

OPINION NO. 503

A state employee who was a school counselor requested an advisory opinion from the Commission. The employee stated that during the last four years, he had developed three products that could be used by schools for their recordkeeping tasks. After the products were developed the employee offered them to his school free of charge. He had, however, sold a few of the products to other public schools and private schools through a store that sold these products. Because the employee had recently been questioned about the propriety of the sales, he asked this Commission whether, under the State Ethics Code, it was permissible for him to make the sales and whether he could continue to sell the products.

The most applicable sections of the ethics code were HRS §84-13(2) and (3), which state as follows:

No legislator or employee shall use or attempt to use his official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for himself or others; including but not limited to the following:

....

- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of his official duties or responsibilities except as provided by law.
- (3) Using state time, equipment or other facilities for private business purposes.

The first portion of the fair treatment section, HRS §84-13(2), prohibits an employee from receiving additional compensation for the performance of his state responsibilities. As a counselor, the employee worked directly with students and their parents and teachers to help these students resolve problems that affected their school work. Students were referred to the employee by the school's administration. Although certain information may have been considered when a referral was made, the compilation of this information was the responsibility of the school administrative personnel and was not a part of the employee's job responsibilities. Furthermore, it was also clear to the Commission that developing any procedures or systems that would assist the school in completing these tasks was not a part of a counselor's job. Accordingly, the employee was not prohibited by this subsection from developing the products as a private business.

The second subsection, HRS §84-13(3), prohibits a state employee from using state time, equipment, or facilities for a private business purpose. In the employee's discussions with the Commission's staff, he had stated that he had developed the products on his own time, did not use the school's equipment, and did not receive assistance from the school's personnel. The employee also had commented that designing the products was relatively simple and access to specialized information from the school was not required in order to develop the products. This was confirmed by the employee's principal, who also emphasized that the principal and the employee both had agreed that even the time the employee spent

assisting the school with the products would be his own time. In light of these statements, the Commission concluded that the employee had conducted himself in accord with this subsection of the ethics code.

The Commission also noted that HRS §84-14(a) governs conflicts of interests and provides that an employee may not take any official action directly affecting a business or undertaking in which he has a substantial financial interest. As a counselor, the employee did not hold an administrative position; consequently, he was not in a position to take official action that directly affected his business. The Commission, therefore, concluded that the employee would be permitted to sell his products to public schools, subject to the provisions of HRS §84-15(a). The Commission was aware, however, that the employee had recently offered the products to the department free of charge.

Finally, the employee also informed the Commission that he had applied for a different position within the department where his primary responsibility would be to teach a certain subject to students. The employee would also hold in-service training sessions on the subject matter for teachers and parents. And, according to an administrator in the district office, the employee's responsibilities would also include evaluating, recommending, and purchasing certain products for the schools. The Commission noted that should the employee change positions, the conflicts-of-interests section of the ethics code would prohibit him from taking any discretionary action that might directly affect his private business. For example, the Commission stated that the employee would be prohibited from recommending or purchasing any products he had privately developed.

The employee also wished to know whether he might continue to sell the three products that he had originally designed to private schools if he were appointed to this position. Since the development of these products and the performance of these recordkeeping tasks would not be a part of his responsibilities, the Commission found it unlikely that an ethics problem would arise. Because the Commission had determined that the employee developed and sold the products without violating the ethics code, naturally, the Commission told the employee that he could continue to sell the products even if he changed positions. The employee, however, was cautioned to refrain from making any references to his position or to the department when conducting sales of the products to the private sector.

The Commission also noted that the employee had stated that he was not interested in privately developing other products that might be used by schools and therefore did not address itself to whether a conflict of interest might arise in the future. The employee was advised to consult with the Commission if he later decided to do so.

The Commission appreciated the employee's candor in discussing his situation and commended him for his sensitivity to the ethical considerations involved.

Dated: Honolulu, Hawaii, August 15, 1983.

STATE ETHICS COMMISSION
Edith K. Kleinjans, Chairperson
Allen K. Hoe, Vice Chairperson
Rabbi Arnold J. Magid, Commissioner

Note: Commissioner Mildred D. Kosaki was excused from the meeting at which this opinion was considered. Commissioner Gary B.K.T. Lee was not present during the discussion and consideration of this opinion.