

SB2873



HAWAII STATE ETHICS COMMISSION

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

February 23, 2010

The Honorable Brian T. Taniguchi, Chair
The Honorable Dwight Y. Takamine, Vice Chair
Senate Committee on Judiciary and Government Operations
Hawaii State Capitol, Room 219
415 South Beretania Street
Honolulu, Hawaii 96813

Re: **Comments on S.B. No. 2873, Relating to Code of Ethics**

Decision Making: Tuesday, February 23, 2010, 10:00 a.m.
State Capitol, Conference Room 016

Comments From: Hawaii State Ethics Commission

The Honorable Brian T. Taniguchi, Chair; The Honorable Dwight Y. Takamine, Vice Chair; and Honorable Members of the Senate Committee on Judiciary and Government Operations:

Thank you for this opportunity to submit written comments on S.B. No. 2873, Relating to Code of Ethics.

While the Hawaii State Ethics Commission is sympathetic to the need for student instruction, with all due respect, the Commission cannot support this bill.

The purpose of this bill is to create an exemption for teachers to the application of the State Ethics Code in certain situations. The bill provides that, notwithstanding any provision of the State Ethics Code, a Department of Education (DOE) teacher may provide private instruction or tutoring, for compensation, to any of the teacher's current, future, or former students in special situations such as the furlough of the teacher or the lengthy illness of the student.

Again, the Hawaii State Ethics Commission is sympathetic to the situation that this bill is attempting to address. However, the Commission believes that allowing teachers to privately tutor their current or future students raises legitimate concerns under the State Ethics Code.

Hawaii Revised Statutes section 84-13, the Fair Treatment section of the State Ethics Code reads, in relevant part:

§ 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; including but not limited to the following:

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- (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.

The Fair Treatment law generally prohibits a state employee from using his state position to grant himself or anyone else any favoritism or preferential treatment. HRS subsection 84-13(4) specifically prohibits a state employee from engaging in a substantial financial transaction with a person in a subordinate position.

If a teacher were allowed to privately tutor the teacher's own students, then this would set up a difficult situation in the DOE classroom. The teacher would be faced with teaching two categories of students, those who are engaged in a private financial relationship with the teacher and those who are not. The Hawaii State Ethics Commission believes that this situation would create serious favoritism concerns under the Fair Treatment section of the State Ethics Code. The Commission believes that it is quite likely that complaints would be made by those students who are not the private employers of the teacher.

In October of last year, the Hawaii State Ethics Commission's staff met with the Superintendent of the DOE about this matter. As a result of that meeting, the Commission and the DOE issued a joint memo concerning the application of the State Ethics Code to the private tutoring of students. A copy of the memo is attached to this testimony.

The Commission is very willing to continue to work with the DOE to address any concerns arising from the private tutoring of students. The Commission does believe, however, that the private tutoring of students raises serious ethics concerns.

For the reasons set forth above, the Hawaii State Ethics Commission cannot support this bill. We appreciate the opportunity to submit our comments on S.B. No. 2873, Relating to Code of Ethics. We would like to thank this Committee for its consideration of our comments.



HAWAII STATE ETHICS COMMISSION

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

October 7, 2009

The Application of the State Ethics Code to DOE Furloughed Teachers

1. The State Ethics Code, set forth in chapter 84 of the Hawaii Revised Statutes ("HRS"), applies to teachers and other employees and officials of the State Department of Education ("DOE").
2. For the reasons set forth in Advisory Opinions Nos. 95 and 150 (attached), DOE teachers, including furloughed teachers, are barred by the State Ethics Code from privately teaching or tutoring their current students, or prospective students, for pay or other consideration. "Prospective students" means those DOE students who are likely in the future to become students of a DOE teacher. Specifically, HRS section 84-13(4) bars teachers, including furloughed teachers, from engaging in substantial financial transactions with anyone supervised by them, including their students, as well as the parents of their students.
3. The restrictions in the State Ethics Code set forth above do not bar a DOE teacher, employee, or a furloughed teacher from accepting employment with a private entity that offers teaching services or other services to students, so long as the teacher or employee does not take action in his or her official capacity as a DOE teacher or employee directly affecting such an entity. As a caveat, teachers who seek employment with a private entity offering teaching services or other services to students, may wish to assure themselves that such entities are in compliance with all applicable laws and standards for the rendering of such services.
4. Under the State Ethics Code, the facilities of the DOE may be used by outside organizations so long as the DOE has a policy in place that allows for fair and equal access to such facilities by all interested organizations. Of course, such a DOE policy may take into account specific considerations relating to the use of facilities, as long as such policies are reasonable and fair.

Potential DOE Administrative and Legal Issues

Aside from the application of the State Ethics Code, the State Ethics Commission cannot speak to administrative matters, legal issues, or other matters of concern under the purview of the DOE, or to which the DOE is subject.

Daniel J. Mollway
Executive Director, State Ethics Commission

Patricia Hamamoto
Superintendent, Department of Education

Attachments

OPINION NO. 95

The State Ethics Commission was asked whether a teacher who tutors one of her own students for compensation would be in a conflict of interest situation. The teacher is assigned to a public high school; the subject she tutors is in the same academic area as that in which she has been hired by the State to instruct. The teacher tutors a student, who is enrolled in one of her classes, after regular school hours.

There are three sections of chapter 84, Hawaii Revised Statutes, which are relevant to this situation. The first relates to gifts (HRS, §84-11). The teacher in this case is responsible for testing and grading this student's performance in a public school. Even though the teacher is performing extra services for the student, it may be inferred that the compensation is intended to influence and/or reward the teacher in regard to the student's grade and class standing.

Secondly, the fair treatment section of the ethics law (HRS, §84-13) requires the teacher to be scrupulously impartial. Her ability to remain objective in grading this student could become severely compromised. Also, the extra instruction the student receives, particularly in regard to preparation for a test which all the students must take, may be construed to be an unwarranted privilege or advantage. Furthermore, the teacher's very employment by the parents may be considered the use of official position to gain a contract or special treatment, such as extra income for oneself.

Finally, even though the amount of money earned by tutoring may be modest, HRS, §84-14, requires that "No employee shall acquire financial interest in business enterprises which he has reason to believe may be directly involved in official action to be taken by him." The teacher's tutoring service will be affected by such official action as examinations and grading.

For these reasons the Commission finds that a teacher may not receive compensation for tutoring one of her own students without violating at least one of these sections of the State ethics law.

We recognize that all teachers are furthermore subject to the employee code of ethics of the Department of Education. *School Code* Policy #5513 advises:

No employee or official will accept compensation in any form other than that to which he is entitled from the State government when performing his duties *within the scope of the activities for which he is responsible*. (Emphasis added)

It is not the intention or responsibility of the State Ethics Commission to prescribe the duties of a teacher in the state education system. However, the job description listed in the *School Code*, Administration Series #2351 requires teachers to "Take part in club work, athletics, or any other outside activity that may be developed in connection with the life of the school." Liberally construed this could include extra instruction for students having

difficulty who show a willingness to apply themselves. Paragraph (7) of the same section charges that teachers shall "Assist with the supervision of pupils before school, during intermissions and after school." Should there be vagueness here, the Department of Education should take the necessary steps toward clarification.

The Ethics Commission is responsible for issuing advisory opinions which can serve as guidelines for state employees in interpreting the State ethics law. The opinion rendered in this case concerns a teacher's receiving compensation for tutoring one of her own students. When such is the case, it does not matter when or where such tutoring takes place. It is a violation of the State ethics law.

Dated: Honolulu, Hawaii, January 28, 1971.

STATE ETHICS COMMISSION
James F. Morgan, Jr., Chairman
Vernon F.L. Char, Vice Chairman
Gwendolyn B. Bailey, Commissioner
Walters K. Eli, Commissioner
S. Don Shimazu, Commissioner

OPINION NO. 150

A supervisor in a state agency asked the Commission to clarify the application of Opinion No. 95 to three teachers who provide private summer lessons to students who will be, or have been, their students during the school year. The teachers also have given private lessons during the school year.

Before rendering an opinion, the Commission obtained statements of fact directly from the three teachers involved, as well as legal counsel of the authorized union representative of the teachers involved. The Commission found that the facts gave rise to various issues, some of which are common to each of the teachers and some of which are peculiar to a given teacher. The Commission stated the questions involved and discussed each in its turn after making preliminary findings.

Section 84-14(b), HRS, provides, "No employee shall acquire financial interest in any business or other undertaking which he has reason to believe may be directly involved in official action to be taken by him." "Official action" is defined as "... a decision ... or other action ... which involves the use of discretionary authority." (Section 84-3(7), HRS.) The Commission has found in Opinion No. 95 that the grading of students, the disciplining of students, and the amount of personal attention a teacher pays to students in class constitutes such discretionary activity. The compensation paid a teacher for private lessons during the school year or during the summer, although it may not be a great deal of money, still constitutes a "financial interest" as defined by §84-3(6)(C), HRS. The Commission defines "reason to believe" as being in possession of facts which would strongly point to the probability of the occurrence rather than the mere possibility of the occurrence.

Applying the above findings to the facts available to the Commission, the Commission answered the following questions:

1. May a teacher accept employment for compensation by a student in one of his classes to provide private lessons during the school year?

It would be a violation of §84-14(b), HRS, for a teacher to accept employment for private lessons during the school year by a student in one of his classes. (See Opinions Nos. 95 and 139.) This would be true whether or not the subject taught was the same as that in the classroom. Opinion No. 145 demonstrates that the thrust of the section is to prevent a situation where the existence of a financial interest could affect discretionary activity. The language of the section is satisfied where the financial interest is in an employment by a business comprising a myriad of activities. It does not require that the financial interest be in an employment pertaining to the specific activity of the business which will be subject to official action. In this case the financial interest is in an employment to give private lessons to the student in a given subject, one of many educational activities in which the student engages. The section does not require that the educational activity be the same for which the teacher has responsibility in the classroom. The Commission stated that this finding goes beyond Opinion No. 95 to the extent that the subject taught in the private lessons need not be related to the classroom responsibility of the teacher.

2. May a teacher accept employment for compensation by a student in one of his classes to provide private lessons during the summer?

It would be a violation of §84-14(b), HRS, for a teacher to accept employment for private summer lessons by a student who was still subject to official action to be taken by him at the end of the year, or from a person he had reason to believe would be his student the following fall. Opinion No. 145 demonstrates that §84-14(b), HRS, operates prospectively from the point at which time the financial interest is acquired, with regard to when the official action may be taken. The circumstances here are such that the teacher is acquiring a financial interest when there is strong probability that it will be directly involved in official action to be taken by him. This is proscribed by §84-14(b), HRS.

The holdings to this point would apply whether or not grades or advanced class standing resulted from the private lessons given.

3. When may a teacher accept employment to provide private lessons?

A teacher could accept former students as pupils for private lessons during the summer without violation of §84-14(b), HRS. This, of course, means that acceptance of the employment would have to occur after the teacher no longer could take "official action" with regard to the pupil. A teacher could also accept employment for private lessons during the school year or during the summer from students at other schools. The element of "official action" is missing. There would, likewise, be no violation of that section where a teacher worked with his students after school, there being no compensation paid therefor, because the element of "financial interest" is lacking.

In addition, a teacher employed by the Department of Education to conduct summer lessons for persons, including school year pupils, would not be in violation of §84-14(b), HRS, as long as his pay did not depend upon the number of students and the teacher was not involved in the enrollment and acceptance process.

4. Does the fact that only a few qualified teachers of a subject are present in a given area excuse violations of §84-14(b) in the circumstances described above?

The existence of only a few qualified teachers of the subject in the area does not excuse violations of §84-14(b), HRS. (See Opinion No. 143 wherein the Commission found a violation of that section when the individual requesting the advisory opinion was one of few qualified teachers of the subject in the area in which he was located.)

5. What state facilities and equipment may be used by the teachers in providing private lessons, if any?

The Commission noted that none of the teachers were in violation of §84-13, HRS, which prohibits the use of an employee's official position to gain unwarranted privileges or treatment, such as the use of state time, facilities or equipment in furtherance of private concerns. State facilities and equipment may be used by the teachers in teaching private lessons when the facilities and equipment are made available to the teacher in accordance with the Department of Education procedures which makes them available to the public at large. (See Opinion No. 139.)

The Commission emphasized that its opinion in this case was based upon facts presented to it. Specifically, the discussion of violation pertained only to that situation where a teacher accepts employment for private lessons during the school year or during the summer from persons

who are students of his during the school year, and certain other persons whom he has reason to believe will be students of his during the forthcoming school year.

The Commission expressed its thanks to the party requesting the opinion for his concern for the ethical considerations relating to matters within his province.

Dated: Honolulu, Hawaii, November 16, 1972.

STATE ETHICS COMMISSION
Walters K. Eli, Vice Chairman
Gwendolyn B. Bailey, Commissioner
Audrey P. Bliss, Commissioner

Note: Commissioner Fred S. Ida was excused from the meeting at which this opinion was considered.

DISSENTING OPINION OF COMMISSIONER VERNON F. L. CHAR

I would find no violation of §84-14(b), HRS, under circumstances where a teacher provides summer tutoring to former regular students, even though they may be potential students for the coming year, where that employment was not accepted or solicited during the period when the teacher had authority over the student in his class; and further where the fee is of a nominal amount in the area of \$20 or \$25. This finding would be based upon my interpretation of §84-14(b), HRS, which I feel requires something more than a *de minimus* financial interest. Further, the official action must be concurrently exercised at the time the financial interest arises in order to be a violation.