

## ADVISORY OPINION NO. 86-10

The Commission received a request for an advisory opinion from a state employee who asked the Commission to determine whether she could accept outside employment as a consultant to a private company that was seeking certification to perform laboratory analyses from the state agency the employee worked for. The division of the employee's agency that certified laboratories was not the division the employee currently worked for, but was one from which she had recently transferred.

The state employee appeared before the Commission to further discuss the facts of this situation and to convey her opinions in the matter. The employee's current state responsibilities included conducting surveillance programs regarding certain environmental impacts in the community and at industrial plants; investigating complaints; and reviewing environmental impact statements and conditional use and zoning change applications for certain anticipated environmental impacts. It appeared that action the employee took in her current official capacity did not affect the company she wished to work for. While employed in her former division, the employee analyzed samples of certain substances for compliance with federal and state regulatory standards.

The employee's outside employment would have been as a consultant to a private company that was attempting to obtain certification from the employee's agency--through her former division--to perform certain laboratory analyses. Such certification required an on-site evaluation by a certification officer from the employee's former division.

In the summer of 1986, the same private company had been denied certification by the employee's agency because of certain deficiencies that were noted during an on-site evaluation. The certification officer who conducted the evaluation and who denied certification to the company at that time was the employee's former supervisor at her former division.

The Commission learned that if the employee had been hired as a consultant to the private company, her primary responsibility would have been to upgrade the company so that it could attain certification from the employee's agency. Specifically, the employee would have worked to correct the deficiencies noted by the state certification officer during the company's previous on-site evaluation. This work would have involved (a) establishing (in written form) and implementing a program of operating procedures to insure the quality and integrity of laboratory analyses and (b) training company staff to perform the analyses required for the on-site evaluation. The state employee represented that she would not personally be performing any analyses on behalf of the company during the on-site evaluation by her state agency. After certification was attained, the employee would have supervised the company's analysts, as required; "trouble-shoot"; and monitor the operating procedures program.

It was the employee's opinion that no conflict of interest would arise from her employment with the private company because there would be no interaction between her present duties as a state employee and her proposed duties with the private company. Further, the employee had proposed taking certain steps to minimize any direct contact between herself and the state certification officer (her former supervisor).

The Commission initially noted that section 84-14(b), Hawaii Revised Statutes, prohibits state employees from acquiring financial interests in a business that they have reason to believe may be directly involved in official action to be taken by them. Section 84-14(b) states as follows:

No employee shall acquire financial interests in any business or other undertaking which he has reason to believe may be directly involved in official action to be taken by him.

The employee's prospective employment with the private company would constitute a financial interest in a business for purposes of section 84-14(b). The Commission concluded, however, that because it did not appear that the private company would be directly involved in official action taken by the employee in her current state position, the employee's proposed employment would not be prohibited by section 84-14(b).

The Commission then noted that there was another section of the ethics code that was also applicable to the employee's situation, section 84-14(d). That section of the ethics code provides as follows:

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 he has participated or will participate as a legislator or employee, nor shall he 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 he is an employee or legislator.

Section 84-14(d) prohibits a state employee from assisting any business or acting in a representative capacity on behalf of such business on a transaction or proposal before that employee's agency.

The Commission reviewed the duties and responsibilities that the state employee would assume as a consultant to the private company and concluded that the employee's proposed outside employment was prohibited by section 84-14(d) because she would be assisting that company in obtaining certification from her own agency. The Commission noted that the employee's primary responsibility as a consultant to the private company would be to insure that the company passed the on-site evaluation by the employee's agency. The Commission stated that although the employee had represented that she would not personally perform any required analyses during the evaluation, the Commission believed that the employee would nevertheless be "assisting" the company, within the meaning of section 84-14(d), because her efforts would have a direct and intended effect on the private company's performance before the employee's own agency.

The Commission also considered the employee's proposal to minimize any "undue influence" upon the state certification officer by reducing direct contact between herself and that individual. The Commission believed, however, such actions notwithstanding, that the employee would still be assisting the private company in a matter before her own agency and that such assistance was prohibited by section 84-14(d). The Commission further believed that section 84-14(d) would prohibit the employee from assisting the company in its attempt to obtain

certification even if a certification officer other than her former supervisor were to perform the on-site evaluation.

The employee had stated to the Commission that the certification process was essentially objective in nature and that she would be unable to exert any undue influence upon the certification officer. The Commission had learned that the on-site evaluation for state certification was a two-day evaluation and was based upon a number of criteria. Those criteria related to personnel; equipment, supplies, and materials; general laboratory practices; analytical methodology; sample collection, handling, and preservation; operating procedures program; data reporting; and action response. The Commission observed that some of these criteria, such as laboratory equipment, appeared to be "objective" factors in which the individual judgment or discretion of a certification officer played a minimal role. However, the Commission also understood that a certification officer did in fact exercise a certain amount of discretion in evaluating a private company with respect to other criteria, such as analytical methodology. The Commission further understood that a certification officer had the final discretion to award a company provisional certification status if, in the officer's opinion, deficiencies or substandard performance by a company were likely to be corrected or improved. The Commission concluded that assistance or representation by an agency employee could influence the judgment or discretion of the certification officer in these areas and that such a result would be prohibited by section 84-14(d).

The state employee had emphasized to the Commission in support of her proposed outside employment that she was employed in one section of the state agency, whereas certification derived from a separate section of that agency. Therefore, the state employee would not be assisting a private company before her own section or, indeed, even before her own division at the agency. The Commission noted that the employee's point was well taken, and stated that it was not insensitive to the fact that the effects of section 84-14(d) could be especially burdensome for those employees of very large and extensive state agencies. Nevertheless, the Commission observed that section 84-14(d) specifically prohibits employees from assisting or representing others for compensation in matters before their own *agencies*. The Commission found that the language of section 84-14(d) simply did not permit it to distinguish between subdivisions or sections of a particular state agency.

The employee had inquired whether there would be any difference between her affiliation with the private company as a consultant and as an employee. The Commission held that for purposes of section 84-14(d), there would not. That section prohibits a state employee from assisting any business before the employee's agency for a fee or other compensation. Whether the employee assisted the private company as a consultant or as an employee, she would in either event receive a fee or other compensation for her services and would therefore be subject to section 84-14(d).

The Commission noted that it had previously upheld the underlying rationale for the restriction imposed by section 84-14(d). In Advisory Opinion No. 369, the Commission stated the following:

We think the rationale for this restriction is reasonable. Your representation and assistance of persons before the department that employs you would create an appearance of impropriety and an advantage to the persons you assist or represent. Such an advantage would be unwarranted and would accrue irrespective of any efforts you took to prevent it. The public would not be persuaded that

favorable results in cases in which you were involved did not result from your employment in the department. For this reason, among others, the Legislature determined that employees should not be privately involved in matters that come before the agencies that employ them.

The Commission stated that it continued to support this rationale and believed that it was applicable to the employee's particular situation. Irrespective of the employee's efforts to prevent an unwarranted advantage to the private company that employed her, the Commission felt that it would still appear to the public and to other private businesses that favorable results for that company were attributable, at least in part, to the employee's employment with the certifying state agency.

The Commission realized that its decision would seriously affect the employee's proposed outside employment. The Commission emphasized, however, the overriding importance of preventing unwarranted advantages and appearances of impropriety that are virtually unavoidable when state employees assist or represent others before their own agencies. Although section 84-14(d) limited the employee's possibilities of outside employment, the Commission believed that the limitation was justified, because otherwise state employees would routinely be representing companies on matters before their own agencies. Such a practice, the Commission observed, would lead to influence-peddling and to the use of insider information--problems section 84-14(d) was enacted to prevent.

The Commission appreciated the employee's contacting the Commission with regard to this matter and thanked the employee for her cooperation in discussing this matter with the Commission's staff.

Dated: Honolulu, Hawaii, December 12, 1986.

STATE ETHICS COMMISSION  
Tim S. Farr, Chairperson  
Laurie A. Loomis, Vice Chairperson  
Cynthia T. Alm, Commissioner  
Rev. David K. Kaupu, Commissioner

Note: Commissioner Arnold J. Magid was not present during the discussion and consideration of this opinion.