

OPINION NO. 144

A state employee's duties required him to direct, supervise and coordinate the work of a staff for effective administration and enforcement of laws, rules, regulations and orders governing operational activities of a service industry.

This employee has been rendering advisory services to another state agency during his regular working hours in conjunction with his position. His position responsibility was directed toward local firms subject to regulation by his department. When performing advisory services to the other state agency, he advised on matters generally involving firms subject to regulation by federal agencies.

He indicated that although he was performing the advisory services to the other state agency in conjunction with his position, he was contemplating performing the services as a private consultant during his off-duty hours instead of his regular hours for additional compensation.

He also proposed to engage in another outside consulting activity which involved audit and review of certain documents and the performance of industry studies for clients not subject to regulation by his agency.

The audit and review consulting services he proposed to render would be for clients who had been assessed charges by the firms subject to federal regulation. Any recovery of overcharges would be adverse to them. The services would be performed during his off-duty time and compensation would be based on a percentage of the overcharges recovered. He indicated that the ability to recover overcharges was based primarily on the probability that human error has occurred in the computation and that his experience in detecting such errors would be beneficial to his client and not the industry firm. There was no negotiation or settlement since the claim was based on the lawful applicable rate.

In connection with the factual situation set forth above, he requested an advisory opinion on the following:

1. Would it be proper for him to perform consulting services to the other state agency and bill that agency for services performed during his off-work hours, while retaining his present state position?
2. Would it be proper for him to engage in the outside consulting activity of auditing and reviewing certain documents of firms not subject to regulation by his agency and performing studies which services would be for the benefit of persons or firms not subject to regulation by his agency?

We noted that his position description required him to maintain liaison with federal, state and municipal agencies, exercising related jurisdictional responsibilities with respect to activities in this particular service industry and directs him to analyze requirements and prepare reports and recommend actions in certain problem areas. This description appeared to encompass the furnishing of such advisory services to the other state agency. Under these circumstances, we found that acceptance of additional compensation for the performance of duties already required by the conditions of his employment would be a use of official position to secure unwarranted advantages or treatment for himself in violation of HRS, §84-13. Our conclusion was premised upon the belief that a public employee should not be twice compensated for performing services

which are his duty to perform. (See Opinion No. 85.) Under the circumstances, therefore, we answered his first question in the negative.

In response to our request for additional information concerning his second question, he indicated that in the course of performing his state duties, he acquired information which by law or practice was not available to the public such as confidential trade and financial information. He further stated that his state duties, including those involving the other state agency, did not include any audit and/or review of firms subject to federal regulation; he had no access to such audits and/or reviews prepared by others; and that he took no official action regarding the documents he proposed to review.

However, he indicated that it was possible that he would be asked to participate in other issues, in which case review of the documents would be necessary because they provided necessary information. He further indicated that if this happened, he would limit his services to the other state agency to the review of proposed rate changes.

Our consideration of the facts and circumstances led us to answer his second question also in the negative.

HRS, §84-14(2) provides 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." We interpret this section to mean that an employee should not, while in public employment, establish new business relationships which are likely to be involved in official action to be taken by him. (See Opinion No. 108.) Since he indicated it might be necessary to review the documents under some circumstances in connection with his advisory services to the other state agency, it seemed to us that his proposed private consulting activities would likely be affected by such official action. It also seemed likely that although the firms subject to federal regulation would not be his clients, his proposed private consulting activities would possibly bring him in contact with them. In that event he would be dealing with them in at least two capacities, and in the case of certain firms which have controlling interests in other firms subject to regulation by his agency, in three capacities.

The prohibition of HRS, §84-14(2), applies regardless of his ability to disqualify himself or otherwise refrain from taking action himself. It is our opinion that a public employee should not voluntarily place himself in a position in which disqualification becomes necessary. (See Opinions Nos. 100, 108, and 115.)

We expressed our appreciation for his concern on matters of ethics.

Dated: Honolulu, Hawaii, May 30, 1972.

STATE ETHICS COMMISSION
Vernon F. L. Char, Chairman
Walters K. Eli, Vice Chairman
Gwendolyn B. Bailey, Commissioner
Fred S. Ida, Commissioner

Note: Commissioner Audrey P. Bliss was excused from the meeting in which this opinion was considered.