

ADVISORY OPINION NO. 562

The Commission received a request for an advisory opinion from a supervisor on whether departmental employees could represent companies or their own products before the department. The Commission noted that recently, in Advisory Opinion No. 557, another employee had asked whether it would be permissible under the State Ethics Code for him to request the evaluation office of his department to review materials for inclusion on the department's list of approved materials. The Commission had concluded that the employee could not represent a business or materials before the department but would be permitted to hire another individual to perform the task. Furthermore, the Commission had found that the employee's spouse could not be precluded from this kind of representation. The Commission believed that the conclusions in Advisory Opinion No. 557 would be applicable to the employees in the supervisor's department.

Before answering the supervisor's specific questions regarding representation before the department, the Commission first considered the application of HRS §84-14(b), which prohibits employees from acquiring financial interests if there is reason to believe that the financial interest may be directly involved in official action to be taken by them. The Commission stated that "official action" is defined in the law as a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority. The Commission noted that while practices might differ from school to school, teachers often were in a position to take official action that directly affected a company whose materials they represented. For example, a teacher might participate in the review by the department of certain educational materials. Additionally, a teacher might recommend educational materials to other teachers or to students and parents. Finally, a teacher might have the authority to expend specific amounts of money each year to purchase educational materials for the teacher's own classroom or a particular school department. Under these circumstances, the Commission determined that a teacher would be prohibited from becoming a sales representative of educational materials.

The Commission recognized that if employees were not in a position to take any discretionary action regarding a company or product, employees would be permitted to represent and sell educational materials. However, the Commission noted that HRS §84-14(d) states as follows:

No legislator or employee shall assist any person or business or act in a representative capacity for a fee or other compensation to secure passage of a bill or to obtain a contract, claim, or other transaction or proposal in which he has participated or will participate as a legislator or employee, nor shall he 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 or legislator.

In Advisory Opinion No. 551, the Commission stated that representation and assistance of persons before the department that an employee is employed by creates an appearance of impropriety and gives an advantage to the persons assisted or represented. The Commission

also stated that it believed that such an advantage would be unwarranted and would accrue irrespective of any efforts taken by the employee to prevent such an appearance. In its discussion of representation in Advisory Opinion No. 557, the Commission also was mindful that the size of the employee's company was modest; nevertheless, the Commission affirmed its belief that the public would not be persuaded that favorable results in a case involving representation by an employee did not result from the employee's relationship to the department.

In light of the foregoing opinions, the Commission concluded that HRS §84-14(d) would preclude departmental employees from representing companies that produced educational materials before the department. Specifically, the Commission determined that employees could not represent educational materials before the department for review and inclusion on the department's list of suggested materials nor could they sell these materials to teachers who used departmental monies for the purchases. The Commission recognized that this result might seem very limiting and could pose some difficulties for employees with outside employment interests. The Commission noted, however, that the ethics law would not prohibit employees from hiring another individual to represent materials or companies before the department. Furthermore, the Commission believed that because the Commission did not have jurisdiction over spouses of employees, so long as employees refrained from assisting, their spouses would not be prohibited from representing a company before the department or transacting business with the department.

The supervisor also asked if the situation would be different in the case of an employee who personally authored a publication or created an audio-visual resource. The Commission did not believe that a distinction could be drawn in the ethics law. The Commission noted that the language of HRS §84-14(d) refers to "any person or business." In the Commission's view, no distinction had been drawn in the statute between other individuals and businesses and an employee's own business. The Commission noted that the impression that unfair advantages might be given or received would be as great, if not greater, in cases involving employees' personal financial interests. Accordingly, the Commission concluded that HRS §84-14(d) would preclude departmental employees from personally representing their products for review or purchase by the department. The Commission affirmed that so long as employees refrained totally from assisting or participating in the matter, the ethics law would permit others, including their spouses, to perform these tasks on their behalf.

The Commission determined that a copy of this opinion should be forwarded to the division chief of the reviewing office for his information.

Because of the widespread effect this opinion could have on the private business interests of departmental employees, the Commission requested the supervisor's assistance in disseminating its conclusions throughout the department.

The Commission commended the supervisor for his concern about the ethical issues of this matter.

Dated: Honolulu, Hawaii, July 15, 1985.

STATE ETHICS COMMISSION
Tim S. Farr, Vice Chairperson
Edith K. Kleinjans, Commissioner
Laurie A. Loomis, Commissioner

Note: Chairperson Allen K. Hoe and Commissioner Arnold J. Magid were not present during the discussion and consideration of this opinion.