

ADVISORY OPINION NO. 555

An employee with a state office wished to know if it would be permissible under the State Ethics Code for her to begin working as a private practitioner. The employee had explained that prior to her accepting her state position, she had been a licensed practitioner, and, if she did not spend a minimal number of active hours engaged in that practice over a six-month period, in accord with regulations promulgated by a state division, would lose her license. Because the criteria for the certification of practitioners had become more stringent, the employee wished to maintain her license on an active standing.

HRS §84-14(b) prohibits 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. "Official action" is a decision, recommendation, or other action that involves the use of discretionary authority. Because the employee did not take action regarding the area in her position, the Commission found that this section would not prohibit the employee from beginning a part-time practice.

The Commission noted that the fair treatment section of the ethics code, HRS §84-13, would impose some restrictions on the employee's new practice. This section prohibits employees from using or attempting to use their official positions to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for themselves or others. The Commission discussed whether, by virtue of the employee's state position, she might be in a position to receive an unfair advantage in the conduct of her private practice. The Commission noted that a part of the employee's responsibilities as a private practitioner would be to advise and assist individuals in a particular area of their lives. The Commission also understood that the local office of the state agency actually was the only office providing a similar service to the area; consequently, the Commission noted that most of the information that would be helpful to the employee in her private work would be available to her in her state position. However, the Commission recognized that this information was not confidential and that the function of the agency was to disseminate the information as widely as possible. Furthermore, the employee's supervisor had stated that, although the office served all members of the public, it would be highly unlikely for someone from the employee's potential client group to seek assistance from the agency since other services specifically for that group would be available. The Commission believed, however, that in a small community it would be difficult for the employee to maintain a clear delineation between her state and private roles because both jobs required her to advise clients on the same subject matter. Although the employee had stated that she would be careful to try and keep her different roles separate, the Commission was deeply concerned that the situation would create an appearance of impropriety that would negatively affect the employee's agency. Accordingly, the Commission concluded that the employee could only accept certain clients. The Commission noted that the employee had agreed to refer any clients who did not continue to meet the Commission's criteria to another practitioner.

A second question the employee had posed was whether she could conduct independent evaluations at the request of other companies. The employee had noted that private companies often sought outside opinions from independent practitioners. Because the

Commission believed that the evaluation work would not involve work she did for the State, the Commission decided that the employee could accept this type of work.

The employee also had asked whether it would be permissible for her to do certain analyses, which involved surveying the geographical area that she lived in. The Commission noted that HRS §84-13(2) prohibits employees from receiving additional compensation for the performance of their state duties. The employee's supervisor had stated that the local office of the state agency actively sought the support of the community by encouraging businesses to utilize the services of the office but did not conduct surveys. Accordingly, the Commission concluded that HRS §84-13(2) would not prohibit the employee from engaging in this activity while she continued her state employment.

Additionally, the employee had asked the Commission whether she could accept as clients individuals who resided on other islands. Because the supervisor had represented that the office primarily served the local area, rarely interacted with a second office on the island, and hardly ever interacted with the rest of the state system, the Commission believed that it would be permissible for the employee to accept clients who did not reside on the island or who would not be seeking services on that island.

Finally, the Commission advised the employee to note that HRS §84-13(3) prohibits employees from using state time, equipment, or facilities for private business purposes. For example, the employee could not use her state position, telephone, or office, even during her lunch hour or after normal working hours, to conduct any of her private business. In this regard, the Commission advised the employee to scrupulously avoid any references to her state position, particularly when she contacted private businesses to obtain information for her analyses.

The Commission commended the employee for seeking its advice prior to undertaking her new business.

Dated: Honolulu, Hawaii, May 13, 1985.

STATE ETHICS COMMISSION
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