



HAWAII STATE ETHICS COMMISSION

State of Hawaii · Bishop Square, 1001 Bishop Street, ASB Tower 970 · Honolulu, Hawaii 96813
50th ANNIVERSARY 1968-2018

ADVISORY OPINION NO. 2018-1

February 22, 2018

A legislator (“Legislator”) requested an advisory opinion from the Hawaii State Ethics Commission (“Commission”) as to how the State Ethics Code, Hawaii Revised Statutes (“HRS”) Chapter 84, applies to his dual roles as a legislator and part owner of a private business. The Legislator asked: (1) whether the State Ethics Code prohibits him from being a part owner of the business; (2) whether his minority ownership interest in the business constitutes a “controlling interest” for purposes of the State Ethics Code’s Contracts law; and (3) what must he or the business do to ensure compliance with the State Ethics Code.

Based on the facts of this case, the Commission concludes as follows: (1) the State Ethics Code does not prohibit the Legislator from being a part owner of the business; (2) the Legislator’s minority ownership interest does not constitute a “controlling interest” in the business for purposes of the Contracts law; and (3) the Legislator must comply with the Confidential Information, Fair Treatment, and Conflicts of Interests provisions of the State Ethics Code.

I. Facts

Having reviewed the information provided by the Legislator, the Commission understands the facts to be as follows.

In addition to serving as a member of the State Legislature, the Legislator is also a “Member” of a Limited Liability Company (“LLC”) and is employed by the LLC. The LLC has adopted an Operating Agreement (“Operating Agreement”), which sets forth the ownership and management structure of the LLC. Pursuant to the Operating Agreement, the Legislator owns a 10% share of the LLC and receives a yearly payment from the business. The LLC’s “Managers” have the exclusive right to manage “the business, property and affairs” of the LLC. The Legislator represented to the Commission that he is not a “Manager” of the LLC and does not exercise any managerial control over any employees of the LLC. The Legislator described his role with respect to the LLC as being strictly advisory.

II. Issues Presented

The Legislator requested an advisory opinion addressing the following issues:

- (1) Whether the State Ethics Code prevents the Legislator from being a part owner of the LLC while serving as a state legislator;
- (2) Whether the Legislator's minority ownership interest in the LLC constitutes a "controlling interest" for purposes of the State Ethics Code's Contracts law, HRS § 84-15; and
- (3) What steps must the Legislator or the LLC take to ensure compliance with relevant provisions of the State Ethics Code.

III. Application of the State Ethics Code

The Legislator is subject to the requirements of the State Ethics Code. The purpose of the State Ethics Code is to prescribe a code of ethics for elected officers and employees of the State as mandated by Article XIV of the State Constitution. The Commission is charged with the responsibility of administering the ethics code so that public confidence in public servants will be preserved.¹

The Commission's response to each issue presented by the Legislator is addressed in turn.

1. The State Ethics Code does not prevent the Legislator from being a part owner of the LLC while serving as a state legislator.

Nothing in the State Ethics Code prohibits Hawaii's part-time legislators from holding or acquiring ownership interests in businesses or holding outside employment.² Dozens of Representatives and Senators hold outside positions, consistent with the Hawaii Legislature's status as a part-time legislature. Although the State Ethics Code does not prohibit legislators from having ownership interests in businesses and/or holding outside employment, it does require legislators to report such ownership and/or employment interests on their public financial disclosure statements filed annually with the Commission.³ This requirement ensures that information about a legislator's outside financial interests is available to the public. The Commission notes that the

¹ Preamble, HRS chapter 84.

² HRS § 84-14(b), part of the Conflicts of Interests law, prohibits an employee from acquiring a financial interest, such as an ownership interest, in a business if the employee has reason to believe the business may be directly involved in the employee's official state action. This restriction, however, does not apply to legislators.

³ HRS § 84-17(f).

Legislator has disclosed his ownership and employment interests in the LLC on his financial disclosure statements.

2. The Legislator's 10% ownership interest in the LLC does not constitute a "controlling interest" for purposes of the Contracts law.

The Contracts law in the State Ethics Code requires state agencies to post a public notice before entering into a non-bid contract with a business in which a legislator or state employee has a "controlling interest" as defined by HRS § 84-3. An agency's failure to publish a notice of intent to enter into such a contract constitutes a violation of HRS § 84-15(a) and could lead the Department of the Attorney General to void the contract.⁴

The Contracts law provides in relevant part:

(a) A state agency shall not enter into any contract to procure or dispose of goods or services, or for construction, with a legislator, an employee, or a business in which a legislator or an employee has a controlling interest, involving services or property of a value in excess of \$10,000 unless:

- (1) The contract is awarded by competitive sealed bidding pursuant to section 103D-302;
- (2) The contract is awarded by competitive sealed proposal pursuant to section 103D-303; or
- (3) The agency posts a notice of its intent to award the contract and files a copy of the notice with the state ethics commission at least ten days before the contract is awarded.

HRS § 84-15(a). In other words, the Contracts law requires that a state agency provide public notice before entering into certain contracts with state legislators or employees, or with businesses in which a state legislator or employee has a controlling interest. The law does not prohibit the state agency from entering into these contracts; it requires only that there be public notice of the agency's intent to award the contract. The purpose of this requirement is to provide greater transparency for state contracts that are awarded to state officials or businesses controlled by state officials.

The term "controlling interest" is defined by HRS § 84-3 as "an interest in a business or other undertaking which is sufficient in fact to control, *whether the interest be greater or less than fifty per cent.*" (Emphasis added.) The Commission has issued

⁴ HRS § 84-16.

several formal advisory opinions as to whether an individual has a “controlling interest” in a business. In Advisory Opinion No. 227, the Commission concluded that a state employee had a “controlling interest” in a corporation where the employee owned 9.5% of the company and served as chairman of the board of directors and president of the company, even though he was not involved in the day-to-day operations of the company. Adv. Op. No. 1975-227, 1975 WL 441620 (HI Ethics Comm’n, Aug. 4, 1975). The Commission concluded, however, that “if he should resign his membership on the board of directors and not serve as an officer of the company, . . . he would then not have a controlling interest in the company.” *Id.* See also Adv. Op. No. 1973-172, 1973 WL 390385 (HI Ethics Comm’n, Dec. 4, 1973), *2 (“In determining whether a state employee has a controlling interest in a business, the Commission looks at ownership interest in the corporation and management control. Employee B owned approximately 10% of the authorized stock of the company. He was also the chief officer of the corporation; he was the president, chairman and a director of the board, and the controller. We ruled that in this case Employee B had a ‘controlling interest’ in the local company.”); Adv. Op. No. 1976-254, 1976 WL 452368 (HI Ethics Comm’n, May 19, 1976) (concluding that an employee had a “controlling interest” where both the employee and the employee’s spouse were officers and “major stockholder[s]” of the corporation).

In this case, the Legislator is a “Member” of the LLC and owns a 10% interest in the LLC. As a “Member,” the Legislator is neither an officer nor a director of the LLC. Moreover, the Operating Agreement confers on the “Managers” of the LLC “full, complete and exclusive authority” to manage and control the business. The Legislator was not named as a “Manager” in the Operating Agreement and has informed the Commission that he does not exercise any managerial control over any employees of the LLC. He described his role as being strictly advisory. The Legislator is also employed by the LLC but in that capacity, again, he exercises no authority to manage or control the business. Given the Legislator’s lack of managerial control with respect to the LLC, the Commission concludes that the Legislator’s 10% interest in the business, standing alone or combined with his private employment, does not constitute a “controlling interest” for purposes of HRS § 84-15(a).

That said, the Commission notes that nothing prohibits the LLC from disclosing the Legislator’s ownership interest in the LLC when attempting to secure a contract with the State of Hawaii.⁵ The Commission believes that although not required under the State Ethics Code, the Legislator may wish to consider voluntarily disclosing his ownership interest to set an example of transparency and accountability throughout state government.

⁵ The Commission does not have jurisdiction over the LLC in this matter and, consequently, cannot require the LLC to include specific language in its contract proposals.

3. Several provisions of the State Ethics Code restrict the Legislator's activities with respect to his work with the LLC.

Three provisions of the State Ethics Code restrict the Legislator's work with the LLC: (1) the Confidential Information law, HRS § 84-12; (2) the Conflicts of Interests law, HRS § 84-14(d); and (3) the Fair Treatment law, HRS § 84-13.

The Confidential Information law provides in relevant part:

No legislator or employee shall disclose information which by law or practice is not available to the public and which the legislator or employee acquires in the course of the legislator's or employee's official duties, or use the information for the legislator's or employee's personal gain or for the benefit of anyone[.]

HRS § 84-12. Stated differently, the State Ethics Code prohibits the Legislator from using any confidential information acquired in his position as a state legislator to benefit the LLC.

The Conflicts of Interests law applies to legislators as follows:

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.

HRS § 84-14(d).⁶ Pursuant to the above provision, a legislator is prohibited from assisting or representing a person or business, for pay, in attempting to pass a bill or secure a contract in which the legislator has participated or will participate as a legislator.

⁶ Another section of the Conflicts of Interests law requires an employee's recusal from official action that directly affects a business in which the employee holds a financial interest. HRS § 84-14(a). This restriction, however, does not apply to legislators; thus, the State Ethics Code does not require the Legislator to recuse himself from taking official action as a legislator affecting the LLC. For example, the State Ethics Code does not require the Legislator to recuse himself from voting on a bill affecting the LLC. The Legislator should, however, consult with the head of his legislative house as to whether legislative rules require recusal in a particular situation. He may also voluntarily recuse himself from a matter even if recusal is not mandated.

HRS § 84-14(d) prohibits the Legislator from assisting or representing the LLC or its clients for pay before the Legislature. For example, the Legislator cannot act as a paid lobbyist for the LLC to secure the passage of legislation. HRS § 84-14(d) also prohibits the Legislator from assisting or representing the LLC or its clients on a matter in which he participated or will participate as a legislator. For example, if the Legislator was significantly involved as a legislator in funding a state contract, then HRS § 84-14(d) may prohibit him from performing work for the LLC relating to that contract. If this situation occurs, the Legislator should contact the Commission's office for further guidance on the application of this law.

The Fair Treatment law provides:

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; including but not limited to the following:

- (1) Seeking other employment or contract for services for oneself by the use or attempted use of the legislator's or employee's office or position.
- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of the legislator's or employee's official duties or responsibilities except as provided by law.
- (3) Using state time, equipment or other facilities for private business purposes.
- (4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom the legislator or employee inspects or supervises in the legislator's or employee's official capacity.

Nothing herein shall be construed to prohibit a legislator from introducing bills and resolutions, or to prevent a person from serving on a task force or from serving on a task force committee, or from making statements or taking official action as a legislator, or a task force member or a task force member's designee or representative. Every legislator, or task force member or designee or representative of a task force member shall file a full and complete public disclosure of the nature and extent of the

interest or transaction which the legislator or task force member or task force member's designee or representative believes may be affected by the legislator's or task force member's official action.

HRS § 84-13. The Fair Treatment law generally prohibits a legislator from using his or her state position to grant an unwarranted benefit to any person or business. More specifically, it also prohibits a legislator from using his or her state position to seek outside employment or contracts (HRS § 84-13(1)), and from using state resources for outside business purposes (HRS § 84-13(3)).

The Fair Treatment law, like the Conflicts of Interests law, recognizes a legislator's constitutionally protected right to engage in core legislative functions – such as introducing and voting upon bills and resolutions. However, outside of this constitutionally protected area, the Fair Treatment law and the Conflicts of Interests law place certain restrictions on a legislator's actions. Thus, for example, a legislator may not, among other things: be hired by a company to ensure passage of a bill before the legislature; suggest or direct that a private company pay him or her in exchange for action on a bill; or direct his or her legislative staff to perform work on behalf of a private company.

HRS § 84-13 prohibits the Legislator from using his state office to provide any unwarranted privileges or advantages to the LLC, such as by trying to secure additional business for the LLC. Nor may the Legislator use the imprimatur of his state office to pressure state agencies or others to conduct business with the LLC. HRS § 84-13 also prohibits the Legislator from using state resources (such as his state e-mail, state office, state letterhead, or state personnel) for his work relating to the LLC.

Under the facts and circumstances as presented to the Commission, the State Ethics Code permits the Legislator to work for the LLC while serving as a state legislator. The Commission believes that the Legislator's current ownership and employment interests in this business do not preclude the LLC from applying for contracts with the State of Hawaii. The Legislator may continue to work for the LLC, and the LLC may continue to seek work with the State of Hawaii, so long as the Legislator complies with HRS §§ 84-12, -13, and -14.

IV. Conclusion

Based on the foregoing, the Commission concludes that the Legislator is permitted to work for the LLC while serving as a state legislator, and that he does not have a "controlling interest" in the LLC for purposes of the Contracts law, HRS § 84-15(a). The Legislator may not use his state position to give confidential information to, steer business towards, or otherwise use state resources to benefit, the LLC; however, neither the Confidential Information law,

the Fair Treatment law, nor the Conflicts of Interests law prohibits the LLC from seeking work with the State of Hawaii.

Dated: Honolulu, Hawaii, February 22, 2018.

HAWAII STATE ETHICS COMMISSION

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