

OPINION NO. 510

An employee who was a supervisor at a state institution started a private company that sold a product for use in homes. The Commission had earlier received an inquiry concerning the potential for conflicts of interest between the employee's state position and his new private business. After the employee was informed of the nature of the inquiry, he requested an advisory opinion from this Commission regarding the application of the State Ethics Code to his situation.

Two sections of the ethics code were relevant. The first, HRS §84-14(b), prohibits state employees from acquiring financial interests in any business that they have reason to believe may be directly involved in official action to be taken by them. The Commission reviewed the employee's state responsibilities and concluded that he would not be prohibited by this section from continuing his private business. In his position, the employee had administrative responsibilities, which included ordering equipment for the institution's use, maintaining control over the equipment, and billing individuals who had used the services of his division while they stayed at the institution. In addition, when the division was understaffed, the employee was also required to check the equipment as necessary. This was not, however, a part of the employee's formal job responsibilities. Although the employee was familiar with a range of equipment, making recommendations regarding home care equipment was not a part of his state responsibilities. Furthermore, the equipment used by the institution was entirely different from the equipment that was sold by the employee's private business; the equipment used by his business was too small for the institution's use and was only appropriate for home use. Finally, the employee had stated that the company that supplied his private business did not have commercial dealings with the institution. Accordingly, it was the Commission's opinion that the employee was not in a position, in his official capacity, to take any official action that might affect his private business.

The Commission also reviewed the employee's situation to determine whether a second section of the ethics code, HRS §84-13(2), might be applicable. This section prohibits state employees from accepting additional compensation for the performance of their official duties and responsibilities. Although the employee occasionally might have been required to provide direct services to an individual, this would happen only during the individual's stay at the institution. If continued assistance was necessary after an individual left the institution, this service would be provided by a private practitioner or by others in another section of the institution. Consequently, the Commission found that the employee's pursuit of his business was not a violation of this section.

The application of the general provisions of the fair treatment section, HRS §84-13, was of more concern to the Commission. This section prohibits employees from using their state positions to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for themselves or others. Because questions had already arisen regarding the employee's situation and that of others in his division, the Commission carefully reviewed the employee's situation in light of this section. The Commission considered at length the question of whether the employee was in a position to gain an unfair advantage over other

private companies. The Commission noted that employees are prohibited by a portion of the fair treatment section, HRS §84-13(3), from using state time, equipment, or other facilities for private business purposes. The Commission stated that, as a matter of policy, the Commission generally presumes that employees, in good faith, will refrain from soliciting individuals or conducting their private business on state time and, therefore, will allow employees to continue their private activities until it is otherwise shown. Although the employee was prohibited from soliciting business or promoting his products at the institution, the Commission recognized that an appearance of impropriety might arise because he would have the opportunity, during the times he was involved in direct care, to solicit individuals who might require the use of the equipment he sold after they had left the institution. The Commission also noted that it would be possible for the employee to promote his equipment and business in discussions with other practitioners who were responsible for the care of the individuals at the institution. The Commission recognized that the employee might have the opportunity to enhance his private business by virtue of his state position; however, the Commission decided not to prohibit the employee from continuing his business without evidence that he had in fact engaged in action that was inappropriate under the State Ethics Code. Before coming to this conclusion, the Commission first reviewed the institution's policy on referrals and the administrative procedures and restrictions of the division and was assured that sufficient safeguards existed to diminish the potential for misuse of position. The Commission also noted that the assistant administrator at the institution was aware that an appearance of impropriety might arise out of the employee's situation; however, it was his opinion that it would be extremely difficult for the employee to take advantage of his position without the situation immediately being noted and a complaint subsequently being filed. Accordingly, the Commission did not believe any further steps would be necessary to ensure that the code provisions would be followed.

Since the Commission was also aware that other individuals in the employee's section were employed by other private companies, the Commission forwarded a copy of this opinion to the employee's supervisor for his information.

The Commission appreciated the employee's candid discussion of his situation and commended him for his concern for ethics in government.

Dated: Honolulu, Hawaii, September 6, 1983.

STATE ETHICS COMMISSION
Edith K. Kleinjans, Chairperson
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