

## INFORMAL ADVISORY OPINION NO. 24

On August 26, 1982, a private individual filed a charge against an employee for allegedly violating certain provisions of the State Ethics Code. The charge was filed in accordance with Section 21-5-1, State Ethics Commission Rules. Pursuant to HRS §84-31(b), the employee was given an opportunity to and did appear at a Commission hearing to respond to the charges. The employee's supervisor also appeared at the hearing.

The employee's state responsibilities included conducting seminars regarding certain employee benefits and advising department employees about these benefits. The substance of the charge was that the employee had violated HRS §84-13, the fair treatment section, and HRS §84-12, the confidential information section, by becoming employed as a salesperson of a certain plan while on leave from the department.

The employee had been granted a professional improvement leave from the department for the period May 1982 to the end of August 1983. A professional improvement leave was equivalent to a sabbatical without pay. The leave had been granted to enable him to fulfill an internship with a federal agency, to develop a computer program, and to do nine credits of course work in a field of study. In May, 1982, the employee was employed as the general manager of a private company's new subsidiary; he was also associated with the company as a salesperson. After this matter was brought to the attention of the Commission, the employee submitted his resignation to the department with an effective date of July 21, 1982. Two days before the resignation was to take effect, the employee changed his mind and the department allowed him to rescind the resignation. At that time, his professional improvement leave status was changed to special leave without pay status. The employee discontinued all sales work sometime in July but continued in his capacity as office manager for the subsidiary through August. Thereafter, in September, the employee returned to his position in the department. His responsibilities, however, were shifted from counseling employees about the benefits in his area of expertise to counseling them about different benefits. In essence, the employee and his supervisor had switched areas of responsibility.

HRS §84-13, the fair treatment section of the code, prohibits state employees from using their state positions to secure unwarranted advantages, contracts, or treatment for themselves or others. As a part of its sales promotional endeavors, the private company sent a mass mailout to potential customers, including department employees. The flyer was signed "[employee's name], State \_\_ Division, [*private company's name*]" and also referred to the employee's authorship of the department's brochure on all plans of that type and its annual updates. The Commission determined that the employee's reference to his work with the department and his authorship of the department's brochure violated this section. The employee explained that the title under his signature, "State \_\_ Division," identified the division of the private company that handled inquiries about the plan. Nevertheless, because the employee was known as a state employee whose responsibilities included counseling employees about certain benefits including such plans, it was the Commission's opinion that the title appeared to be an attempt to mislead the public and department employees by reference to his state connection.

A second applicable section of the ethics code was HRS §84-12. This section prohibits employees from using information which by law or practice is not available to the public, and which they acquire during the course of their official duties, for their personal gain or for the benefit of anyone. Prior to his leave from the department, the employee had at his disposal a computer sheet

for each pay period from another state department which listed the name of every department employee who participated in a certain benefits plan, the amount of money deducted for the particular pay period, and the amount of money deducted for the year to date. In addition, the records of all participating employees were available in the office. The employee stated that he did not use, nor was he able to use, any of the information that had been available to him prior to his leave from the department in his work for the private company. It was the complainant's position, and employee's supervisor concurred, that such information could be exceptionally useful to anyone engaged in the sale of the certain benefit plans. After reviewing the employee's sales record, the Commission did not find it credible that the employee did not take advantage of this information in pursuing his private interests as a salesperson; accordingly, we found that there was also a violation of HRS §84-12.

The Commission also ascertained that a third section of the ethics code was relevant. HRS §84-14(b), a portion of the conflicts-of-interests section, prohibits state employees from acquiring a financial interest if they have reason to believe they may take action that affects the interest. Although the employee had been on a leave of absence, he was still an employee of the department and his responsibilities included advising employees about those plans. While both the supervisor and the employee were firm in their assertions that they did not and would not recommend particular plans to employees, it was clear that the employee would have been in a position to affect his private interest. The Commission realized that because the employee had been on a leave of absence, he had not actually been in a position to take such action. Nevertheless, his dual positions had been in conflict, and the Commission found that his acquisition of an employment interest with the private company was inappropriate under this section of the code.

In arriving at its conclusions, the Commission recognized that the employee had acknowledged that he made a mistake in becoming associated with the private company without terminating his state employment. The Commission was also aware that the employee had terminated his employment with the private company and that he had agreed not to accept any commissions from sales to department employees. The Commission, however, was distressed to learn that the employee had intended to pursue full-time employment with the private company while attempting to follow the extensive schedule set out in the terms of his professional improvement leave application. And it disturbed the Commission to learn that the department had been informed of the plans. While it is not clear how many of the supervisory personnel were aware of the employee's plans, the Commission understood that his plans to work for the private company were known in the department. Consequently, the Commission found that there was an element of complicity on the part of the department in this matter. In the Commission's opinion, the department should have been more vigilant and should have considered the possibility of an appearance of impropriety arising, if not actual violations of the ethics code, before allowing the employee to embark on his new venture. A little foresight by the department could have prevented the employee from contravening the provisions of the ethics code.

Finally, the Commission determined that it was likely that questions regarding the employee's reinstatement would continue to be posed and that an appearance of impropriety would result. The employee had severed his ties with the private company; he was, however, in a position to pass along information to others in the company. Although the employee stated that he no longer had access to information regarding the plans, that view was not corroborated by his supervisor. Furthermore, the Commission was aware that because the office's staff was small, easy access was more probable. In the Commission's opinion, because employees in the office

did have access to such information, it was incumbent upon the department to see that the possibility of access, direct or indirect, by the employee was substantially curtailed. The Commission also advised the department to take steps to ensure that the employee's responsibilities never included the kind of work he had previously done. Because the section was small, the Commission observed that such responsibilities might naturally fall upon the employee in cases where the supervisor was away from the office or on leave. In fact, such an instance had already occurred. The Commission staff had telephoned the office for information, and because the supervisor was not available, the call was referred to the employee. Such a transfer of responsibilities might have seemed practical and innocuous; however, in light of the circumstances, the Commission regarded such action to be inadvisable in the future and proposed that the department modify the office procedures as soon as practicable.

Because of the Commission's concern regarding the department's role in this matter, copies of this informal advisory opinion also were sent to the supervisor, the department's personnel director, the department head and the chairman of the department's supervisory board.

Dated: Honolulu, Hawaii, October 5, 1982.

STATE ETHICS COMMISSION  
Edith K. Kleinjans, Chairperson  
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