

OPINION NO. 456

The Commission received a request for an advisory opinion from a state employee. The employee supervised a crew whose foremost responsibility was to conduct surveys for a certain state department. The crew collected data for the department, and the department, after examining the data, made certain management decisions. The function of the state employee who supervised the crew was simply to collect data; he was not involved in making any decisions with regard to the data he furnished to the State. The employee was planning to engage in outside work as a consultant for certain private companies that collected the same sort of data that the employee gathered as part of his state job. These companies collected the data on behalf of their clients, who were required to submit a report of certain data to the employee's department for approval in regard to certain actions they wished to undertake. The companies wanted to subcontract the data collection function to the state employee because of his expertise in the area. The employee explained to the Commission's staff that, as a private consultant for such companies, he would be required to make a report of his findings and affix his name to it. The report would then be submitted to his department by the person for whom the report had been prepared. Concerned that such outside consulting work might be dissonant with the provisions of the ethics code, the employee asked the Commission to determine whether he could do outside work as a consultant for companies or individuals who planned to submit such reports to his department.

The Commission learned that reports of the sort that the employee wished to prepare as a consultant were usually sent to the employee's supervisor after the reports were submitted to the employee's department. The supervisor was responsible for evaluating the reports. Although the supervisor made no ultimate decisions in regard to the request for permission to undertake certain actions, she did give her opinion as to the thoroughness and accuracy of the report. The supervisor's comments, of course, influenced those responsible for the ultimate acceptance or rejection of the report. When asked about the employee's outside work as a consultant, the supervisor told the Commission's staff that she would know when the employee was responsible for a certain report because he had to sign the reports he submitted on behalf of his private clients. The supervisor also told the Commission's staff that she might contact the employee if she had any questions concerning his data and might ask him directly if he felt that the data he collected tended to support, or tended not to support, an individual's request for permission to undertake certain actions.

In accordance with HRS §84-2, the employee, as a state employee, was subject to the restrictions of the ethics code. In regard to the question the employee raised, both HRS §84-14(b) and HRS §84-13 had application. The Commission found that each would independently prohibit him from engaging in the sort of outside work he wished to do.

HRS §84-14(b) bars state employees from acquiring financial interests in businesses that they have reason to believe may be directly involved in official action to be taken by them. Official action is defined in HRS §84-3(7) as a decision, recommendation, approval, disapproval, or other action, including inaction, that involves the use of discretionary authority. Although the state employee did not review reports of data as part of his state job, it appeared to the Commission that it would not be unlikely for his supervisor to discuss his

own data with him or to ask him for his own appraisal of his data. Such participation in the evaluation process by the state employee would constitute official action, and thus his acquisition of the consulting work would be in violation of the ethics code.

HRS §84-13, the fair treatment section of the ethics code, prohibits state employees from using their official positions to secure unwarranted treatment for themselves or others. An employee's submission of a report to his or her own supervisor creates a strong appearance of unwarranted treatment, whether or not anything inappropriate is in fact done. Such situations undermine public confidence in state employees and are thus prohibited by the ethics code. Because of the relationship between the supervisor and the employee, it seemed to the Commission that an appearance of impropriety would arise. Others could reasonably take the view that the employee would be able to use his position to secure more favorable recommendations from his supervisor for his clients or that the supervisor was being partial to reports submitted by the employee. The Commission told the employee that it did not intend to imply that either he or his supervisor would violate the provisions of the ethics code; the Commission simply felt that an avoidance of an appearance of impropriety was not possible given the circumstances of his case.

The employee also asked the Commission to determine whether he could work for compensation during vacation time or during compensatory time. Since vacation time or compensatory time is not state time, the Commission told the employee that there was no violation of HRS §84-13(3), which prohibits the use of state time for private business purposes. Likewise, there was no violation of the code's prohibition against double compensation in HRS §84-13(2), unless, of course, the employee performed his state duties for compensation during that time. The Commission thus informed the employee that the use of compensatory time or vacation time for outside employment did not per se violate the ethics code. The Commission suggested, however, that the employee contact his department or supervisor in regard to departmental policies concerning vacation and compensatory time.

The Commission commended the employee for promptly bringing these matters to its attention. The Commission also commended the employee for his sensitivity to the ethical considerations discussed herein and for his desire to uphold the provisions of the ethics code.

Dated: Honolulu, Hawaii, February 12, 1982.

STATE ETHICS COMMISSION
Edith K. Kleinjans, Chairperson
Gary B.K.T. Lee, Commissioner
Robert N. Mitcham, Commissioner

Note: Vice Chairperson Paul C.T. Loo and Commissioner Dorothy K. Ching were excused from the meeting at which this opinion was considered.