



HAWAI‘I STATE ETHICS COMMISSION

State of Hawai‘i · Bishop Square, 1001 Bishop Street, ASB Tower 970 · Honolulu, Hawai‘i 96813

December 6, 2019

Via email: sione.thompson@spcsc.hawaii.gov

Mr. Sione Thompson
Executive Director
State Public Charter School Commission
1111 Bishop Street, Suite 516
Honolulu, HI 96813

Re: Application of the State Ethics Code to Public Charter School Employees and Members of Governing Boards Serving as Officers and Directors or Employees of Non-Profit Organizations, and Related Issues

Dear Mr. Thompson:

The following is general ethics guidance regarding the application of the State Ethics Code to public charter school employees and members of public charter school governing boards serving as officers and directors or employees of the non-profit organizations affiliated with their schools, and related issues. We respectfully ask that you share this guidance with all charter schools and governing boards.

I. Introduction

It is our understanding that employees of public charter schools have concurrently served as uncompensated officers and directors of non-profit organizations that were established to support the schools. We also are aware that former charter school employees have become employed by the non-profit organizations immediately after leaving their employment at the school. These and other situations can create problems under the State Ethics Code, Hawaii Revised Statutes (“HRS”) Chapter 84.

We are providing general ethics guidance to explain how the State Ethics Code applies with respect to public charter school employees, as well as members of charter school governing boards (who are also considered state employees) and their relationships with the non-profit organizations affiliated with their charter schools. We

will also discuss the application of the State Ethics Code to former charter school employees and former charter school governing board members with respect to their relationships with the non-profit organizations.¹

Public charter schools are state agencies for purposes of the State Ethics Code. Employees of public charter schools as well as members of the governing boards of public charter schools are considered state employees.² Thus, they are required to comply with the State Ethics Code.

We understand that there are non-profit organizations established for the specific purpose of applying to the State Public Charter School Commission for a charter to establish a charter school, and/or for the purpose of supporting a charter school. A non-profit organization may assist a charter school in fundraising for the school and seek grants on behalf of the school. The non-profit organization has its own officers and directors and may also employ a staff.

A charter school and its affiliated non-profit organization may conduct business transactions with each other. For example, the charter school may contract with the non-profit organization for services or property. Indeed, several charter schools lease property from their affiliated non-profit organizations. In these situations, charter school employees or governing board members sometimes are called upon to take action, on behalf of the charter school, affecting the non-profit organization. Such actions may include: negotiating or approving contracts with the non-profit organization; authorizing payments to the non-profit organization; and participating in meetings with the non-profit organization in order to determine what actions the non-profit organizations should take on behalf of the charter school.

Charter school employees and governing board members who concurrently serve as uncompensated officers or directors of the charter schools' non-profit organizations, or who are concurrently employed by the non-profit organizations, may have prohibited conflicts of interests or other problems under the State Ethics Code.

¹ Please note that this letter is intended as general educational material provided by the staff of the State Ethics Commission ("Commission"). If any individual would like formal, binding guidance for a specific situation, that individual may request an Advisory Opinion from the Commission itself. This letter does not create any new rules or obligations.

² "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 of the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices and judges." HRS § 84-3.

II. Prohibited Actions

In general, charter school employees and governing board members are prohibited from doing the following:

1. They must not take official action affecting the school's affiliated non-profit organization if they also serve as an officer, director, or employee of the non-profit organization.
2. If – as charter school employees or governing board members – they already take official action affecting the non-profit organization, they must not join the non-profit organization's board of directors or become employed by the non-profit organization.
3. If they are paid to work for the non-profit organization (in addition to being a charter school employee or governing board member), then they must not assist or represent the non-profit organization before the charter school. Also, they must not assist or represent the non-profit organization on matters in which they have participated or will participate as charter school employees or governing board members.
4. They must not use their positions as charter school employees or governing board members to grant special treatment to themselves, the non-profit organization, or anyone else.
5. They must not disclose or use confidential state information – gained as a charter school employee or governing board member – to benefit the non-profit organization or anyone else.
6. When they stop working at the charter school or leave the governing board, there is a twelve-month "cooling off" period during which they cannot be paid to represent the non-profit organization or others in transactions with the charter school. Also, they cannot be paid to represent the non-profit organization or others before any other state agency on matters in which they participated as charter school employees or governing board members.
7. When they stop working at the charter school or leave the governing board, they must not disclose or use confidential state information – gained as a charter school employee or governing board member – to benefit the non-profit organization or anyone else.

III. Conflicts of Interests

- A. Charter school employees and governing board members must not take official action affecting the non-profit organization affiliated with their school if they also serve on the non-profit organization's board of directors or are employed by the non-profit organization.

HRS § 84-14(a), part of the Conflicts of Interests law, prohibits a state employee from taking official action³ directly affecting a business in which the employee has a substantial financial interest.⁴ Under the State Ethics Code, a “financial interest” means an interest held by a state employee, the employee’s spouse, or the employee’s dependent children.⁵ A state employee who concurrently serves as an officer or director of a non-profit organization is considered to have a substantial financial interest in the non-profit organization, regardless of whether the employee is compensated by the non-profit organization.⁶

In situations where a charter school employee or governing board member also serves as an officer or director of the school’s affiliated non-profit organization, HRS § 84-14(a) prohibits the individual from taking official action in his/her state capacity (that is, as a charter school employee or governing board member) that directly affects the school’s affiliated non-profit organization. For example, the charter school employee or governing board member must not:

- participate in lease negotiations with the non-profit organization on behalf of the charter school;
- participate in discussions regarding other possible contracts with the non-profit organization;
- approve or sign school check payments issued to the non-profit organization; or

³ “Official action” is defined as “a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.” HRS § 84-3. “Official action” includes providing input to decision making even if one is not the final decision maker.

⁴ HRS § 84-14(a) states, in relevant part:

(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[.]

⁵ HRS § 84-3.

⁶ HRS § 84-3.

- recommend or otherwise suggest that that the charter school take action affecting the non-profit organization.

In addition, these same rules apply if a charter school employee or governing board member's spouse is an officer or director of the non-profit organization: the employee or governing board member is prohibited from taking official action directly affecting the non-profit organization.

A financial interest also includes employment.⁷ Thus, a charter school employee or governing board member who is also employed by the non-profit organization – or whose spouse is employed by the non-profit organization – is prohibited from taking official action in his/her state (charter school) capacity directly affecting the non-profit organization.

- B. If charter school employees or governing board members (in their charter school capacities) already take official action affecting the non-profit organization, they must not join the non-profit organization's board of directors or become employed by the non-profit organization.

HRS § 84-14(b), another section of the Conflicts of Interests law, prohibits a state employee from acquiring a financial interest in a business if the employee has reason to believe the business will be directly involved in the employee's official action.⁸ In other words, state employees cannot create new conflicts for themselves. For example, a charter school employee or a governing board member who reviews or approves agreements between the charter school and the school's affiliated non-profit organization is prohibited from becoming an officer or director of the non-profit organization and is prohibited from accepting employment from the non-profit organization.

⁷ HRS § 84-3.

⁸ HRS § 84-14(b) provides:

(b) 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.

- C. If charter school employees or governing board members are paid to work for the non-profit organization, then they must not assist or represent the non-profit organization before the charter school. Also, they must not assist or represent the non-profit organization on matters in which they have participated or will participate as charter school employees or governing board members.

HRS § 84-14(d), another section of the Conflicts of Interests law, prohibits a state employee from being compensated to assist a business on matters before the employee's own state agency or on matters in which he/she has participated or will participate as a state employee.⁹ Therefore, if a charter school employee or governing board member is also paid by the school's non-profit organization, then that person must not assist or represent the non-profit organization in any transactions with the school. For example, this individual must not:

- represent the non-profit organization in meetings with charter school personnel;
- speak on behalf of the non-profit organization before the charter school governing board;
- negotiate a contract or agreement with the charter school; or
- prepare or submit invoices to the charter school for the non-profit organization.

Again, this provision of the Conflicts of Interests law only applies where the charter school employee or governing board member is also paid by the non-profit organization.

⁹ HRS § 84-14(d) provides:

(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.

IV. Charter school employees and governing board members must not use their charter school positions to grant special treatment to themselves, the non-profit organization, or anyone else.

The Fair Treatment law, HRS § 84-13(a), prohibits state employees from using their state positions to obtain special treatment or unwarranted advantages to themselves or anyone else.¹⁰ Thus, charter school employees and governing board members must not use their state (charter school) positions to grant themselves, the school's affiliated non-profit organization, its officers, directors, or contractors, or anyone else any special treatment or unwarranted advantage or benefit. For example, charter school employees and members of governing boards must not:

- spend charter school funds on food for governing board meetings;¹¹
- use charter school funds to buy first class plane tickets to travel on school business;
- use airline mileage accrued from charter school travel for personal purposes; or
- borrow charter school equipment for personal use.

V. Charter school employees must not disclose or use confidential state information.

The Confidential Information law, HRS § 84-12, prohibits state employees from disclosing or using confidential state information they gained as state employees to benefit anyone. Charter school employees and governing board members therefore must not disclose or use confidential information they obtained in their charter school positions to benefit the non-profit organization or anyone else. For example, if these individuals review confidential procurement information for their charter school, they must not share this information with the non-profit organization or others or use the information to benefit the non-profit organization or others.

¹⁰ HRS § 84-13(a) states in relevant part:

No . . . employee shall use or attempt to use the . . . employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others[.]

¹¹ We strongly recommend that you seek guidance from the State Department of Accounting and General Services for guidelines regarding expenditures for meals. Spending state funds for meals for state employees – even if in connection with an official meeting – can raise ethics concerns.

VI. Post-Employment Restrictions

- A. When individuals stop working at the charter school or leave the governing board, there is a twelve-month “cooling off” period during which they cannot be paid to represent the non-profit organization or others in transactions with the charter school. Also, they cannot be paid to represent the non-profit organization or others before any other state agency on matters in which they participated as charter school employees or governing board members.

The Post-Employment law, specifically, HRS § 84-18(c), prohibits a former state employee, within twelve months after leaving state employment, from representing others for pay (1) on the same matters in which s/he participated as a state employee, or (2) on matters involving official action by the state agency or subdivision thereof that s/he formerly served.¹² Under the State Ethics Code, the term “represent” means “to engage in direct communication on behalf of any person or business with a legislator, a legislative employee, a particular state agency or subdivision thereof, or their employees.”¹³

For example, if a former charter school employee or governing board member goes to work for the charter school’s affiliated non-profit entity, this individual is prohibited from communicating directly with the charter school on behalf of the non-profit organization regarding contracts, business transactions, or other matters involving official action by the charter school, for twelve months. This twelve-month restriction also prohibits a former charter school employee or governing board member from communicating directly with any other state agency regarding the same projects or other matters in which he or she participated as a charter school employee or governing board member.

¹² HRS § 84-18(c) states in relevant part:

No former employee, within twelve months after termination of the former employee's employment, shall represent any person or business for a fee or other consideration, on matters in which the former employee participated as an employee or on matters involving official action by the particular state agency or subdivision thereof with which the former employee had actually served.

¹³ HRS § 84-18(f).

B. Former charter school employees and governing board members must not disclose or use confidential state information.

HRS § 84-18(a) prohibits former state employees from disclosing any confidential state information acquired in the course of state employment; it also prohibits former state employees from using the information for personal gain or for the benefit of anyone. For example, a former charter school employee or governing board member must not disclose or use any confidential state information to benefit the charter school's affiliated non-profit organization.

VII. Summary

Ethics concerns are likely to arise in situations where charter school employees and governing board members – or their spouses – serve as officers and directors or employees of their school's affiliated non-profit organizations. We advise that these situations be avoided as they are likely to result in prohibited conflicts of interests or raise other issues under the State Ethics Code.

The foregoing is general guidance regarding the application of the State Ethics Code. Charter school employees and governing board members with questions about specific situations should contact the State Ethics Commission's office for further advice.

Again, we respectfully ask that you share this information with all public charter schools and governing boards. Thank you very much for your assistance. If you have any questions, please do not hesitate to call us at (808) 587-0460.

Sincerely,



Virginia M. Chock
Staff Attorney

VMC/ny