

## ADVISORY OPINION NO. 560

An administrator of a state facility requested an advisory opinion on the application of the State Ethics Code to the facility's past and present practice of allowing certain employees to conduct their private businesses using state facilities and personnel. The administrator had initiated this request for an advisory opinion at the request of the Commission because the Commission had received an anonymous inquiry regarding the facility's policy.

The administrator stated that the practice of allowing the employees stationed at the facilities to conduct their private businesses had been in existence since 1937. In order to attract employees who would be willing to provide the necessary service to an isolated location, the employees were given housing on the grounds of the facility and also were allowed to conduct a private business by running a related service facility using state personnel and facilities. Furthermore, because of the nature of the facility, it was necessary to have the employees on the premises or close to the premises twenty-four hours a day. Additionally, the facility's policy recognized that there was a bonafide need for a related service facility in the area since the closest available one was located quite a distance away. Finally, the administrator noted that the facility paid two civil service employees considerably less salary than their peers received in the private sector, and this also had served as part of the basis for the policy of allowing the employees to conduct their private business in this manner.

The Commission was told that the situation at the facility was as follows: the employees provided on-call services twenty-four hours a day, seven days a week on an alternating basis. Each employee was allowed one-half day off each week. The employees conducted their private business, Monday through Friday. The stated hours of the business were from 1:30 p.m. to 4:30 p.m.; however, in practice, the business hours often overlapped the morning hours and evening hours set aside for the facility's work. The facility provided all supplies for the private business but billed the employees for the stock used in the conduct of their private business. The private business's equipment was paid for and maintained by the State, and ancillary supplies and services, for instance janitorial services and supplies, were provided as general support by the State. In addition, three other staff members were provided to the business during its normal working hours on an as needed basis. The Commission was told that a volunteer organization had been established to provide voluntary services to the facility and assist in promoting the health and welfare of the community; the organization also provided volunteers who generally served as receptionists to the related service facility. The employees also have hired one staff person, as a business office accountant/manager.

The employees performed their responsibilities from 7:15 a.m. up through the time the business opened. In meetings with the administrator, the employees, and other facility personnel, the Commission staff had recognized that a difference of opinion on whether it was possible to limit the private business hours to specific time periods, namely 1:30 p.m. to 4:30 p.m., existed. The employees noted that their business hours were often were interrupted by state work. They noted that interruptions sometimes occurred in the afternoon thus interrupting the time normally allotted for the business. Similarly, the employees noted that

their private clients often required their attention in the morning or early evening. Therefore, both employees had urged that a more flexible time schedule reflecting the overlapping time constraints be adopted.

The applicable section of the ethics law was HRS §84-13(3), which states as follows:

No legislator or employee shall use or attempt to use his official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for himself or others; including but not limited to the following:

....

- (3) Using state time, equipment or other facilities for private business purposes.

The Commission noted that it generally had applied this section when an individual employee, without the approval of the department he served, used state facilities or personnel to advantage either himself, another individual, or a business in a way which was clearly unfair. In the Commission's view, this kind of situation could be differentiated from the use of state facilities or personnel that might be accorded to a private individual because it served an overall state policy. In such circumstances, the Commission has believed that the department itself had weighed the pros and cons of the policy and had come to its own conclusions based upon reasonable grounds, and the Commission has concluded that no unwarranted advantages have been given. It was clear to the Commission in this instance that the department and the former administrators of the facility had determined that having these employees be always available and accessible to the community at large in the isolated area was beneficial to the department and the persons it served. Accordingly, in the Commission's opinion, when the practice had been first instituted, it had not provided the employees with an unwarranted advantage.

However, the Commission had reviewed the recent circumstances at the facility and believed that the original circumstances that required the adoption of this policy no longer existed. The Commission concluded that the changes in the circumstances of the facility and the community required an adjustment to the practice of allowing employees to use state facilities and personnel in the conduct of their private businesses. In the Commission's view, a concomitant payment or reimbursement of costs from the present employees to the State would be required.

The Commission noted that the facility was owned by the State, and, therefore, was a facility whose use was subject to the provisions of the state ethics law. In Advisory Opinion No. 362, the Commission had discussed the question of whether a department could rent state facilities to private practitioners. The department head had told the Commission that the rental of these facilities to private practitioners would promote an overall state policy and satisfy a state need. After reviewing the proposals, the Commission had determined that the department would be permitted to rent or lease the facilities so long as no unwarranted advantages were given. The Commission emphasized that the use of the facilities should be awarded through an open, public process, and, if at all feasible, the department should award

the use of the facility through a competitive bid process. In this instance, the department had advised the Commission that the continued establishment of the private business using state facilities would promote the department's purposes. Accordingly, the Commission concluded that the facilities should be leased, with the employees providing reimbursement to the State for the cost of all services and supplies provided by the State.

In the Commission's opinion, the ethics law exists to separate the activities of state employees in the performance of their state duties from activities connected to their personal and private business interests. The Commission stated that the standards of conduct provide employees with guidelines that clearly differentiate between state responsibilities and private business interests. The department had been advised, therefore, to consider possible steps that would separate the state and private functions of the employees without jeopardizing the work flow, the facility's clients, or the community the facility served. The Commission had been informed by the deputy director that the department intended to enter into an agreement with the employees of the facility to allow them to conduct and independently run their business on the grounds of the facility. The deputy director stated that this would be done in the form of a revocable permit to the employees through the Department of Land and Natural Resources, on a year-to-year basis, with clauses allowing for revocation on thirty-day notice. As tentatively agreed upon by all parties, the terms of the permit were to stipulate the following:

- (1) The permittees would operate and manage the business independently between the hours of 1:00 p.m. and 5:00 p.m. during the normal work week.
- (2) In all circumstances, the permittees would give priority to the facility's clients when required even during the afternoon hours.
- (3) Morning hours, 7:30 a.m. to 11:30 a.m., would be devoted to the facility's clients and staff business.
- (4) The permittees would be available and on-call 24 hours per day, seven days a week, as part of the permittees' compensation as salaried employees of the State.
- (5) The facility would have access to audited financial statements detailing the business' operations as it related to revenues generated and expenses incurred.
- (6) The permittees would be required to hire their own personnel as necessary to the operation of the business.
- (7) The permittees would be responsible for the procurement of supplies.
- (8) The permittees were required to allow anyone designated by the department also to utilize the space.

- (9) The permittee would reimburse the facility on the basis of a \$5 capitation fee in consideration for use of the space at facility.
- (10) The facility would provide the business with sufficient space and ancillary support at an agreed rate schedule. Additionally, the facility would provide building and equipment maintenance, and janitorial services.

With respect to Provision #6, the Commission noted that HRS §84-13(4), a portion of the fair treatment section, prohibits employees from engaging in substantial financial transactions with a subordinate or a person whom they supervise in their official capacity. Accordingly, the Commission concluded that the employees would not be permitted to hire state personnel they supervised at the facility to provide private support services to the business. For example, because the employees had supervisory authority over certain professional staff members in their state capacities, those professionals could not be hired by the private business. Additionally, the Commission noted that Provision #8 stated that other approved practitioners must be allowed to utilize the space. The Commission believed that the facility's administrator or other departmental officials, not the employees, should authorize other permittees to use the space. The Commission concluded that these provisions demonstrated the department's intent to follow an open, public process, as described in Advisory Opinion No. 362 and required by HRS §84-15(a), in the award of permits for the use of the facility's space.

The Commission determined that the proposal presented by the department would substantially correct the existing situation at the facility so that it would not be violative of the ethics law. In the Commission's opinion, the situation could be further clarified and would satisfy all of the requirements of the ethics law if additional steps were adopted. First, the Commission believed that the facility's policies regarding what constituted state business, private business, and private business in conjunction with state business should be clarified and enforced. The Commission noted that there was little agreement among the personnel regarding what constituted private business versus state business. Second, the Commission noted that the facility's staff should not answer telephone calls relating to any employees' private businesses. Third, the Commission concluded that state telephone lines could not be used for private business; the Commission believed that the employees should install private telephone lines in the leased space and their residences for their private business. Furthermore, the Commission suggested that the employees advise their clients not to contact them at the facility. The Commission stated that it recognized that a period of time might be required for the staff and community to adjust to the changes but urged that the staff be immediately advised of the amended policy. Finally, the Commission believed that the role of the private volunteer organization should be clarified. The Commission recommended discussion and a determination on whether the organization, which existed to serve the facility and community, could also continue to volunteer its services to the private businesses of the employees.

The Commission determined that a copy of this opinion should be forwarded to the deputy director overseeing this matter.

The Commission appreciated the candor exhibited by the administrator, the employees, and other members of the staff, and acknowledged the support of the deputy director and the willingness of all parties to resolve this matter within the ethical guidelines of the law.

Dated: Honolulu, Hawaii, July 2, 1985.

STATE ETHICS COMMISSION  
Allen K. Hoe, Chairperson  
Tim S. Farr, Vice Chairperson  
Laurie A. Loomis, Commissioner

Note: Commissioners Edith K. Kleinjans and Arnold J. Magid were excused from the meeting at which this opinion was considered.