

## OPINION NO. 509

A supervisor asked the Commission to determine whether an employee in his department could perform outside part-time work for compensation even though the work appeared to constitute part of the employee's official duties. The supervisor and the employee appeared before the Commission at one of its meetings to discuss why they believed that the employee's outside employment did not raise a problem under the ethics code. Essentially, the supervisor stated that the outside employment did not in fact constitute part of the employee's state responsibilities. Furthermore, the supervisor stated that his department encouraged such outside employment because the department itself benefitted substantially from it and because the outside employment provided additional compensation needed to attract employees of high caliber.

The ethics code provision relevant to the supervisor's inquiry was HRS §84-13(2), which bars a state employee from "[a]ccepting, receiving, or soliciting compensation or other consideration for the performance of his official duties or responsibilities except as provided by law."

In the past, the Commission has prohibited state employees from performing outside part-time employment for compensation if it appears that the outside employment constitutes one of the employee's official duties. Under such circumstances, the Commission believes that the employee would in effect be receiving double compensation for the performance of his or her state duties.

The question for the Commission to determine in the employee's case was whether the outside work he performed could have been construed to be one of his official responsibilities. It initially appeared to the Commission that such was the case. This assumption was strengthened by the fact that the employee's job description specifically mentioned duties that seemed identical to the duties the employee would perform as part of his outside employment.

Because the employee's job description seemed to encompass the duties of the outside employment, the Commission asked the supervisor to provide information to the Commission as to why the outside employment went beyond the scope of the employee's official duties. In response to this inquiry, the head of the supervisor's section and a department administrator forwarded letters to the Commission. Both letters pointed out that although the duties of the outside employment seemed to be similar to the employee's official responsibilities, the employee's outside duties in fact clearly went beyond the scope of his official responsibilities. The administrator's letter also mentioned that the employee prepared for his outside employment on his own time and did not make use of any department materials or equipment. The administrator and the section head also mentioned that other states allowed such outside employment because it provided substantial benefits to their departments and the additional compensation provided by the outside employment attracted competent employees.

Before making its determination in this case, the Commission decided to contact ethics commissions in other states to see if they prohibited the employee's counterparts in those states from doing similar outside work. Of the forty or so states contacted, about thirty responded. Of those thirty, about a dozen commented specifically on the problem. These commissions stated that in their opinion the outside employment did not present an ethical problem. The commissions stated that such outside employment benefitted the department, attracted high-caliber employees, and was a nationwide practice. Furthermore, the commissions pointed out that they believed that the outside employment was acceptable because it took place after ordinary working hours.

After reviewing the comments from other ethics commissions and the views submitted by the supervisor, the employee, the section head, and the administrator, the Commission determined that the employee could engage in the outside employment for compensation so long as the following conditions were met:

1. The outside employment serves the public interest.
2. The outside employment is not in the ordinary course of the employee's state employment.
3. The outside employment will be performed in addition to and beyond the hours of service required in the ordinary course of the employee's state employment.
4. The outside employment will not involve the use of state time, equipment, or facilities.
5. Written approval of the outside activity is submitted to the State Ethics Commission by the employee's supervisor or director, which approval shall state that
  - a. The outside employment is not in the ordinary course of the employee's state employment.
  - b. The outside employment will be performed in addition to the employee's ordinary or regular hours of employment and in addition to his or her ordinary responsibilities.

The Commission informed the supervisor that although it does not intend to waive its right to make independent judgments in double compensation cases, it realized that an employee's supervisor or director is often in a better position than the Commission to determine whether a state employee's outside part-time employment constitutes a part of the employee's official responsibilities. Thus, based on the written representations made by the section head and the administrator, the Commission believed that the above conditions had been met and that the employee could engage in the outside employment.

Finally, the Commission pointed out that HRS §84-14(a) prohibits state employees from taking official action directly affecting businesses in which they have substantial financial interests. The Commission explained to the supervisor that this provision of the code would prohibit the employee from taking any official action that would affect his company or any of its competitors. The Commission told the supervisor that this provision of the code would prohibit the employee, for example, from participating in contract negotiations between his private employer and the state agency for which he worked. Since "official action" is defined as discretionary action, the employee was not precluded from taking ministerial or non-discretionary action that might affect his financial interests.

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 the state employee who was involved in, but did not request, the advisory opinion.

The Commission commended the supervisor and the employee for their cooperation and assistance in resolving this matter.

Dated: Honolulu, Hawaii, September 6, 1983.

STATE ETHICS COMMISSION

Edith K. Kleinjans, Chairperson

Allen K. Hoe, Vice Chairperson

Mildred D. Kosaki, Commissioner

Rabbi Arnold J. Magid, Commissioner

Note: Commissioner Gary B.K.T. Lee disqualified himself from consideration of this opinion.