ADVISORY OPINION NO. 563

An employee with a state agency wished to know if he could accept outside consulting work with a private firm. Because the employee wished to be able to work on reports submitted to another state agency and the employee's state responsibilities included evaluating certain project proposals, negotiating with private contractors, and coordinating the projects, the employee wished to know if he would be permitted under the State Ethics Code to pursue his proposed outside employment.

The most applicable section of the ethics law was HRS §84-14(b), which prohibits employees from acquiring financial interests in any business or undertaking that they have reason to believe may be directly involved in official action to be taken by them. The Commission stated that "official action", as defined in the statute, means a decision, recommendation, approval, disapproval, or other action, including inaction, involving the use of discretionary authority. The Commission concluded, therefore, that the employee would not be permitted to work on the reports if there was a possibility that he might take discretionary action affecting the reports he worked on or the private firms he subcontracted with.

The Commission contacted the office with which the reports were filed and inquired about its procedures. The Commission was told that the office generally distributed copies of draft reports to various state departments for their review and comments. After the departments reviewed a draft report, the organization that submitted the draft report would be allowed a period of time to respond. Thereafter, a final draft would be submitted and approval or disapproval would be given by the appropriate authority.

The employee represented to the Commission that it was not likely that he would be asked to comment on a report transmitted to the employee's agency for its review and comments. The employee stated that in the event that a report was to be reviewed by the agency, the review would be done by another branch, which was housed in a different building and which operated separately from the employee's branch. The employee also noted that it would be possible that the reviewing branch would consult with his branch if the project for which the report was required might have an impact on an existing project of his branch. The employee stated, however, that in that instance, the report would be submitted to his supervisor. The employee emphasized that his supervisor would not seek the employee's input unless there might be an impact on one of the projects overseen by the employee. The employee noted that because of the nature of his projects, it would be highly improbable that he would ever be asked to review any reports because one of his projects might be affected. Accordingly, the Commission concluded that HRS §84-14(b) would not prohibit the employee from beginning his consultancy work.

The Commission, however, also believed that HRS §84-13(1) might have application to the employee's situation. This section 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:

(1) Seeking other employment or contract for services for himself by the use or attempted use of his office or position.

The employee commented to the Commission that he was aware of the ethical restrictions that would prohibit him from using his state position to seek a private contract for services for himself or from using state time, equipment and facilities for his private business purposes. Nevertheless, the Commission was concerned that an impression could be created that the employee would receive an unfair advantage over other potential subcontractors to private firms because of his relationships with private contractors in his state capacity. The employee recognized the Commission's concern and, consequently, decided that he would only accept subcontract work with one private firm that did not deal with his agency or the private contractors he worked with. Furthermore, the employee stated that he had had a long professional relationship with the principal of the private firm prior to accepting his state position. Finally, the employee noted that he did not approach the private firm for possible work but had been solicited by its principal. The employee noted that before pursuing the possible employment, he had determined it would be appropriate to seek the advice of this Commission. The employee stated that the different roles in the industry were easily defined and separated. Additionally, the employee represented that the two branches of his agency functioned completely separately. The employee also stated that he did not deal with one segment of the industry in his state position and that if a private contractor were to ask him to recommend an expert from that part of the industry, he would not make a recommendation because it would be inappropriate for him to do so. Given these circumstances, the Commission believed that the employee's limiting himself to working with the one private firm that had solicited him would alleviate the suspicion of his receiving an unfair advantage in acquiring employment as a subcontractor by virtue of his state position.

The Commission noted that it had had some difficulty in reaching its conclusions because the employee had requested that the Commission not confirm the information he submitted by contacting his supervisor or others at the state agency. The Commission noted that the employee had expressed a preference for confidentiality until he had received clearance from the Commission with respect to the ethical considerations. The employee asserted, however, that he would inform his supervisor and discuss his situation prior to beginning a consultancy. In the Commission's view, this openness on the employee's part could only foster an atmosphere in which he and his agency might clearly avoid any situations that could be potentially inappropriate under the ethics law.

The Commission commended the employee for seeking its advice at an early time.

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.