



HAWAII STATE ETHICS COMMISSION

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

Resolution of Charge **2015-2**

(Charge No. 2015-Cg-3)

Conflicts of Interests Due to Board Member's Consulting Services

October 29, 2015

On March 18, 2015, the Hawaii State Ethics Commission ("Commission") issued Charge No. 2015-Cg-3 ("Charge") against John Doe for violations of the conflicts of interests section of the State Ethics Code, Hawaii Revised Statutes ("HRS") section 84-14. At the time of the actions that formed the basis of the Charge, John Doe was a member of a Hawaii Health Systems Corporation ("HHSC") regional board of directors ("Board").¹ The Charge alleged that John Doe violated: (1) HRS section 84-14(a) by taking official action as a Board member directly affecting his private employer and a private client; and (2) HRS section 84-14(d) by assisting and/or representing his private employer and a private client before HHSC.

The Commission and John Doe agreed to a resolution of the Charge, which includes the publication of this Resolution of Charge.² As part of that resolution, John Doe also agreed to pay \$1,000 to the State of Hawaii general fund.

Alleged Facts

Based on its investigation, the Commission understood the facts to be as follows:

In his private capacity, John Doe is employed by a consulting firm. The Commission's investigation indicated that John Doe received a fee or other compensation for his consulting services.

Before his appointment to the Board, HHSC retained John Doe, as an employee of the firm, to provide consulting services to HHSC for a certain project ("Project A"). John

¹ The HHSC, a public health system established under HRS chapter 323F, is divided into five regional systems. Each of the five regional systems is governed by a regional system board of directors.

² The resolution of this Charge does not constitute an admission by John Doe that John Doe violated the State Ethics Code. The resolution of this Charge does not constitute a determination by the Commission that John Doe violated the State Ethics Code.

Doe continued to provide consulting services on behalf of the firm to HHSC for Project A after his appointment to the Board.

As a member of the Board, John Doe attended Board meetings. At several meetings, he presented information concerning Project A to the Board in his private capacity as an employee of the consulting firm. In his capacity as a Board member, John Doe also appeared to have participated in Board discussions about Project A at several meetings and also appeared to have voted on Board motions concerning Project A.

John Doe also provided consulting services as an employee of the firm to a private business client. John Doe represented the client in negotiations with HHSC for another project ("Project B"). John Doe also attended a Board meeting at which he appeared to have voted as a Board member on a motion concerning Project B.

Application of the State Ethics Code

As a member of the Board, John Doe was an "employee" for purposes of the State Ethics Code.³ As such, he was subject to, and was required to comply with, all provisions of the State Ethics Code, including the conflicts of interests law, HRS section 84-14.

HRS Section 84-14(d)

The State Ethics Code prohibits a state employee from transacting business on behalf of a private employer or client with the employee's state agency. Specifically, under HRS section 84-14(d), an employee cannot assist or represent any person or business on a transaction or proposal before the employee's state agency, if he is paid or otherwise compensated to do so.⁴ This prohibition is intended to prevent an employee

³ HRS section 84-3 states:

"Employee" means any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, and employees under contract to the State or the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices and judges.

[Emphasis added.]

⁴ HRS section 84-14(d) states:

(d) 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 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.

from using, or appearing to use, contacts and relationships that the employee has developed with other agency employees in order to benefit himself or a private entity.

HRS section 84-14(d) prohibited John Doe from assisting or representing his private employer or a private client for pay on transactions before his state agency, HHSC.⁵

With respect to Project A, John Doe appeared to have provided consulting services to HHSC and presented information to HHSC in his private capacity as the consulting firm's employee. Thus, John Doe appeared to have "represented" the firm before HHSC, which was prohibited by HRS section 84-14(d). John Doe further appeared to have received pay or other compensation for his services to HHSC on behalf of the consulting firm.

With respect to Project B, it appeared that John Doe represented his private employer and a private client in negotiations with HHSC and received compensation to do so.

HRS section 84-14(d) prohibited John Doe's apparent actions with respect to both Project A and Project B.

HRS Section 84-14(a)

Another section of the State Ethics Code's conflicts of interests law, HRS section 84-14(a), prohibits an employee from taking action, as a state employee, that directly affects his private employer. In relevant part, the statute provides:

No employee shall take any official action⁶ directly affecting . . .
[a] business or other undertaking in which the employee has a
substantial financial interest⁷[.]⁸

⁵ As an HHSC Board member, John Doe's state agency was HHSC, which included the Board.

⁶ HRS section 84-3 defines "official action" as follows:

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

⁷ HRS section 84-3 defines "financial interest" as follows:

"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.

Accordingly, HRS section 84-14(a) prohibited John Doe from taking action, in his capacity as a member of the Board, affecting the consulting firm at which he was employed. John Doe was required to abstain from participating in Board discussions or votes on matters involving the consulting firm. By apparently participating in Board discussions and voting on motions concerning Project A and Project B, John Doe appeared to have taken “official action” as a Board member directly affecting a business (the consulting firm) in which he had a substantial financial interest. HRS section 84-14(a) prohibited John Doe from taking such action.

Resolution of Charge

John Doe cooperated with the Commission throughout its investigation in this case. He stated that he was retained to provide consulting services to HHSC before he was appointed to the Board, and that HHSC Board members and management employees approached him and encouraged him to agree to serve as a volunteer member of the Board.

John Doe also said that he sought the advice of HHSC’s legal counsel as to whether he could serve as a Board member and continue to provide consulting services to HHSC. According to John Doe, HHSC’s legal counsel specifically advised him that he would not have a conflict of interest; that he could continue to provide consulting services and report to HHSC on matters relating to Project A; and that he would only have to recuse himself when Project A came before the Board for a vote. John Doe has since resigned from the Board.

The Commission considered John Doe’s explanation that he had relied upon the legal advice that he received from HHSC’s attorney and, based upon that advice, did not realize that his private employment activities placed him in a conflict of interest with his

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- (5) A loan or other debtor interest.
 - (6) A directorship or officership in a business.

⁸ In its entirety, HRS section 84-14(a) 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; or
 - (2) A private undertaking in which the employee is engaged as legal counsel, advisor, consultant, representative, or other agency capacity.

A department head who is unable to disqualify the department head's self on any matter described in paragraphs (1) and (2) will not be in violation of this subsection if the department head has complied with the disclosure requirements of section 84-17.

A person whose position on a board, commission, or committee is mandated by statute, resolution, or executive order to have particular qualifications shall only be prohibited from taking official action that directly and specifically affects a business or undertaking in which the person has a substantial financial interest; provided that the substantial financial interest is related to the member’s particular qualifications.

position on the Board.⁹ It appeared to the Commission that by advising John Doe that he could represent his private employer on matters before HHSC, HHSC's attorney provided legal advice to John Doe that was contrary to the State Ethics Code. Although a state employee's misunderstanding or ignorance of the State Ethics Code does not excuse a violation of the law, the Commission noted that John Doe had sought legal advice from HHSC's legal counsel and believed it was reasonable for him to have relied upon the advice that he received.

The Commission believes it is important for HHSC's legal counsel to develop a better understanding of the State Ethics Code, as well as the Commission's application of the statute, to avoid offering guidance that is not consistent with the standards of conduct prescribed by the State Ethics Code. The Commission is aware of other members of HHSC regional boards who, following the legal advice of HHSC's counsel, acted in ways that appeared to be in violation of the State Ethics Code's standards of conduct. The Commission has the statutory authority to administer the State Ethics Code, meaning that the Commission is empowered to interpret, apply, and enforce the statute.

Considering the totality of circumstances in this case, the Commission believed it was fair and in the public interest to resolve Charge No. 2015-Cg-3 by the issuance of this Resolution of Charge and by John Doe's payment of \$1,000 to the State of Hawaii general fund.

⁹ The Commission, however, noted that HHSC's legal counsel advised John Doe to recuse himself from participating in the Board's action relating to Project A. John Doe appeared to have voted, as part of the Board, on matters relating to Project A. It also appeared that John Doe did not recuse himself from a Board vote relating to Project B.