

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.