



HAWAII STATE ETHICS COMMISSION

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

ETHICS ADVISORY 2013-03

BOARD MEMBER APPLYING FOR POSITION SELECTED, HIRED OR OTHERWISE SUBJECT TO APPROVAL BY THE BOARD

July 15, 2013

University of Hawaii President M.R.C. Greenwood recently announced her intention to retire as the University president on August 31, 2013. In response to her announcement, the University of Hawaii's Board of Regents formed a presidential selection committee to look for President Greenwood's successor. The committee is chaired by Regent John Holzman, who is also the chair of a smaller group of regents charged with recommending an interim president to the Board. The Board will hire both the interim president as well as the next University president.

Regent Artemio Baxa reportedly suggested that one of the regents could be the next University president.¹ Regent Baxa specifically identified Regent Holzman and another regent as members who he felt would make a good president for the University. A number of other regents also are reported as expressing their opinion that the next president should have a strong connection to Hawaii.²

In light of Regent Baxa's suggestion that a regent could be considered for the UH president position, the Commission issues this advisory memorandum to inform the regents and members of other state boards³ 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.

¹ UH Regents begin search to replace Greenwood, *Hawaii News Now*, May 16, 2013.

² Selection group will emphasize island connection, *Star Advertiser*, June 20, 2013.

³ Any reference to "board" or "boards" applies equally to state commissions and committees.

Discussion

The State Ethics Code prohibits an employee from, among other things, using his position to give himself an unwarranted advantage.⁴ Specifically, the statute's "fair treatment" provision provides in relevant part:

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[.]⁵

Prior Commission opinions may have suggested that, absent evidence that a board member actually misused his position to gain an unwarranted advantage, a board member can apply to the board on which he is a member for a position that the board will hire, select or approve without violating the fair treatment provision.⁶ The Commission hereby "rescinds" or "overrules" those opinions to the extent that they may be so construed. In the Commission's opinion, the situation creates an inherent unfairness, which is inconsistent with the fair treatment section of the State Ethics Code. The Commission construes the fair treatment provision to prohibit, per se, a board member from applying for a position to be hired, selected or approved by the board while he is serving on the board.

The legislature recognized that there are certain circumstances where, by their very nature, it is likely a state employee will receive an unwarranted advantage. More specifically, the State Ethics Code's fair treatment provision includes four subsections which describe situations which the legislature deemed to be prohibited, per se: an employee is prohibited from using his position to seek private employment,⁷ from accepting additional compensation for performing his state duties,⁸ from using state time or equipment for a private business purpose,⁹ and from engaging in a substantial financial transaction with a subordinate.¹⁰ In those situations, it is immaterial whether an employee

⁴ "Employee" is defined to include members of boards, commissions and committees. HRS section 84-3. Accordingly, a board member is subject to the State Ethics Code and must adhere to the standards of conduct contained therein. HRS section 84-2.

⁵ HRS section 84-13.

⁶ See Opinion No. 193 (issued October 4, 1974); see also Advisory Opinion No. 882 (issued April 8, 1988).

⁷ HRS section 84-13(1).

⁸ HRS section 84-13(2).

⁹ HRS section 84-13(3).

¹⁰ HRS section 84-13(4).

actually misused his position to gain an unwarranted advantage; the statute simply prohibits an employee from engaging in the specified conduct.

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.

Giving due consideration to the underlying purpose of the State Ethics Code, i.e., to foster public confidence in state employees, and the mandate that the statute be liberally construed, the Commission concludes that the advantage, inherent whenever a board member seeks employment with the board on which he serves, constitutes an unwarranted advantage under the fair treatment provision of the State Ethics Code.¹¹ The situation raises a number of issues about the fairness or propriety of the hiring process, both real and reasonably inferred, and erodes public confidence in government.

In the Commission’s opinion, the fair treatment provision requires a board member to resign from the board no later than when he decides to apply for a position that is hired, selected or approved by the board. The Commission recognizes that the timing of a board member’s subjective intent to apply for the position may be difficult to objectively ascertain; however, a board member clearly must resign from the board before he submits an application or otherwise applies for the position. Moreover, if he is considering applying for a position that is hired, selected or approved by the board, a board member must recuse himself from the board’s consideration of matters relating to the position and cannot informally discuss those matters with other members of the board.

¹¹ The plain language of the statute and the legislative history relating to the fair treatment provision make clear that the proscribed activities are “not limited to” the four delineated in the statute. See HRS section 84-13; see also Standing Committee Report No.670-72, page 2 (1972 Session) (“The fair treatment section under chapter 84 was amended to delineate, without limiting thereto, the following proscribed activities. . .”).