

ADVISORY OPINION NO. 558

The administrator of a state facility requested an advisory opinion regarding an employee of the facility because the employee had begun a business. The business employed professionals, including professionals employed full-time by the facility, who provided services at both private and public facilities, including the state facility. Because potential ethical problems could arise out of this situation, the administrator had requested the Commission's advice.

The Commission first reviewed the situation in light of HRS §84-14(b), which states as follows:

No employee shall acquire financial interests in any business or other undertaking which he has reason to believe may be directly involved in official action to be taken by him.

This section prohibits employees from acquiring new financial interests where there is a reasonable possibility that the business may be directly involved in discretionary action taken by them. The Commission was told that the employee was not part of the facility's administration nor was he a supervisor; thus, in the Commission's view, the employee was not in a position to take official action that might affect his private business or its employees.

The Commission discussed the possibility of the employee recommending his business to people he came into contact with while performing his state responsibilities. The employee stated, and the administrator confirmed, that the facility had been very careful about its referral policy. First, both the administrator and the employee had noted that it was beyond the scope of the responsibilities of the employee and others in his position to make referrals or recommendations since all requests for recommendations for private services were directed to the division head. The division head referred people to the yellow pages or gave them a current list of the businesses that provided private services. The Commission noted that the division head had commented that he had always limited himself to a general referral and had refrained from making specific recommendations. As a consequence, the Commission believed that HRS §84-14(b) would not prohibit the employee from acquiring his new financial interest.

The Commission also considered the application of HRS §84-13, the fair treatment section, to this situation. Specifically, the Commission stated that HRS §84-13(2) prohibits employees from accepting, receiving, or soliciting compensation or other consideration for the performance of their official duties or responsibilities except as provided by law. The Commission noted that there was a clear delineation at the facility between the duties of the state personnel and the private workers. The Commission also recognized that both the administrator and the employee firmly believed that the responsibilities of the state personnel and private workers could not be confused. Accordingly, the Commission concluded that HRS §84-13(2), prohibiting double compensation, was inapplicable.

The Commission recognized that a concern was expressed that an appearance of impropriety might arise out of the employee's situation and noted that the general provisions of HRS §84-13, the fair treatment section, prohibited employees from using their positions to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for themselves or others. For example, the Commission pointed out that the employee would be prohibited from approaching and soliciting his fellow employees as possible recruits for his business. Additionally, it would be impermissible for the employee or any other employees working for the private business to solicit customers on behalf of the business. The Commission wished to emphasize that, while possible questions might be raised in this regard, at the time the Commission considered the question, the Commission had not received evidence of any transgression of the state ethics law.

Finally, the Commission believed that the employee should be informed that HRS §84-12, the confidential information section, also would prohibit him from using information which would be confidential by law or by practice to further his private business.

The Commission determined that a copy of this advisory opinion should be forwarded to the employee for his information.

The Commission commended the administrator for his sensitivity to the ethics law and appreciated the cooperation of the employee in this matter.

Dated: Honolulu, Hawaii, June 7, 1985.

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

Note: Vice Chairperson Tim S. Farr was excused from the meeting at which this opinion was considered. There was a vacancy on the Commission.