

OPINION NO. 379

We received a request for an advisory opinion from an employee who was involved in administering written tests to applicants for certain licenses. He asked the Commission if he might himself acquire such a license.

We explained that the section of the code which was applicable to the acquisition of financial interests was HRS §84-14(b). That section states:

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.

In reading the statute governing the licensure of persons practicing the activity involved we noted that the statute governed only those persons who "[follow] the occupation or practice [of the activity] for compensation." A person who wished to engage in the activity without receiving compensation need not acquire a license. A license then was a permit to operate a business. We stated in Opinion No. 155 that a license was a financial interest of the person seeking it in that it was "an ownership interest in a business enterprise, that is, all the rights and interests which accrue to him by virtue of the license and all other properties involved in the exercise of the rights therein." We found this also to be so in this case. The acquisition of a license to practice this activity was the acquisition of a right to conduct a practice for compensation. We stated that the statute would then prohibit this employee from acquiring this license if it might be involved in action he took in an official capacity. We noted that official action is defined by the code to include "a decision, recommendation, approval, disapproval or other action, including inaction, which involves the use of discretionary authority."

The law governing the practice of this activity required that the board administer a written or oral exam and a practical exam. The written exam was set up, administered and graded by this employee's branch. The exam, a multiple choice type, was developed around 1969. The employee indicated to the staff that he had helped develop the test at that time. His office, however, used a key to grade the test. An applicant had to have correctly answered at least 75 percent of the questions to pass. In addition, the employee set the time and place for the practical exams and received a list from the board of those persons who passed the practical exam. His branch then sent out notification of the results to those tested.

In reviewing these duties, it did not appear to us that the action he took with regard to the licensing procedure involved discretionary action. We saw that setting up the testing place and sending out notifications was ministerial action. So also was the grading of a multiple choice test when the employee used a key established by the board. Therefore, we found that the conflicts section would not prohibit him from acquiring a license to practice this activity.

It was our view, however, that if he took the written exam he might very well violate HRS §84-12, the confidential information section. That section prohibits an employee from using information "which by law or practice is not available to the public...." Because he had helped develop the exam and had access to it and the answer key, his taking of this exam would be inappropriate. We held that he could not take this written exam.

We noted, however, that the law governing this activity allowed the board to give written or oral exams. We stated that he could pursue this license if he was successful in his request to the board to take an oral exam. We cautioned him, however, that, because of his dealings with the board, he should be careful not to use his state position to gain the board's approval for an oral exam.

Finally, we pointed out that if he did become licensed to practice this activity he should be aware that HRS §84-13(3) prohibited him from using state time, equipment or facilities to conduct a private business purpose. And, HRS §84-13(4) prohibited him from soliciting business from those persons he supervised.

We commended the employee for his concern for ethics as evidenced by this request.

Dated: Honolulu, Hawaii, April 2, 1979.

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

Note: Commissioner Audrey P. Bliss was excused from the meeting at which this opinion was considered. There was one vacancy on the Commission.