:

Jane Doe explained that she had assisted and represented clients before the Board prior to her tenure on the Board. A member of the Board and an official of the state agency to which the Board is attached both asked her to join the Board. She initially declined and told them that she was concerned about possible conflicts of interests. They both advised her that, as long as she recused herself from taking action affecting her firm's clients, she would not have a conflict of interests. Based on these assurances, Jane Doe joined the Board.

At the beginning of her term, agency staff provided Jane Doe with a copy of an agency manual that contained guidance on conflicts of interests. The manual explained that, if a conflict of interests arose, the Board member was required to disclose the conflict and recuse himself from taking action on the matter. Jane Doe explained that she had acted in accordance with the advice and guidance she had received from the agency and was unaware of any other applicable laws.

Application of the Hawaii State Ethics Code:

As a member of the Board, Jane Doe was an "employee" for purposes of the State Ethics Code.¹ As such, she was subject to, and was required to comply with, all of the statute's provisions.²

HRS Section 84-14(d)

The State Ethics Code prohibits an employee from using, or appearing to use, the contacts and relationships that the employee has developed with co-workers in order to benefit himself or a private entity. Specifically, HRS section 84-14(d) provides:

No legislator or employee shall assist any person or business or act in a representative capacity for a fee or other compensation to secure passage of a bill or to obtain a contract, claim, or other transaction or proposal in which the legislator or employee has participated or will participate as a legislator or employee, nor shall the legislator or employee assist any

¹ HRS section 84-3.

² Jane Doe resigned from the Board during the Commission's investigation of this matter. As a former state employee, Jane Doe is subject to the post employment restrictions of the State Ethics Code. Specifically, HRS section 84-18(c) prohibits her, for a twelve month period, from being compensated to represent her private firm or a client on matters that she participated in while a Board member or on matters involving official action by the Board. For example, during this period Jane Doe may not be compensated to make presentations on behalf of clients before the Board.

person or business or act in a representative capacity for a fee or other compensation on such bill, contract, claim, or other transaction or proposal before the legislature or agency of which the legislator or employee is an employee or legislator.

Under HRS section 84-14(d), Jane Doe was prohibited from being compensated to assist or represent her firm or her private clients on matters before the Board.³ It appeared that she did so and, therefore, may have violated HRS section 84-14(d).

HRS Section 84-14(b)

Another of the State Ethics Code's conflicts of interest laws prohibits an employee from "acquiring" a conflict of interest. HRS section 84-14(b) reads:

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.

"Financial interest" is defined to include an employment.⁴ Accordingly, the law does not allow an employee, in his private capacity, to "acquire" a new client or other employment if it is reasonably likely that the employee, in his state capacity, will take some "official action" with respect to that client or the private employer.⁵

³ HRS section 84-14(d) does not prohibit a state employee from assisting or representing a government agency. Thus, Jane Doe was not prohibited from representing her third client, a government agency. However, Jane Doe, under this section, was prohibited from representing her private firm before the Board.

⁴ HRS section 84-3 defines the term "financial interest" as:

§84-3 Definitions. "Financial interest" means 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.

⁵ HRS section 84-3 defines the term "official action" as:

§84-3 Definitions. "Official act" or "official action" means a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.

Through her private firm, Jane Doe acquired two clients while she was a member of the Board. These clients hired her to secure approval and/or a favorable recommendation from the Board. Thus, it appeared that it was reasonable to believe that Jane Doe, as a member of the Board, would be required to take official action affecting her clients and her firm. HRS section 84-14(b) prohibited her from “acquiring” the clients and thereby creating a likely conflict of interests with her duties as a member of the Board. By acquiring these clients through her firm while she was a member of the Board, it appeared that Jane Doe may have violated HRS section 84-14(b).

Issuance of Informal Advisory Opinion:

In its review of this matter, the Commission considered the fact that Jane Doe was repeatedly informed by agency staff and by a Board member that she would not be in violation of any conflicts of interests provisions if she recused herself from taking action affecting her private clients. She was also provided with a manual that repeated this same advice. The Commission’s investigation revealed that agency employees believed this as well. Although a State employee’s misunderstanding of the law does not excuse a violation of the law, the Commission believed that, in this case, it was reasonable for Jane Doe to have relied upon the advice of the Board member and the agency staff. Jane Doe followed the advice that she received and recused herself from taking action affecting her private clients. She was told that no other action was necessary. When Jane Doe was informed about the conflicts of interests provisions that were the subject of the Charge, she resigned from the Board.

Considering the totality of circumstances, the Commission believed it was appropriate to resolve this matter with an Informal Advisory Opinion to educate and advise Jane Doe about the application of the State Ethics Code.

Dated: Honolulu, Hawaii, November 19, 2014.

HAWAII STATE ETHICS COMMISSION

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