



# HAWAII STATE ETHICS COMMISSION

State of Hawaii · Bishop Square, 1001 Bishop Street, ASB Tower 970 · Honolulu, Hawaii 96813  
*50<sup>th</sup> ANNIVERSARY 1968-2018*

## ADVISORY OPINION NO. 2018-3

June 21, 2018

The Hawaii State Ethics Commission (“Commission”) received a written request for an advisory opinion as to whether the State Ethics Code, Hawaii Revised Statutes (“HRS”) Chapter 84, allowed a state employee (“Employee”) to continue his private employment for a non-profit corporation (“Non-Profit”). As discussed below, while the Commission recognizes that this situation raised some unusual circumstances, the Commission believes that the State Ethics Code prohibits the Employee’s private employment with the Non-Profit.

### I. Facts

#### A. Employee’s State Position

The Commission understands the facts to be as follows. The Employee’s employment with his State Division (“Division”) predated his employment with the Non-Profit. The Employee’s state duties include coordinating services for members of the public in a somewhat isolated geographical area of the State. The Employee is the only employee at the Division’s office in this area and performs all duties for the office. If he is away, he must close the Division office and state services are unavailable until he returns. He has regular state work hours from 7:45 a.m. to 4:30 p.m. and is a salaried employee.

At the Division, he meets with individuals and assists in arranging services for them. As part of that process, the Employee makes recommendations or referrals to private provider agencies that offer the needed services. The Employee has recommended that individuals seek services from his private employer, the Non-Profit.

If an individual needs immediate emergency assistance during state work hours, then the Employee’s state duties require him to respond. Calls for emergency assistance occurring outside of state office hours are handled through a Division hotline.

## B. Private Employment with the Non-Profit

The Employee has been privately employed by the Non-Profit for a number of years. The Non-Profit has two contracts with the Division. The first contract is to provide emergency services. This includes fielding calls received from the Division's hotline. The second contract relates to the Non-Profit's provision of specialized services for individuals.

The Employee was employed by the Non-Profit in two capacities. First, he was an on-call emergency outreach employee on weekdays from 7:00 a.m. to 7:00 p.m., and on alternating weekends. During that time, he was required to respond, on behalf of the Non-Profit, to emergency calls within forty-five minutes of receiving a call. The Non-Profit paid him an hourly rate for on-call services, and a higher rate if he responded to an emergency call.

On average, the Employee responded to one or two emergency calls a month. The amount of time required to respond to calls varied depending on the situation, but could take up to several hours. If, as an employee of the Non-Profit, he responded to a call during state work hours, he would take vacation leave for his time away. Because he is the only Division employee in his area, when fielding an emergency call, he closed the Division office. He informed the Commission that, if he received an emergency call during state business hours, he might reschedule state meetings to accommodate his private work.

Second, in addition to providing on-call services, the Employee's duties for the Non-Profit also included providing specialized services to clients of the Non-Profit. The Employee stated that he was the only provider of these services in the area.

## II. **Issues Presented**

The issues before the Commission are:

1. Did the State Ethics Code prohibit the Employee from acquiring employment with the Non-Profit when, as a Division employee, he made recommendations or referrals to the Non-Profit?
2. Does the State Ethics Code prohibit the Employee from being on call as an emergency outreach employee for the Non-Profit during state business hours?
3. Is there an exception to the Conflicts of Interests or Fair Treatment laws that allows the Employee to continue working for the Non-Profit?

### III. Application of the State Ethics Code

As a state employee, the Employee is subject to the requirements of the State Ethics Code. The purpose of the State Ethics Code is to prescribe a code of conduct for elected officers and employees of the State as mandated by Article XIV of the State Constitution. The Commission is charged with the responsibility of administering the Ethics Code so that public confidence in public servants will be preserved.<sup>1</sup>

1. HRS § 84-14(b) Prohibited the Employee's Private Employment with the Non-Profit

The Conflicts of Interests law, HRS § 84-14(b), prohibits a state employee from acquiring a financial interest in any business (including a non-profit corporation) that the employee reasonably believes may be involved in official action to be taken by the employee. A "financial interest" is defined by the State Ethics Code to include employment. HRS § 84-3. "Official action" is defined as a "decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." HRS § 84-3.

The Employee was already a state employee when he acquired employment with the Non-Profit. At the time he acquired this employment, he had reason to believe that he would take state official action affecting the Non-Profit. As part of his state duties, the Employee made recommendations and referrals to the Non-Profit. Regardless of whether a referred individual actually received services from the Non-Profit, the Employee's recommendation or referral in itself constituted official action affecting the Non-Profit. Accordingly, because at the time the Employee was hired by the Non-Profit there was reason to believe that the Employee would be called upon to take state official action directly affecting the Non-Profit, the State Ethics Code prohibited him from acquiring private employment with the Non-Profit.

2. The Ethics Code Also Prohibits the Employee from Being Paid as an On Call Emergency Outreach Employee for the Non-Profit During State Work Hours

Although the Commission concludes that the Employee's employment at the Non-Profit was prohibited entirely by the Conflicts of Interests law as discussed above, the Commission also believes that the Employee was prohibited from being privately paid as an on call employee during his state work hours. The Fair Treatment law, HRS § 84-13, prohibits state employees from using their state positions to obtain unwarranted advantages or benefits for themselves or others. This law specifically prohibits employees from using state

---

<sup>1</sup> Preamble, HRS chapter 84.

time, facilities, or other resources for private business purposes, including for outside employment. The Employee's acceptance of private compensation for being on call during his state work hours is not permitted by the Ethics Code, regardless of whether he takes vacation time to respond to any calls that are actually received.

Further, the Employee indicated that, when responding to a call, he may unexpectedly need to close the Division office, potentially for several hours, and cancel any scheduled meetings. The Division stated that the office closure "may be disruptive to operations such as scheduled appointments, audits and meetings," and that such "disruptions may seriously detract from [the Division]'s primary services to our customers." The Commission shares this concern. Accordingly, the Commission believes the Fair Treatment law prohibits the Employee from committing state time to a private business in a manner that detracts from his ability to perform his state duties.

3. There is No "Exception" Permitting the Employee's Employment with the Non-Profit

The Employee also requested that the Commission apply an "exception" to HRS §§ 84-13 and 84-14 to allow him to continue to work for the Non-Profit due to the lack of another service provider in the area. The Non-Profit and another state employee submitted statements in support of his request. The Division has not taken a position on whether the Employee should be able to remain employed by the Non-Profit, but notes that it has a contract with the Non-Profit to provide these services and it has not received any written notification from the Non-Profit that it is unable to perform its contractual duties.

In very limited situations, the Commission has previously made exceptions to HRS §§ 84-13 and 84-14. For instance, in Advisory Opinion No. 360 (1978), the Commission permitted a state medical provider to treat his state patients at his private practice while on leave from state employment for a year. The Commission held that "a limited exception should be granted to him in this unique situation so that he might treat privately those individuals who had expressed a strong desire to continue treatment with him." Id. at 2; See also Advisory Op. 93-4 at 2-3 (allowing state practitioner to rent a room in her home to a state client because it benefitted the client and the situation was overseen by other state personnel). In this case, the Employee has presented evidence that some of the Non-Profit's clients may be disadvantaged if he is not permitted to provide services.

However, the Commission notes that, in the cases where it has allowed an exception, it has insisted on procedures to ensure that a conflict of interest is not exploited. See Advisory Op. No. 93-4 (allowing the rental agreement discussed above so long as "three supervisors monitored the rental arrangement between

the employee and the client . . .”); Advisory Op. No. 459 (1982) (requiring the submission of safeguard procedures for the Commission’s approval).

Unlike previous cases where the Commission has made exceptions to the application of the Ethics Code in very unique circumstances, there does not appear to be direct, continuous, and vigilant state oversight over the Employee’s situation in this case. The Employee has a direct financial interest in making referrals to his private employer, the Non-Profit. Additionally, the Employee is the only Division employee in his area and has little direct contact with, or oversight by, his supervisor; indeed, he generally speaks with his supervisor via telephone no more than once a week, and he sees his direct supervisor in person less often than that.<sup>2</sup> The Division does not currently have policies in place to monitor the Employee’s conflict of interest at this time. Finally, the Commission notes that, while not dispositive, the Division has not supported the Employee’s request to continue as an employee of the Non-Profit and has indicated that it has not received any notice from the Non-Profit that it is unable to satisfy its contractual obligations to the Division. These facts weigh against allowing the Employee’s private employment despite the unusual circumstances.

Considering the direct nature of the conflict of interest, the lack of potential oversight by the State, and the lack of discussion between the Division and the Non-Profit of alternatives to the Employee’s private employment, the Commission believes that an exception to the application of the State Ethics Code is not appropriate in this case. The Commission urges the Division and the Non-Profit to attempt to provide the needed services without violating the State Ethics Code. Should this not be possible, the Division may contact the Commission for advice in the future.

#### **IV. Conclusion**

For the reasons discussed above, the Commission believes that the State Ethics Code prohibits the Employee’s private employment with the Non-Profit. The Commission thanks the Employee for seeking guidance on this issue.

---

<sup>2</sup> The Commission does not mean to suggest a deficiency in either the level or manner of supervision. The Commission merely notes that, for purposes of considering whether an exception ought to apply in this case, there does not appear to be the kind of close and direct monitoring that has been present in previous cases where the Commission has allowed an exception.

Dated: Honolulu, Hawaii, June 21, 2018

HAWAII STATE ETHICS COMMISSION

Reynard D. Gaulty, Chair

Ruth D. Tschumy, Vice Chair

Susan N. DeGuzman, Commissioner

David O'Neal, Commissioner

Melinda S. Wood, Commissioner