

OPINION NO. 453

The Commission received a request for an advisory opinion from the director of a state board that was in charge of operating a state facility. In regard to the request, the Commission was apprised of the following pertinent facts: that the state facility was responsible for the production of certain commodities; that commodity A was the first commodity produced by the facility; that commodity B, an offshoot of commodity A, had become a valuable asset of the facility; that the director had learned that it was possible for the board to sell the distribution rights of commodity B; that the profit from a sale of the distribution rights would be substantial and would help the state facility recover from current financial difficulties; that an employee had performed certain special services in regard to commodity B that were not originally within his normal job duties; that, given the nature of the industry of which the facility was a part, a distributor who wished to purchase the distribution rights to commodity B was concerned that the employee might have had legal rights in commodity B because of the special services he had rendered in regard to it; that before the distribution rights could thus be sold, the distributor required that a waiver of rights in commodity B be obtained by the facility from the employee, as well as from others who had also performed special services in regard to commodity B; that the employee had agreed to perform certain special services in regard to commodity A even though these special services did not fall within the duties of the job for which he was hired; that the employee later agreed to perform the same special services in regard to commodity B; that, because the special services rendered by the employee in regard to commodity B did not fall within the duties of the job for which he was hired, the employee felt that, when the distribution rights were sold, he should be awarded a percentage of the profit from the sale of the distribution rights, as well as certain rights in commodity B itself; that the employee would sign a waiver only if he were awarded a percentage of the profit and the certain rights; that the special services the employee performed in regard to commodity B were done during normal working hours, as well as during the employee's own time; that the employee had not signed a contract with the facility; that the employee had no written job description; that a job description written up approximately two years ago for the employee's position did not limit the duties of his position to the duties expressly mentioned therein; and that other employees of the facility had performed certain special services in relation to their jobs, even though such responsibilities were not technically part of the jobs for which they were employed.

In light of the above facts, the director asked this Commission to determine whether it was appropriate in terms of the ethics code for the facility to give a percentage of the profit it would receive, as well as certain rights in commodity B, to the employee in exchange for his signed waiver. The director had informed the Commission's staff that the board itself had already agreed to give the employee a percentage of the profit and certain rights in commodity B if such an award was consonant with the provisions of the ethics code.

The Commission invited the employee to appear before it, so that he would have an opportunity to personally present his views as to why, in exchange for his waiver, an award of a percentage of the profit from a sale of the distribution rights and an award of certain rights in commodity B should be allowed. The employee told the Commission at the meeting that he felt he should receive the percentage of the profit and the certain rights because the

special services he rendered in regard to commodity B were not a part of his job description. The employee further stated that he had spent much outside time working in regard to commodity B and that commodity B had value only because of the special services he performed in regard to it. The employee also explained that he felt that an award of a percentage of the profit and certain rights in commodity B was justified since the distribution rights of commodity B were going to be sold commercially, and since commodity B was thus going to be distributed commercially. Previously, commodities produced by the facility were used solely for non-commercial purposes. The employee pointed out that an award of a percentage of the profit and certain rights in commodity B was in keeping with the commercial practices of the industry of which the facility was a part.

In accordance with HRS §84-2, the employee, as a state employee, was subject to the restrictions of the ethics code. In light of the facts recited above, the applicable provision of the ethics code was HRS §83-13(2), which bars a state employee from "accepting, receiving, or soliciting compensation or other consideration for the performance of his official duties or responsibilities except as provided by law."

It was the Commission's view that the special services the employee had performed had become, in actuality, a part of his job when he agreed to assume those duties, despite the fact that the special services were not originally part of the job for which the employee was hired. A former general manager at the facility during the time the employee rendered special services in regard to commodities A and B stated to the Commission's staff that many facility employees had performed duties that were not technically part of their job descriptions. He said that, during the facility's early developmental period, employees were often asked to perform the sort of special duties the employee was asked to perform. He said that the employees could, of course, refuse; however, he stated that those responsibilities that an employee agreed to assume became a part of his or her job. Hence, a number of employees in the past had performed duties identical to the special services that the employee performed and had received no extra compensation, although the special duties were not part of their job descriptions. The Commission understood that, though the facility was in the process of conforming job descriptions to actual job duties, the practice of having employees perform duties not technically a part of the particular jobs for which they were hired had not as yet been completely set aside by the facility.

Because it was commonplace, given the exigencies of a new facility with a small staff attempting to establish itself, for employees to take on responsibilities not specifically within the particular job for which they were hired, the Commission was of the opinion that the employee's performance of special services in regard to the production of commodity B came to constitute a part of his employment with the facility when he agreed to perform those special duties. Since the employee had already been compensated for performing his job, the acceptance of a percentage of the profit from a sale of the distribution rights and the acceptance of certain rights in commodity B would be considered as additional compensation under the ethics code, and thus was prohibited.

The Commission understood that the employee had spent many outside hours working in regard to the production of commodity B. Although such efforts on the part of the

employee were exceedingly commendable, the Commission had held in a number of previous opinions that HRS §84-13(2) prohibits a state employee from accepting additional compensation for the performance of his or her official duties, even when those official duties were performed during an employee's own time, unless otherwise provided by law. Further, the Commission was not unmindful of the severe financial difficulties that the facility was encountering; however, it was the Commission's opinion that the ethics code compelled the result reached herein.

In accordance with Section 21-4-2(c), State Ethics Commission Rules, a copy of the advisory opinion was forwarded to the employee. Section 21-4-2(c) provides that a copy of an advisory opinion rendered by the Commission will be sent to a state employee who is involved in, but has not requested, the advisory opinion.

The Commission informed the director that it appreciated his cooperation, as well as the employee's, in regard to the ethical problem he had presented to the Commission. The Commission commended the director for bringing the matter to the attention of the Commission, since it had been the Commission's experience that this kind of attention to ethical matters furthers public confidence in state employees and thus contributes to an improved ethical climate in state government.

Dated: Honolulu, Hawaii, January 18, 1982.

STATE ETHICS COMMISSION
Edith K. Kleinjans, Chairperson
Dorothy K. Ching, Commissioner
Robert N. Mitcham, Commissioner

Note: Commissioner Gary B.K.T. Lee was excused from the meeting at which this opinion was considered. Vice Chairperson Paul C.T. Loo disqualified himself from the consideration and preparation of this opinion.