

### ADVISORY OPINION NO. 87-3

A state department administrator asked the State Ethics Commission ("Commission") whether the ethics code prohibited one of the administrator's employees from privately participating in a project that was being undertaken by a private professional organization. The organization was planning to publish a series of books in the employee's field of expertise. This series would include at least one volume devoted to objects located within each state. The organization had asked the employee to participate in the project by authoring the volume about such objects in Hawaii. The employee would receive an honorarium in return for her services to this project. Both the employee and the department administrator appeared at the Commission's meeting on June 10, 1987, to provide additional information and to discuss their respective opinions in connection with this matter.

The sections of the State Ethics Code, chapter 84, Hawaii Revised Statutes ("HRS"), that were applicable to this situation were sections 84-14(b) and 84-13, HRS. Section 84-14(b) governs the acquisition of financial interests by state employees, and provides as follows:

§84-14(b) 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 Commission noted that section 84-14(b) prohibited the employee from acquiring financial interests in any business or undertaking that she had reason to believe might be directly involved in official action to be taken by her. A "financial interest" is defined under the ethics code to include an employment (any rendering of services for compensation) or prospective employment for which negotiations have begun. A "business" under the ethics code includes any organization carrying on a business, whether or not operated for profit. Finally, "official action" is defined as a decision, recommendation, approval, disapproval, or other action, including inaction, that involves the use of discretionary authority.

The Commission determined that by rendering services to the organization's project for compensation, the employee would be acquiring a financial interest in the organization. The Commission held that section 84-14(b) prohibited the employee from acquiring such a financial interest if she had reason to believe that the organization might be directly involved in official action to be taken by her.

The Commission had learned that the organization was a national association of professionals interested in a particular subject. The organization published a journal on this subject. It was the Commission's understanding that while the employee's state office was a member of the organization, the office's membership activities were limited to subscribing to the organization's journal. Both the employee and the department administrator confirmed to the Commission that the organization probably would not be involved in any official action to be taken by the employee. Accordingly, the Commission believed that section 84-14(b) did not prohibit the employee's participation in the project. However, the Commission noted that if the employee did participate in the project, thereby acquiring a financial interest in the organization, section 84-14(a) of the ethics code mandated that she disqualify herself from taking any official action directly affecting the organization if, in the future, and contrary to current expectations, the organization became subject to action taken by the employee.

The second section of the ethics code that was applicable to this situation was section 84-13, HRS. That section provides, in pertinent part, as follows:

**Fair treatment.** No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others; including but not limited to the following:

- (1) Seeking other employment or contract for services for oneself by the use or attempted use of the legislator's or employee's office or position.
- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of the legislator's or employee's official duties or responsibilities except as provided by law.
- (3) Using state time, equipment or other facilities for private business purposes.
- (4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom the legislator or employee inspects or supervises in the legislator's or employee's official capacity.

Section 84-13(1) prohibits state employees from seeking other employment for themselves by the use or attempted use of their state offices or positions. The employee informed the Commission that, after learning about the project, she approached the organization to inquire whether she might be considered as an author for the project series. The employee was not transacting state business with the organization at that time and related to the Commission that she did not make any reference to her state office or position other than in her resume, which, together with a writing sample, she submitted to the organization at its request.

The Commission had not seen any evidence that the employee used or attempted to use her state office to obtain private employment for herself in connection with the project. The Commission noted that although the experience and expertise that the employee had derived from her state employment may have enhanced her qualifications to participate in the project, given the circumstances of this case, the Commission did not believe that there had been a violation of section 84-13(1).

Section 84-13(2) prohibits a state employee from receiving compensation for the performance of the employee's official duties or responsibilities except as provided by law. The Commission stated that this section of the ethics law prohibits a state employee from receiving an honorarium from a private source if the work done for the honorarium falls within the state employee's official responsibilities. The Commission believed, however, that section 84-13(2) did not prohibit the employee in this case from participating in the project for an honorarium or compensation.

The Commission noted that the employee's major state duties and responsibilities were to direct and supervise a state program, which included the identification and registration of certain objects and the production of public information concerning the objects. The employee's state duties and responsibilities also included locating and evaluating certain objects; researching and writing studies of certain objects; and assisting in the preparation of reports and answers to requests for information about certain objects.

The employee's activities in connection with the project would be to select, research, and write descriptive narratives about certain objects in Hawaii. The department administrator, as the employee's supervisor, informed the Commission that to the extent these activities related to certain types of objects, the activities fell within the employee's official responsibilities. After discussing this matter with the employee and with the department administrator, the Commission concluded that the employee's participation in the project would exceed the scope of her official responsibilities for purposes of the ethics code.

The department administrator and the state employee both related to the Commission that the employee's official responsibilities related exclusively to certain types of objects. The project would profile these types of objects but would also profile other types of objects. The employee estimated that approximately two-thirds of the project would be devoted to the types of objects with which she dealt as a state employee and one-third to other types of objects. Thus, it appeared to the Commission that a considerable portion of the project would relate to object types which did not fall within the employee's official responsibilities. The Commission noted that the department administrator had also agreed that the project exceeded the scope of the employee's official responsibilities because the project encompassed objects with which the employee did not work in her official capacity.

The Commission also believed that the project exceeded and was outside the scope of the employee's official responsibilities because of the project's magnitude. The Commission had learned that the employee planned to select some two to three thousand objects in Hawaii to depict in the book that she authored for this project. The employee informed the Commission that only seven hundred fifty objects (of the type with which she dealt as a state employee) to date had been catalogued by her state office. The employee's participation in the project would entail producing a six hundred page manuscript, including photographs. The department administrator had stated to the Commission that because of its magnitude, participation in such a project would *not* be in the ordinary course of the employee's state employment.

The administrator had also related that limited staff and the magnitude of the project would preclude her office from undertaking this project. Therefore, the project would *not* become a part of the employee's state duties. The Commission found this to be a very significant factor in determining whether HRS section 84-13(2) prohibited the employee's private participation in the project.

Finally, the Commission noted that the State would benefit from the results of the employee's work for the project. The department administrator had also related that the employee's book would also be beneficial to her state office in the future.

For the reasons discussed above the Commission concluded that section 84-13(2) did not prohibit the employee from undertaking the project for private compensation.

The department administrator had expressed some concern about the possible misuse of state office when an employee privately undertakes a project such as this. The Commission recognized and shared the administrator's concern. State employees who misuse their official positions to privately advantage themselves would be in violation of section 84-13, HRS. However, the Commission concluded that the possibility that an employee may misuse his or her state office does not automatically preclude the employee from outside employment.

The Commission concluded that the ethics code did not prohibit the employee's private participation in the project provided the following conditions were satisfied:

(1) The employee was not permitted to use state time, equipment, or facilities to work on the project. Except to the extent that state equipment or facilities would be available for public use, this prohibition included the use of the state telephones, photocopy machines, typewriters, and other state equipment, and use of the employee's state office and desk.

(2) The employee was not permitted access to state files or other state resources for the project beyond that which was given to the public. This also meant that the employee was not permitted to access state research files beyond the hours during which such files were made available to the public.

(3) The employee did not disclose or use in connection with the project information which by law or practice was not available to the public and which she acquired in the course of her official duties. The Commission noted that misuse of such confidential information was expressly prohibited by section 84-12, HRS.

(4) The employee did not use or attempt to use her official position to direct state work to benefit or facilitate her project work. The Commission realized that this condition might be difficult to monitor. However, the Commission was informed that the employee was required to submit for the department administrator's approval and for approval by the state board that headed the department a work plan for the employee's office. The Commission believed that adherence to this work plan would help to minimize any possible misdirection of state work.

The Commission realized that there might be other considerations in determining whether the employee should be allowed to undertake the project. However, the Commission believed that for the most part, these were administrative rather than ethical considerations. Subject to the conditions set forth in its opinion, the Commission found that the ethics code did not prohibit the employee's participation in the project.

For the project, the employee planned to use information contained in state research files that were available to the public. The Commission made no decision in this case regarding any copyright issues or other issues requiring a determination of state title or property right. The Commission found that those issues, if relevant to this case, should be referred to the Office of the Attorney General.

The Commission commended both the department administrator and the state employee for their cooperation and assistance in this matter and thanked them for their sensitivity to state ethics.

Dated: Honolulu, Hawaii, June 29, 1987.

STATE ETHICS COMMISSION  
Cynthia T. Alm, Chairperson  
Laurie A. Loomis, Vice Chairperson  
Rev. David K. Kaupu, Commissioner  
K. Koki Akamine, Commissioner

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