

OPINION NO. 479

A state employee who worked at a certain state facility requested an advisory opinion from this Commission concerning possible conflicts between his private business interests and his state position. The employee's duties at his facility included, among other things, providing maintenance and engineering services for machines at the facility. The employee informed the Commission that he wished to perform, as an employee of a certain private company, engineering services and consultant work for outside organizations that planned to install machines at his facility. The engineering services that the employee wished to perform would involve the machines that the outside organizations would be installing at his facility. Outside organizations were permitted to install machines at the facility for their own use. Machines, however, had to be maintained and operated in accordance with the facility's policies. The employee stated to the Commission's staff that outside organizations had often contacted him for his services because of his expertise in installing, maintaining, and modifying machines of the sort that the outside organizations would be installing. Those outside organizations who wished to make use of his services for their machines at the facility were permitted to contract with the employee's facility. The director of the facility stated that furnishing the employee's services upon request was in the best interest of the facility, and thus the facility had a policy of complying with such requests.

The employee stated that he was already employed by the private company and had done consulting work in the past through the company for organizations that had installed machines at his facility. The private company paid the employee an hourly rate for the work that he did, and also paid him 50 percent of the profit from clients that he himself brought into the company. The employee asked the Commission to determine whether the work he wished to perform through the private company on behalf of outside organizations that had, or planned to have, machines at his facility would conflict with his present state duties. After examining the facts of his case and the applicable law, the Commission was of the opinion that the outside work the employee wished to perform would conflict with his present state position.

In reaching its decision, the Commission considered the applicability of HRS §84-14(b). This provision of the ethics code prohibits employees from acquiring financial interests in businesses or undertakings that they have reason to believe may be directly involved in official action to be taken by them. The director of the facility informed the Commission that the facility relied on the employee's expertise and advice when the facility negotiated with outside organizations regarding machine installations at the facility. Although the employee did not participate in the negotiations himself, the Commission has held in the past that advice or input into the decision-making process constitutes official action. Since such official action directly involved the outside organizations that wished to install machines at the facility, the Commission was of the opinion that the ethics code would prohibit the employee from working for such organizations in a private capacity.

Furthermore, as stated above, outside organizations at times requested engineering services from the facility for the machines they had installed there. Since the employee was the engineer who ultimately performed these services, and since the employee might be called upon to advise the facility in regard to such services, the Commission believed that a conflict

would also arise if the employee were to do outside work for organizations that might request engineering services from the facility. Again, the action the employee would be taking on behalf of the facility would be official action and would directly involve the outside organizations.

The Commission realized that the consultant work that the employee did for outside organizations was channeled through the private company. However, since the employee created work for himself by bringing clients to the private company, and received extra compensation for doing so, the Commission was of the opinion that for purposes of the ethics code such clients were essentially his own.

Although the Commission believed that an employment relationship with organizations that planned to install machines at the facility would be prohibited by HRS §84-14(b), the Commission pointed out that, of course, the employee could seek outside employment with organizations or companies that would not be directly involved in official action to be taken by him.

The Commission also drew the employee's attention to HRS §84-13(1), a part of the fair treatment section of the ethics code. This provision prohibits employees from seeking other employment or contracts for services for themselves by the use or attempted use of their office or position. The Commission informed the employee that this provision of the code would prohibit him from using his official position to acquire private clients for himself. Also, the Commission stated to the employee that HRS §84-13, which prohibits employees from using or attempting to use their official positions to secure unwarranted advantages for themselves or others, would prohibit him from referring clients to his private company in any manner that would give his private company preference over competing firms. Furthermore, if referrals were made, the Commission stated that the employee should make them in accordance with the facility's policies.

Finally, the Commission informed the employee that a copy of this advisory opinion would be sent to the director of the facility for his information.

The Commission commended the employee for bringing this matter to the Commission at an early time. The Commission has found 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, October 22, 1982.

STATE ETHICS COMMISSION
Edith K. Kleinjans, Chairperson
Paul C.T. Loo, Vice Chairperson
Allen K. Hoe, Commissioner
Gary B.K.T. Lee, Commissioner

Note: Commissioner Robert N. Mitcham was excused from the meeting at which this opinion was considered.