

ADVISORY OPINION NO. 551

An employee in a state division who was also a former employee of another state office wished to accept employment as a private consultant to write applications that would be presented to her former office. Because the division and the office were both within the same department, she had requested an advisory opinion on whether any State Ethics Code provisions would prohibit her from undertaking the consulting work.

The division did not have any input into the application process; therefore, the Commission determined that HRS §84-14(b), the prohibited acquisition portion of the conflict-of-interests section, did not apply to the employee's situation. The Commission noted, however, that HRS §84-14(d) did apply. This section states, in part, as follows:

No ... employee ... shall ... assist any person or business or act in a representative capacity for a fee or other compensation on such bill, contract, claim, or other transaction or proposal before the legislature or agency of which he is an employee

In order to apply this section, the Commission had to first determine whether the office and the division were a part of the same department for purposes of the ethics code. If the Commission concluded that the office was a part of the same department, under HRS §84-14(d) the employee would not be able to accept private contract work to write applications.

In reviewing the relationship of the office to the department, the Commission recognized that a number of factors could weigh in favor of finding that the office was separate from the department. First, the office had been set up in accord with federal requirements and was administratively attached to the department. Second, the administrator of the office was not appointed by the director of the department but was an appointee of the governor who was confirmed by the senate. Third, final decisions regarding applications were made by the administrator without input or direction from the director of the department. And, in the event that an application was rejected, the unsuccessful applicant could either petition the administrator of the office (not the director of the department) for a reconsideration at the administrator's discretion or appeal directly to the courts. Fourth, the office had a fairly independent budgetary relationship with the department. Although the office's budget was a part of the entire department's budget, the office was responsible for determining its own needs and justifying its requests to the legislature. The Commission also was told that it was the view of the office's administrators that the office operated in a predominantly separate fashion from the department. The Commission noted, however, that the office was bound by other administrative restrictions and approvals pursuant to HRS §26-35.

Notwithstanding these factors indicating some autonomy on the office's part, the Commission believed that for purposes of the ethics law, "state agency" in HRS §84-14(d) meant the department in this case, and the office had to be included as a part of the department. The Commission noted that HRS §84-1 mandates that the ethics law be liberally

construed to promote high standards of ethical conduct in state government. To that end, the Commission believed its responsibility was to apply the ethical principles in the State Ethics Code in a way that heightened public confidence in state employees. In the Commission's view, representation and assistance of persons before the department that an employee is employed by created an appearance of impropriety and gave an advantage to the persons assisted or represented. Furthermore, the Commission believed that such an advantage would be unwarranted and would accrue irrespective of any efforts taken by the employee to prevent such an appearance. The Commission also believed that the public would not be persuaded that favorable results in cases in which employees were involved did not result from their employment in the department. The Commission noted that the ethics law was designed to promote credibility in state government. The Commission commented that some of the ethics law provisions prohibit certain inappropriate actions; others require an employee to avoid situations where inferences of unethical behavior may be raised, thereby damaging the State's efforts to serve the public. In the Commission's opinion, HRS §84-14(d) was one of the latter provisions. Thus, the Commission concluded that HRS §84-14(d) would preclude the employee from accepting consultant work to represent or assist a person or business before the department or any subdivision of the department, including the office.

The Commission understood that its decision had a limiting effect on the employee's outside employment opportunities but firmly believed that an alternative conclusion would not support the principles underlying the ethics law. The Commission commended the employee for seeking its advice and appreciated her candor in discussing her situation.

Dated: Honolulu, Hawaii, February 13, 1985.

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

Note: There was a vacancy on the Commission.