OPINION NO. 305

An employee of a department on a neighbor island began operating a private retail business approximately a year before assuming a supervisory position in that department. The business involved the sale of two limited and specialized items. Some of the employees that this employee supervised had in the past purchased items from him and had indicated some interest in future purchases. Before entering into any further transactions with individuals he supervised, the employee asked the Commission to determine whether his selling these items to them constituted a violation of the ethics code.

The section of the statute most applicable to his question was HRS §84-13 (Supp. 1975). That section deals with using one's state position to gain unwarranted advantages or contracts for oneself or others. We explained to the employee that because the wording of this particular section was somewhat broad, the statute listed four types of conduct which if engaged in by an employee would be violations of the section.[†] One with particular significance to his question, found in subsection (4), prohibits an employee from

> ... [s]oliciting, selling or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom he inspects or supervises in his official capacity.

The employee stated that in his position he supervised approximately 50 employees. We pointed out that that section of the statute could apply to his selling items to any of those individuals. In determining whether such a sale would be a violation of this section, however, the Commission was required to address the issue of whether the transaction involved was substantial. We noted that the Commission had stated in the past that an interest is substantial when it is sufficient in magnitude to influence an employee in his official duties. (See Opinion No. 30.) We indicated that the same standard should apply to determine if a transaction were substantial. We explained that to make this determination, the Commission must look at the total situation surrounding an employee's outside business pursuits including how he operated his business and the money that was involved. We also looked at how that outside interest related to and affected the employee's official duties.

The employee had begun his business the year before assuming his present position. He indicated that he had done so in order to obtain the two items he sold at a reasonable cost to himself. He did not advertise, depending instead upon customers telling others of his dealership. In addition he did not keep a stock of the more expensive item on hand but only ordered a specific model once a customer had chosen it from his catalogs. In contrast, the employee mentioned that the only other dealership of this type on this island kept one of each general type of the more expensive item and a customer was required to choose from one of them if he or she wanted to purchase an item of that nature.

The employee indicated that his gross sales for the past three years had averaged around $3,000; his profit margin on a sale was approximately 5%. The year prior to his request he had sold approximately $1,000-$1,200 worth of items to employees he supervised, an amount which he stated was unusually high. The largest sale to a single employee was around $500 which

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[†]Conduct which does not fall within these four categories may nevertheless constitute an improper use of position.

represented the purchase of two of the more expensive items--one for the customer and one for a gift to the customer's relative. Because these items were not easily expended, he did not expect to have any of these customers return in the near future.

This case presented a good example of a situation in which the amount of money involved would clearly be substantial in certain instances but would not be in others. We stated to the employee that we could not look only to the profit he received on a sale which to us seemed very minimal, but to the liability he was exposed to in each sale. For instance, he had indicated to the staff that if he knew the person who was interested in ordering an item, he did not require prepayment from that person, yet he was required to include payment to the company with the order. If the customer for some reason did not take the item after ordering it, he was left with it. That cost to him could be well above $200. We pointed out that certainly in some cases this amount would be substantial in the sense of influencing an official in his duties with regard to that person.

On the other hand, we indicated that we realized that the employee lived and worked in a small community, that he knew most of the people and that it would be unlikely that he would be left with an unwanted item. We knew that he began the business primarily for his own benefit in order to secure, as he had stated, the items he now sold at a "reasonable" price on this island. We also recognized that he did not actively solicit or sell the items he carried and that customers came to him because they had heard from others that he sold or could order these items. The income he earned from this business was quite small when compared to his earnings as a state employee. For those reasons we found that the single transactions he entered into with those he supervised involving either of these two items were not substantial in that they were not sufficient to influence him in his official duties. Therefore we found that he could engage in single sales of these two items to those people he supervised if he adhered to certain basic precautions.

We indicated those precautions as follows: First, he should be careful to avoid the use of state time, equipment or facilities to carry out his private business. Second, he should never solicit any people he supervised. If they were interested in purchasing either of the items he sold they must come to him; he should not approach them. We pointed out that in this way he would avoid the appearance of impropriety that was such an important consideration in a highly public position such as his. Finally, we stated that should a number of those people he supervised join together in some sort of club and then approach him to sell them either or both of the items in large amounts he should not become involved in such a transaction. The financial liability on his part would be increased by an amount sufficient to influence him in his official conduct should something go wrong with the sale. The transaction would then become substantial and would therefore be in violation of HRS §84-13(4).

We were careful to point out that we had reached this decision because of the specific circumstances surrounding this employee's business and because of the smallness of the community in which he lived. We stated to the employee that should he move to another island, retain the same type of supervisory position and wish to maintain his dealership, he should then request another opinion from the Commission.

We commended the employee for his concern for adhering to the ethical principles set out in the code of conduct and thanked him for his cooperation with the staff in obtaining necessary information.

Dated: Honolulu, Hawaii, July 13, 1977.

STATE ETHICS COMMISSION
Paul C.T. Loo, Chairman
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Audrey P. Bliss, Commissioner
Dorothy K. Ching, Commissioner
Gary B.K.T. Lee, Commissioner