

INFORMAL ADVISORY OPINION NO. 2005-6

A state employee filed a formal Charge with the Hawaii State Ethics Commission ("State Ethics Commission" or "Commission") against the head of a state agency ("Agency Head"). The Charge raised issues regarding the Agency Head's outside private employment. The Agency Head engaged in this private employment while carrying out his duties with his state agency ("Agency"). The Charge alleged that the Agency Head had misused his official position to secure unwarranted benefits for himself, in violation of the State Ethics Code, Chapter 84, Hawaii Revised Statutes ("HRS").

The State Ethics Commission conducted an investigation and concluded that the Agency Head had engaged in conduct that was prohibited under the State Ethics Code. The Commission learned, in the course of its investigation, that the Agency Head's private employment had ended. Shortly thereafter, the Commission learned that the Agency Head had been terminated from his state employment with his Agency. Due to the Agency Head's termination from his state employment, the Commission did not believe that additional time or resources should be expended on further charge proceedings against him. Instead, the Commission decided to issue this Informal Advisory Opinion to the Agency Head.

BACKGROUND

The Agency was governed by a policy and oversight board ("Agency Board"). The Agency Board was authorized, under state statute, to employ an individual to head the state Agency.

Due to a vacancy, the Agency Board began efforts to find and employ an individual to head the Agency. After completing its search, the Agency Board extended an offer of employment to the Agency Head. The Agency Head accepted the offer, and began his state employment with the Agency about a month or so later. The Agency Head was employed with the Agency for approximately one year. The Agency Head served as the Agency's chief executive officer and was responsible for developing and administering the Agency's programs under the direction of the Agency Board. The Agency Head served at the pleasure of the Agency Board.

The Agency Head was a state employee for purposes of the State Ethics Code, in accordance with HRS section 84-3. This section defines the term "employee" for purposes of the State Ethics Code as follows:

"Employee" means any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, and employees under contract to the State or of the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices and judges.

Thus, as a state employee, the Agency Head was subject to the provisions of the State Ethics Code.

Request for an Advisory Opinion

At the time the Agency Head became employed with the State, he was already employed in a professional private practice with a private firm ("Firm"). When the Agency Head began his state employment with his Agency, he continued his private practice with his Firm.

Approximately five months after he began his state work, the Agency Head submitted a written request to the State Ethics Commission for an advisory opinion. The Agency Head asked in his request whether his "continued outside employment" with his Firm was "appropriate and proper in terms of the State Ethics Code." In the Agency Head's letter requesting an advisory opinion, he made the following statements:

- "My outside employment is performed in addition to and beyond the hours of service required in the ordinary course of my state employment;" and
- "My outside employment does not involve the use of state time, equipment, or facilities."

Upon receipt of the Agency Head's request for an advisory opinion, the Commission's staff contacted him by telephone to inquire further about his employment situation. He was asked at the time how he was able to manage both state and private employment at the same time. The Agency Head replied that his work for his Firm was "part-time" and occasionally involved state work time, but that he was able make up his state work for his state Agency.

Shortly after the Agency Head requested an advisory opinion from the Commission, the Charge, referenced above, was filed against the Agency Head. The Charge brought to light additional information that might possibly render the Agency Head's request for an advisory opinion moot. In fact, the request for an advisory opinion was ultimately rendered moot by the Commission.

The Charge

The Charge against the Agency Head was filed by an employee of the Agency. The employee was one of the Agency Head's subordinates. The Charge alleged that the Agency Head had violated the State Ethics Code. The allegations that were contained in the Charge are summarized as follows:

- The Agency Head had been hired by the Agency Board with the understanding that he was to end his employment with his Firm within 30 days, but he did not do so and had continued to work at his Firm.
- The Agency Head had been using state time for private business purposes.
- The Agency Head had been using state equipment--in particular, a state-issued cellular telephone ("cellphone")--for private business purposes, and had incurred charges on the state cellphone for private business purposes.
- The Agency Head had been using his official state position to give himself unwarranted advantages.

The Charge was based on two provisions of the State Ethics Code, HRS sections 84-13 and 84-13(3). These two provisions state as follows:

§ 84-13 Fair treatment. No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others; including but not limited to the following:

...

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

HRS section 84-13 prohibits a state employee from using or attempting to use the employee's state position to obtain any unwarranted advantages or benefits. HRS section 84-13(3) prohibits a state employee from using state time, state equipment, or state facilities for private business purposes.

In accordance with HRS section 84-31(b), the State Ethics Commission notified the Agency Head of the Charge. This was done by way of a letter, which included a copy of the Charge, and afforded the Agency Head, as required by law, an opportunity to respond to the Charge. The Commission also began an investigation, which involved interviewing individuals, reviewing documents and records relevant to the case, and reviewing information that was stored on the Agency Head's state cellphone and state office computer.

Television News Stories

A day after the Charge was filed against the Agency Head, a local television station ("TV Station") reported in a television news story that a number of Agency staff members had been complaining that the Agency Head had been spending a significant amount of

time at his job with his Firm during state work hours. The TV Station reported that the Agency Head had sought an opinion from the State Ethics Commission regarding his outside employment. The Agency Head appeared in the news story and said that when the issue first arose, he immediately wrote to the Commission and described the “entire” situation to the Commission.

According to the news story, the Agency Head explained that his private employment rarely took up state time, and that, when it did, it was part of the natural transition to his state employment. The Agency Head stated, in the news story, that he was able to make up the time because his state position required more than 40 hours a week. He claimed that, as long as he worked a minimum of 40 hours a week at his state job, he had flexibility in terms of when he could perform his state work.

In addition, the TV Station reported that the Agency Head had stated that he was still working at his Firm because he wanted to keep active the professional license he held that was applicable to his private employment, and that he was in need of the income that his work for his Firm provided.

During the news story, the TV Station raised the issue of the Agency Head’s use of his state cellphone for private business purposes. The Agency Head responded that he was in the process of determining the extent to which he may have used his state cellphone for private business purposes, in order to reimburse the State.

The TV Station aired a follow-up story a few days later. The TV Station reported that, in addition to the Agency Head’s own request to the State Ethics Commission for an opinion regarding his concurrent state and private employments, a formal ethics complaint against the Agency Head had been filed with the Commission. In reference to the Agency Head’s previous statement that he had described the “entire” situation to the Commission, the TV Station reported that it was not clear how complete a disclosure the Agency Head had made to the Commission. The TV station reported that the Agency Head’s letter requesting an opinion from the Commission did not say anything about state cellphone usage or flexible state working hours.

The Commission’s Executive Director appeared in the TV Station’s follow-up story. In light of the Agency Head’s public statements regarding his request for an advisory opinion, the Executive Director stated, for purposes of accuracy, that the Agency Head had not described the “entire” situation in his letter requesting an advisory opinion, and that the Agency Head’s letter had only asked a very simple question, which was whether he could work for his Firm and whether doing so created any problems in terms of his work for his state Agency.

Request for Additional Information

Because of the allegations of wrongdoing made against the Agency Head, the Commission’s Executive Director wrote to the Agency Head to obtain further information

regarding the Agency Head's request for an advisory opinion. The Agency Head was informed that, although he had presented a "Statement of Facts and Circumstances" in his request for an advisory opinion, the Commission's staff had learned of the possibility of additional facts and circumstances that had to be considered before issuing an advisory opinion to the Agency Head. It was pointed out to the Agency Head that if the Agency Board had hired him with the understanding that he would be ending his employment with his Firm, then it seemed that his request for an advisory opinion from the Commission was unnecessary. The Agency Head was asked to explain the statement he had made in his advisory opinion request that his outside employment did not involve the use of state time, equipment, or facilities. The Agency Head was also asked to furnish additional information, including telephone records, to the Commission.

The Agency Head subsequently filed an Answer to the Charge. His Answer also responded to the Executive Director's request for additional information. The issues relevant to this case, the Agency Head's responses to the allegations made against him, and the information obtained through the Commission's investigation are discussed below.

Additional Information Obtained

- **Whether the Agency Head was expected to end his private employment**

The Charge alleged that, contrary to the terms of the Agency Head's hiring as the head of the Agency, he continued his outside private employment. The Charge stated that the Agency Head's state position was approximately at the same level of a state division chief. The Charge stated that the Agency Head received a salary of \$71,000 a year, and that the Agency Head's position was historically considered a full-time position. The Charge stated that the staff of the Agency "was made to understand by the [Agency] board" that the Agency Head had been given 30 days to close out his work at his Firm, and leave his Firm to start work at the Agency.

The Charge noted that the Agency Head's Firm maintained a web site on the Internet that included biographical information about individuals who were members of the Firm, and that the Agency Head was identified on the web site as being a member of the Firm. It appeared that this information remained on the Firm's web site well after the Agency Head started working at the Agency.

The State Ethics Commission's staff asked the Agency Head whether there had been an understanding between him and the Agency Board to the effect that he would be terminating his employment with his Firm within 30 days of his hiring.

In his Answer to the Charge, the Agency Head stated that the Agency Board offered him the position to head the Agency, and that he was employed with his Firm at that time. The Agency Head further stated that, pursuant to statute, the person in his position at the Agency could serve on either a full-time or part-time basis. The Agency Head claimed that,

in his experience, “but for the self-imposed projects [he had] undertaken,” his job at the Agency “barely amount[ed] to full-time.”

The Agency Head stated in his Answer that before he accepted the job offer from the Agency Board, he had expressed two concerns:

- (1) That he could not impose upon his family the cost of giving up his private employment, which, he claimed, would have resulted in an immediate 40 percent reduction in his income; and
- (2) That he needed time “to transition from private practice to State service” if the first concern (1) “could be adequately addressed.”

With regard to the issue of having reduced income, the Agency Head stated that he had been assured by Agency Board members that there was a commitment to secure additional funds--perhaps from private sources--to augment his state salary. Regarding the second issue, the Agency Head stated that a starting date of about a month or so after his hiring was acceptable. The Agency Head further stated that discussion about these issues was verbal and not reduced to writing.

With regard to the issue of terminating his private employment, the Agency Head stated that the situation had “evolved through time,” and that discussions had taken place with individual members of the Agency Board, including the Chair, though not the entire Agency Board. He went on to say that “there was **no** understanding whatsoever” that he was “to work **exclusively** for the [Agency].” The Agency Head further stated:

Indeed, this is an issue that has only been squarely addressed since the charges have been filed. “Full-time” has only now come to be the code for “exclusive.” As a result of these charges and publicity, we are currently in the process of re-visiting and working through the issue again, with two new [Agency Board members] who have replaced two who have resigned or whose term ended.

The thirty days referenced in the charges refer to the time I informed the original [Agency Board members] I needed to have in order to begin work. I did not agree nor did the [Agency Board] or any individual [Agency Board member] request that I completely terminate my [private employment] or my relationship with [the Firm] after the thirty days or within any particular time frame thereafter. Indeed, I recall explicitly saying [when hired] that some matters would need continued attention, but I would be ready to tackle the job in [approximately] thirty days

The Agency Head stated in his Answer that when it became apparent that “augmented funding” for his state position “was not forthcoming, settling into a sustained part-time [private] practice appeared to [him] to be both a reasonable and ethically appropriate alternative to pursue, not only for economic reasons, but also because it allowed [him] to keep [his professional] license active for the future.”

The Agency Head asserted that he had no “contractual relationship” with the Agency and had no “written contract” for his state position with the Agency. He said that he could be terminated from his Agency position without cause or notice.

State personnel records that documented the Agency Head’s hiring showed the existence of a written understanding in some form with regard to his state employment with the Agency. His state employment papers included a document that appeared to memorialize “[b]asic information explained to [him] during employment processing by the Personnel Office.” This document contained information regarding his state position, salary, pay periods, vacation and sick leave, working hours, and outside employment. As to outside employment, the document stated:

Other employment, or “moonlighting”, is permitted, provided it does not interfere or conflict in any way with your State job. Information on your outside employment should be filed with your supervisor for review and a determination.

The Agency Head’s state employment papers also included a memorandum of understanding regarding “exempt service,” which was signed by him on the date he began his employment with the Agency.

The Agency Head asserted to the Commission that his Agency position requirements “barely amounted to full-time.” Yet, his state personnel records indicated that he was hired as a full-time employee, with a starting salary of approximately \$71,000. The State Ethics Commission learned that at the time the Charge was filed, the Agency had at least twenty employees, and a budget within the range of five to seven million dollars. In addition, the Agency was about to open a new facility. Given the number of employees under the Agency Head’s supervision, the size of the budget he oversaw, and his high state salary in terms of other state salaries, the Commission found it difficult to understand the Agency Head’s statement that his state position “barely amounted” to full-time employment.

The Commission’s staff interviewed an Agency Board member who had direct knowledge of the terms under which the Agency Head had been hired. According to the Board member, the Agency Head was, in fact, expected to give up his private employment in order to serve as the Agency Head. The Board member maintained that the Agency Head had not expressed concern over the cost of giving up his private employment. The Board member stated that the Agency Head had been given approximately a month to discontinue his private employment. The Board member also remarked that the Agency Board would not have hired the Agency Head to fill only a “half-time” position at the Agency.

The Agency Board member was found to be credible by the Commission's staff. The Commission's staff also learned that another applicant for the Agency Head's position had been asked by the Agency Board during the selection process if the applicant would give up an outside business in order to take the position.

The Commission found that the statements of the Agency Board member were supported by numerous facts in the case. The statements were supported by the Agency Head's own comment made in his Answer to the Charge that he had elected to pursue part-time work with his Firm when supplementation of his state salary appeared unlikely. The Agency Head stated that this was his solution to his income concerns. This was not an understanding between him and the Agency Board.

The Commission also noted that the Agency Head's reference on his Firm's web site that his Agency position was a "community activity" was inconsistent with the size of his state salary, the number of staff he oversaw, and the large budget he oversaw. The Commission believed that such responsibilities would mandate the hiring of a person who could devote his or her full attention to the state position. It appeared clear to the Commission, given the facts, that the Agency Head's state position required from the beginning a severance of outside employment.

The Agency Head said in his Answer to the Charge that he did not end his private employment because it became apparent to him after awhile that his state salary was not going to be augmented by his Agency Board. It appeared that the Agency Head may have talked to at least one individual Agency Board member about the subject of private funding for his state position. The Commission observed that, while the subject of private funding may have been discussed informally between the Agency Head and one or more of the Agency Board members on a one-to-one basis, it did not appear that the Agency Board as a body ever discussed or formally agreed to pursue the possibility of augmenting his state salary. Moreover, it did not appear to the Commission that the Agency Board ever gave the Agency Head clearance to continue his private employment.

The Commission believed that the information obtained through its investigation supported the allegation that the Agency Head had been hired with the understanding that he would end his private employment. Because the Agency Head's employment with the Agency was to commence about a month or so after his hiring, it appeared that his employment with his Firm should have ended at approximately the same time. It appeared to the Commission, in consideration of the totality of the facts and circumstances, that, contrary to the employment agreement between the Agency Head and the Agency Board, the Agency Head decided to continue his private employment while serving as the Agency Head.

Based on its review of this case, the Commission believed that the Agency Head had been hired by the Agency Board with the expectation that he would not have outside employment beyond a short, transitional time period. The Commission noted that the Agency Head, nevertheless, continued his private employment without an intention to quit,

as evidenced by the fact of his requesting an advisory opinion from the Commission, and by his description on his Firm's web site of his position as the Agency Head as a "community activity." The description on his Firm's web site of his state position as only a "community activity" gave the Commission the clear impression that the Agency Head had no intention of severing his ties to his Firm. Further, as discussed below, it appeared that the Agency Head had utilized, in violation of the State Ethics Code, state time, state equipment, and state facilities to perform his outside private employment duties for his Firm.

STATE ETHICS CODE

HRS section 84-13(3): Use of State Time, Equipment, and Facilities

HRS section 84-13(3) prohibits a state employee from using state time, state equipment, or state facilities for private business purposes.

- **Use of state time for private employment**

The Charge alleged that the Agency Head had been using approximately six to eight hours of state time per week for private business work, for which neither compensatory time nor flex time was available. In addition, the Charge included documentation of some specific times during state working hours when the Agency Head allegedly had been away from the Agency office or had been seen entering or leaving the Firm's office building, which was located across the street from the Agency's office building.

The Commission's Executive Director, in his request to the Agency Head for additional information, asked the Agency Head to clarify how much time during normal state working hours, 7:45 a.m. to 4:30 p.m., the Agency Head had been away from the Agency office and working for his Firm. The Agency Head was asked to provide the information in terms of monthly estimates. He was also asked, if he had been doing work for his Firm during state working hours, to indicate how he had made up the time.

In his Answer to the Charge, the Agency Head initially stated that, by statute, the person in his state position could serve in either a full-time or part-time capacity. He stated that his experience had been that, "but for the self-imposed projects [he had] undertaken, the job's requirements barely amount[ed] to full-time." [Emphasis added.] This statement contradicted an earlier statement the Agency Head had made in the TV news story, discussed above, that his state job involved over 40 hours a week. Later on in his Answer, the Agency Head stated that he "averaged in excess of 50 hours a week" for his state job.

The Agency Head said that neither he nor the Agency staff were required to keep time records, and as far as he was aware, no one did. He said that he stressed to his Agency staff that they were on an "honor" system. He said that hours of employment for individual staff members at the Agency ranged from 7 a.m. to 3:30 p.m., and 9 a.m. to 5:45

p.m. The Agency Head stated that his own “normal” state hours varied from a start time as early as 7 a.m. to as late as 9 a.m.

The Agency Head stated that there were numerous occasions when he was not physically in the Agency office, due to Agency-related business, such as meetings and legislative hearings. In response to the allegation that the Agency Head had been seen entering the building where his Firm’s office was located, he explained that the entrance to that building also led to the parking structure where he said he sometimes parked. The Agency Head also said that he had attended meetings at another business office located in the same building, which he said related to an on-going Agency-supported project.

The Agency Head said in his Answer that there were times during the workday when he handled matters pertaining to his private employment, but that his usual habit was to do so before business hours, at lunch, after hours, and on weekends. It appeared that the Agency Head used his state office computer to schedule events relating to his outside private employment, using “date planner” or “calendar” software that was installed in his state computer. Events relating to his private employment that were scheduled on his state computer included at least one monthly meeting at his Firm that occurred around the middle of the day.

The Agency Head said in his Answer that he assumed that the term “state time” was not necessarily confined to the hours between 7:45 a.m. and 4:30 p.m., but rather, encompassed any time state work was being performed, especially for managerial executive positions. He said he believed that so long as a full 40 or 50 hours was devoted to the job--whenever those hours were spent--he was fulfilling his state responsibilities. The Agency Head contended that his outside employment was “performed in addition to and beyond the hours of service required in the ordinary course of [his] state employment.” He contended that, to the extent that he had to perform work for his outside private employment during normal state office hours, he made up the time--ensuring that he matched or exceeded it--by performing evening and weekend Agency-related work, such as revising Agency administrative rules and job descriptions, drafting proposed legislation, writing articles and letters, and attending evening and weekend functions.

According to the Agency Head’s state hiring papers, his working hours were 7:45 a.m. to 4:30 p.m., unless otherwise determined. It was noted that shortly after the Agency Head began his state employment with the Agency, he issued a memorandum to his staff, regarding work schedules. It appeared that Agency employees were allowed to have different starting and ending times for work. The Agency Head’s work hours were shown as 8:00 a.m. to 4:45 p.m. It was also noted that a few months later, the Agency Head issued another memorandum to his staff, regarding policies applicable to overtime and “adjusted time.” “Adjusted time” was described as work other than overtime work that was performed before or after normal hours. “Adjusted time” was to be taken as “one hour off for one hour worked.” It appeared that the Agency Head required his staff to obtain his prior approval for overtime and adjusted time. However, it did not appear that the Agency Head obtained approval from the Agency Board for adjustments to his own state working time.

Information obtained during the Commission's investigation indicated that the Agency Head performed a substantial amount of work relating to his outside private employment during state working hours. Information obtained from data retrieved from his Agency office computer indicated that he attended regularly scheduled meetings at his Firm during state business hours. Telephone records pertaining to his state-issued cellphone indicated that he communicated with his Firm by telephone during state working hours. In addition, it appeared that the Agency Head sent email messages from his Firm email account during state working hours, which suggested that he was physically present at the Firm's office during those times. It also appeared that on several occasions he attended formal meetings relating to his private employment during state working hours. Information indicated that in one instance he was scheduled to be in two different places at the same time in connection with his private employment.

It also appeared that the Agency Head, during state working hours, was involved with private business seminars that were related to his outside employment. He prepared materials for these seminars, served as a presenter, or otherwise participated in the events. Calendar entries in his state computer showed that he was involved in such activities. In addition, the private business seminars in which the Agency Head participated during state hours were publicized through brochures circulated in the business community.

Contrary to the Agency Head's assertion that his private employment "rarely" took place during state business hours, it appeared that he was involved in many private business-related activities that consumed a significant amount of time during state business hours. Whether he in fact made up the time by performing Agency work after hours could not be determined through any written record. The Agency's employment leave records showed that the Agency Head used only eight hours of vacation time during the time he was employed with his Agency. Given his position as the head of his Agency, it appeared that some aspects of the Agency Head's state position may have called for him to perform work outside of normal state business hours. However, in the Commission's view, it appeared that his private employment took up a fair amount of state time that would have been difficult to make up.

While the Commission could not say with mathematical certainty that the Agency Head did not work a forty-hour week each week for the Agency due to his frequent private business work during the normal state workday, the Commission was left with the impression that it would have been difficult for him to make up the state time. The Commission noted that because the Agency Head had described his state job with his Agency as a "community activity" in his biography posted on his Firm's web site, he gave the clear impression that his duties at his Agency were subordinate to his employment at his Firm. In the Commission's view, given the Agency Head's frequent absences from his state job and his attitude toward his state job as being less than full-time and only a "community activity," it was easy to understand why serious questions had arisen as to whether he was fulfilling his duties as the head of his Agency.

- **Use of state cellphone for private employment**

The Charge alleged that the Agency Head used a state-issued cellphone to make private business calls. It was further alleged that he used the cellphone to make private business calls for which the State of Hawaii was charged user fees and costs.

The Agency Head characterized his use of the state cellphone for his private employment as a “theoretical infraction” of the State Ethics Code. He stated in his Answer as follows:

[T]he only theoretical infraction that could be interpreted is that my use of a cell phone -- at no charge to the State, either because no charges were incurred or charges have been reimbursed -- constitutes an ethical violation. . . . I did not then nor do I now believe that such an interpretation is grounded in any prior interpretation or reasonable construction of the ethics code. Clarification on the issue would be welcomed if I am wrong.

The Agency Head produced copies of Agency telephone bills that showed the activity on his state-issued cellphone. The bills covered the time period starting from the time he began his state employment until several months thereafter. The Agency Head said it was true that he used his state cellphone to communicate with his Firm, but that for the first two months these calls did not result in any charges to the State. He contended that almost all of the calls were for the purpose of checking his voice messages at his Firm.

The Agency Head said that approximately five months after he began working at his Agency, it was brought to his attention that he had incurred cellphone charges for his private business, at which time he paid the charges with a personal check. It appeared that the Agency Head had incurred those charges when he traveled outside of the State. The Agency’s office records appeared to confirm that he paid for those charges.

The Agency Head also said in his Answer that he had given up his state cellphone. Specifically, he stated:

So that there can be absolutely no question in the future about cell phone usage, I surrendered the State phone for use by other staff, and I can be reached by my staff on my private cell phone.

The Commission obtained cellphone usage records for the Agency Head’s state-issued cellphone. The records were obtained directly from the telephone company that provided cellphone service to the Agency. The telephone company’s records indicated that the Agency Head used his state cellphone frequently to call his Firm during state working hours.

As previously mentioned, the Agency Head indicated that he personally paid for extra charges incurred for using his state cellphone for private business-related calls. It appeared that two months after he started working at the Agency, the Agency Head asked his staff to requisition the telephone company to upgrade his state cellphone plan to include a "roaming" feature. The Commission noted that the roaming feature would have made it possible for the charges for the Agency Head's out-of-area private business calls to be absorbed by the State.

The Agency Head was asked about the calls he had received from his Firm on his state cellphone. The following are excerpts from his Answer:

As to incoming calls, the bills do not reflect the source, so it is difficult for me to reconstruct. However, I received very few calls, since I checked my [Firm] voice mail frequently and instructed my [Firm] secretary to leave messages for me on my [Firm's] office voice mail.

. . .

I generally shut off my cellular [sic] when I was in the [Agency] office, since its prime reason was to enable [Agency] staff and public to contact me when I was away from the [Agency] office. I believe I received at least one call from my [secretary at the Firm] at the [Agency] office when I inadvertently had left the phone on prior to our move to our current [state] office Thereafter I instructed her to use my [voice mail at the Firm].

Records that were obtained directly from the telephone company indicated that the Agency Head received a number of incoming calls from his Firm on his state cellphone during state working hours. The telephone company's records reflected the origin of each incoming call, and showed that calls originated from more than one telephone number of the Firm. These numbers were traced to the Firm's main office line, and to the direct telephone lines of different members of the Firm.

A number of voicemail messages were retrieved from the Agency Head's state-issued cellphone that indicated that individuals from his Firm left messages for him on his state cellphone regarding Firm-related matters. These messages were left for him not only shortly after he had given up his state cellphone, but also months after he had given up his state cellphone.

Outgoing and incoming call activity for the Agency Head's state cellphone for approximately eight months from the start of his state employment indicated that over 120 outgoing calls were made to the Firm from the Agency's Head's state cellphone. Of the total outgoing calls made to the Firm:

- Over one-half of the calls were local calls made during the regular work week of Monday through Friday, and between the hours of 7 a.m. and 5 p.m.;
- Roughly one-fourth of the calls were local calls made outside of regular working hours; and
- Over one-fifth of the calls appeared to have originated from outside the State of Hawaii and incurred roaming charges.

It appeared that many of the outgoing calls made to the Firm from the Agency Head's state cellphone were relatively short in duration.

With respect to incoming calls, the telephone company's records showed that over 40 calls originating from Firm telephone numbers were received by the Agency Head's state cellphone during his first eight months of state employment. Of the total incoming calls from the Firm:

- Over three-fourths of the calls were local calls received between Monday and Friday, and between the hours of 8:00 a.m. and 5:00 p.m.; and
- Nearly one-fourth of the calls were received outside of normal working hours.

(The number of incoming calls from the Firm that may have incurred roaming charges was not known.)

The Agency Head was asked whether he had given out his state cellphone number to individuals who worked for, or did business with, his Firm, or to any of his private business clients. He contended that he had given out his state cellphone number only to his secretary at the Firm, and not to his private business clients.

The telephone company's records showed that during state work hours the Agency Head received incoming calls on his state cellphone from several Firm telephone numbers, including numbers that were traced to the office numbers of different members of the Firm. This indicated that others at the Firm besides his secretary had the Agency Head's state cellphone number. Moreover, even well after the Agency Head had given up his state cellphone, individuals from his Firm, as well as persons outside of his Firm with private business concerns called him at his state cellphone number.

Several voicemail messages were retrieved by the Commission's staff from the Agency Head's state cellphone that pertained to his Firm-related work, or other private business-related work. These messages were left during regular state working hours. For example, on a Wednesday, a message for him was left at 11:03 a.m., by someone who identified herself by name. The Commission's staff learned that a person by that name

worked at the Firm. The message for the Agency Head was that his “one o’clock meeting” that day had been cancelled, and that he might want to call to find out whether his “four o’clock meeting” was “still on.” These meetings related to his outside employment with his Firm.

Another voicemail message was left for the Agency Head on a Monday, at 1:56 p.m, by an individual who identified himself by name. The State Ethics Commission’s staff learned that this person had been a member of the Firm at that time. The message was traced to a Firm telephone number and concerned Firm-related business.

It appeared that at least one private business client or potential private business client of the Agency Head had his state cellphone number as well. For example, a voicemail message was left for the Agency Head months after he had surrendered his state cellphone, on a Wednesday, at 11:42 a.m., regarding a private business-related matter. A message from the same caller was left on a Wednesday about a month later, at 3:23 p.m., stating that the caller wanted to retain the Agency Head regarding a personal business matter, and inquiring as to whom he should pay and where to “send the money.” Another voicemail message was left for the Agency Head on a Friday, months after he stopped using his state cellphone, at 10:54 a.m, to inform him about a certain private business-related matter.

Other voicemail messages, besides those described above, indicated that a number of individuals had the Agency Head’s state cellphone number and had attempted to reach him at that number to discuss private business matters. The Commission’s investigation clearly showed that the Agency Head’s state cellphone number had been widely disseminated among those involved in his outside employment. Further, voice messages left by Firm personnel and others involved in his private employment showed that those calling anticipated that their messages would be retrieved by the Agency Head in a timely manner.

The State Ethics Code prohibits the use of state equipment for outside private business. Such equipment is paid for and maintained by the State through taxpayer dollars. The State Ethics Commission determined that it was beyond dispute that the Agency Head had violated HRS section 84-13(3) by using his state cellphone for his outside, private employment. In the Commission’s view, the fact that the Agency Head paid for the roaming charges he incurred due to his private employment addressed only part of the problem. The Commission noted that individuals in the private sector would have to acquire their own cellphones and pay all fees for their cellphones for their own private employment. The Commission concluded that the Agency Head thus had derived an unwarranted advantage by using in a substantial manner a state cellphone for his private employment.

- **Use of state computer for private employment**

The Agency Head denied using his state computer or state personnel in conjunction with his private employment. He disclosed one instance when his state secretary had been contacted by a third party about a matter related to his private employment. The Agency Head explained that, aside from his state secretary relaying the message to him, he was “aware of no other impact on any other State personnel.”

Contrary to the Agency Head’s assertion that he did not use his state computer for his outside private employment, it appeared that his state office computer was in fact used for that purpose. Data retrieved from his state computer indicated that the Agency Head had used this computer to keep track of dates and deadlines for private business-related activities. In addition, it was evident that the Agency Head had used his state computer to store names, addresses, telephone numbers, and email addresses of individuals involved in his private business activities. The Commission determined that the Agency Head’s use of his state computer for his outside private employment had constituted a violation of HRS section 84-13(3).

- **Use of state facilities for private employment**

In his Answer to the Charge, the Agency Head stated, “I have not been charged with using State facilities, and I have not used any.” However, it appeared to the Commission that the state computer, which was physically located in the Agency Head’s state office, was used to schedule private business-related activities and to store other information relevant to his private employment. While the Agency Head was not actually charged with using state facilities for private business purposes, the State Ethics Commission nevertheless recognized this as a prohibited activity in which he was involved. The Commission pointed out that those who work in the private sector do not have access to a “free” office for performing their private business work. The Commission concluded that the Agency Head’s use of his state office for his private employment had also constituted a violation of HRS section 84-13(3).

OTHER MATTERS

The State Ethics Commission’s investigation pursuant to the Charge also produced additional information that raised concerns under HRS section 84-13. These concerns are discussed below.

HRS section 84-13: Use of Official Position for Self-Benefit

HRS section 84-13 prohibits a state employee from using or attempting to use the employee’s official position to obtain any unwarranted advantages or benefits.

- **Mischaracterization of state position for private gain**

As discussed above, the Agency Head's Firm maintained a web site containing biographical information about each of the members of the Firm. The Commission learned that the Agency Head for a number of months continued to be listed as one of the members of the Firm on the Firm's web site even after he began state employment, despite the understanding that he would be leaving the Firm. The Agency Head's resume on his Firm's web site listed his state position with his Agency under a heading which read, "*Community Activities.*" A single sentence appeared under the heading, which stated that he "also serv[ed]" as the Head of the Agency.

The Commission believed that the characterization of the Agency Head's state employment as a "community activity" on his Firm's web site created the erroneous impression that his state position with his Agency was volunteer, community service work that he performed in addition to his work as a member of his Firm. The Commission believed that the Agency Head's work for the State had been depicted on the Firm's web site in a way that was meant to enhance his stature in his private profession, as well as the Firm's reputation in the community. In the Commission's view, the Agency Head had sought to capitalize on his state position to privately benefit himself and his Firm, by misrepresenting the nature of his state position as "community" service. The Commission believed that this had constituted a clear violation of HRS section 84-13 on the part of the Agency Head.

- **Misrepresentation in requesting an advisory opinion**

The facts presented in the Agency Head's letter requesting an advisory opinion from the Commission gave no indication that he had been expected to end his employment with his Firm. The question the Agency Head posed to the Commission in his request for an advisory opinion was, simply, whether his outside employment with his Firm was "deemed appropriate and proper" by the Commission. He also specifically stated that his outside employment did not involve the use of state time, equipment, or facilities.

In the Agency Head's Answer to the Charge, he stated that at the time he requested an advisory opinion (which was approximately five months after he began his state employment with the Agency), he was under the impression that the "the gravamen" of the concern of the employee who had filed the Charge against him was that the Agency Head was engaged in outside employment. The Agency Head indicated that his request for an advisory opinion had been prompted by concerns that had been raised by this employee about his outside employment. The Agency Head contended that this employee "had misunderstood the applicable ethical standard about outside employment." The Agency Head went on to say:

Therefore, I wrote to the Ethics Commission that very day, enclosing my job description and asking for an opinion as to the appropriateness of my outside employment, based upon the

following most relevant factors for purposes of addressing what I believed to be the concerns:

3. My outside employment is performed in addition to and beyond the hours of service required in the ordinary course of my State employment.
4. My outside employment does not involve the use of State time, equipment, or facilities.

It was my intention to present the entire issue to the Commission after receiving the Ethics Commission's advisory opinion.

From today's vantage point, and in light of the specific charges contained in the formal complaint, I realize that these statements could be construed to be incomplete. Pursuant to the Ethics Commission's administrative rules, however, any opinion is limited to the facts presented in writing, and therefore I could never use any informal opinion based on incomplete information as a basis for anything. Both the [second, follow-up television news story] and the [letter from the Commission's Executive Director requesting additional information] unfortunately and unfairly suggest my letter was improper.

[Emphasis added.]

In his Answer, the Agency Head claimed that it was only after seeing the Charge that he "learned for the first time the full scope of [the employee's complaint against him] in detail." The Agency Head further stated that he had intended to "secure an informal opinion from the Ethics Commission and then present the issue at a formal Commission meeting for full discussion." [Emphasis added.] In the Commission's view, the Agency Head's intention by his own admission was to first obtain an advisory opinion based on incomplete facts, then to later present the "entire issue" to the Commission for a further determination. The Commission believed that, under the circumstances, the Agency Head's request for an advisory opinion was clearly disingenuous.

The Commission informed the Agency Head that the State Ethics Code does not per se prohibit state employees from having outside employment. However, advice issued by the Commission or its staff is always based upon the specific facts of a particular situation. The Commission informed the Agency Head that in some situations, the relevant facts and circumstances may indicate that outside employment is prohibited under the State Ethics Code, but that in other situations, outside employment may be acceptable. The Commission further explained to the Agency Head that the State Ethics Code is a minimum standard of conduct, and that a state agency may establish rules, policies, or terms of employment that are more stringent than the State Ethics Code.

The Commission informed the Agency Head that in this case, the Agency Board hired the Agency Head with the understanding that he would soon leave his position with his Firm. The Commission observed that the Agency Board, in not permitting the Agency Head to have outside employment in the first place, placed that restriction on him because it evidently believed that his state duties for the Agency required his full attention. The Commission pointed out that the Agency Head, however, withheld this key fact from the Commission, and thus misrepresented the true nature of his situation. The Commission believed that the Agency Head had violated HRS section 84-13 by misrepresenting the true facts of his situation in requesting an advisory opinion from the Commission.

END OF EMPLOYMENT

The Agency Head's employment with his Firm eventually came to an end. The State Ethics Commission received information indicating that approximately seven months after the Agency Head began his state employment and two months after the Charge was filed, he informed the Agency Board that he was agreeing to the Agency Board's requirement that he work exclusively for the Agency and that his association with his Firm would be terminated. The Commission also received information indicating that the Agency Head also notified the entity that had issued his private professional license that he was no longer associated with his Firm, and was serving full-time and exclusively as the Head of the Agency.

The Commission learned a few months after the Charge was filed that several Agency employees expressed concerns they had about the Agency Head in a "no confidence" letter to the Agency Board. The concerns that were raised in the letter included the following: that the Agency Head had used state time and equipment for non-state work; that he had publicly represented that he had provided the complete facts of his situation to the State Ethics Commission, when that had not been the case; that he had harassed Agency staff members; and that he had retaliated against an employee for having filed an ethics charge against him. The letter was also critical of the Agency Board itself for having failed to address in a timely manner concerns that had been raised about the Agency Head by Agency employees.

The Commission was informed that approximately three months after the "no confidence letter" was issued, the Agency Board terminated the Agency Head. According to a story reported in a local newspaper, the Agency Head was terminated after having declined an offer from the Agency Board to resign.

INFORMAL ADVISORY OPINION

The State Ethics Commission believed that the Agency Head's conduct, as described above, had been in violation of HRS sections 84-13 and 84-13(3). The Commission found his conduct to be particularly troubling, given the position that he held in state government. The Commission believed, however, that the Charge filed against the Agency Head would be best addressed by way of an informal advisory opinion in lieu of further charge proceedings. The

Commission noted that the Agency Head had been terminated. Because the termination itself was based largely on conduct violative of the State Ethics Code, and alone was a serious sanction, the Commission believed that the expenditure of further time and taxpayer resources to engage in further proceedings was not warranted in this case.

Dated: Honolulu, Hawaii, May 18, 2005.

HAWAII STATE ETHICS COMMISSION

Dawn Suyenaga, Chairperson
Carl Morton, M.D., Vice Chairperson
Nadine Y. Ando, Commissioner
Ronald R. Yoshida, Commissioner

Note: Commissioner Robert R. Bean did not participate in this matter.