

OPINION NO. 152

A state employee inquired whether his present outside employment in a field related to his state employment constituted a conflict of interest under chapter 84, HRS; and if so, under what circumstances employment could be accepted without constituting a violation of law.

1. The employee's state duties included the supervising of groups of lower level state employees engaged in the activities of his division; reviewing project or work assignments, determining priority, time and personnel required to accomplish an assignment and making cost estimates; discussing procedures, methods, background data, deadlines, and anticipated problems with subordinates; spot-checking the work while in progress, providing advice and assistance as needed, and reviewing finished work for technical adequacy. Part of his duties included appearance in court as an expert witness during litigation related to his division's area of concern.

2. The division by which the employee is employed is primarily concerned with property belonging to the State, but as a part of its function, it reviews work conducted by private practitioners in the division's area of concern under various circumstances.

3. The state employee had advised the staff of this Commission that he provided services for private parties in the field related to his state employment during his free time. The services supplied did not involve state property, and prospective employers contacted him at his home. The head of the state employee's division indicated that in most instances the employee's private employment did not involve the use of state time or state facilities, and that he encouraged members of his department to take private business in the field with which the division is concerned because it makes them aware of the practical problems involved. He also indicated that there are many persons available to review work conducted by private practitioners under the various situations calling for review and that should private work done by the employee come before the division, others would be available to review it.

The Commission advised the employee that to accept employment in matters which would be the subject of official action by the division in the situations described would constitute a violation of §84-14(b), HRS. That section prohibits an employee from acquiring financial interests in a business or enterprise which he has reason to believe will be directly involved in official action to be taken by him. In each of the described functions of the division, the division is charged with review of private work. The review consists of independent evaluation conducted by division employees to verify figures provided by the private practitioner in some cases. In other cases, the review is conducted in the division office. If division employees find inconsistencies, the evaluation is returned to the private practitioner for redetermination or the matter is negotiated.

The Commission advised him that in carrying out these activities, he is taking official action as defined by §84-3(7), HRS. Although his superior has indicated others would be available to review evaluation done by him in his private capacity, the prohibition of this particular section of the ethics law applies regardless of the ability to disqualify oneself from participation in official action. The public employee who is compensated should not voluntarily place himself in a position in which disqualification becomes necessary so that he cannot carry out the work for which he is paid. A violation of this section occurs at the time employment is accepted when there is reason to believe that the matter is one which will become the subject of official action to be taken by the employee in his state capacity. (See Opinion No. 100.)

Consequently, while there is no prohibition against private employment generally, he was advised that he should refrain from private employment where the employer indicates a wish for an evaluation which may fall within the described functions of the division or any other function which would call for review of an evaluation by his division.

Parenthetically, the Commission called to his attention a rule of the court in which he might have to appear as an expert witness for his private employer. That rule prohibits state employees from engaging in employment by private persons in connection with the court's procedure for use therein. The Commission is charged with ascertaining potential violations of chapter 84, but included reference to the rule for this employee's information.

The Commission further called his attention to §84-13, HRS, relating to fair treatment. Pursuant to that section, the Commission advised him that he should continue to refrain from conducting private business during normal state working hours or from using state facilities or equipment while doing same. He was also advised that he must also refrain from using his state position to obtain business.

We thanked him for his interest in conducting himself in conformity with the State ethics law.

Dated: Honolulu, Hawaii, December 4, 1972.

STATE ETHICS COMMISSION
Vernon F. L. Char, Chairman
Walters K. Eli, Vice Chairman
Audrey P. Bliss, Commissioner
Fred S. Ida, Commissioner

Note: Commissioner Gwendolyn B. Bailey was excused from the meeting in which this opinion was considered.