

OPINION NO. 139

We were informed that for many years it had been an established practice at a state agency for employees to perform additional services for payment from clients of the agency. The head of the agency requested an advisory opinion as to whether this practice was a violation of the State ethics law.

The job descriptions submitted reflected that some service was required as part of the employees' normal state duties. However, it was indicated that this was a "minimum" service for either health purposes or in compliance with the agency's general policy to return the property to the client in the same condition as when received. It was further indicated that although the performance of additional services was not done on state time, state facilities, such as power, water, and space were used.

It was further indicated that because of the long-standing practice, the availability of the employees for the outside employment was widely known. So far as was known, they did not actively solicit the business; however, some arrangements to perform the service were made and discussions were held during normal working hours. About three or four employees and some of their spouses were engaged in this activity. There were numerous individuals in the geographical area qualified to perform these services.

We noted that the head of the agency had concluded that the performance of additional services might be a violation of the State ethics law, and that he had temporarily suspended it pending our opinion.

The State ethics law, HRS, chapter 84, does not generally prohibit outside employment of state employees. However, an important limitation on such activity is imposed by HRS, §84-13, which provides that, "No ... 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."

We were of the opinion that a competitive advantage would accrue to the employees because of their contact with the clients as the property was delivered to the agency. Furthermore, the employees' very employment by the owners might be considered the use of official position to gain a contract or special treatment such as extra income for one's self. (See Opinion No. 95). The clients would realize that since the same employees would also perform the additional services, an advantage would accrue to them because the employee would likely spend more time with their property, resulting in greater rewards. We, therefore, found a violation of HRS, §84-13, with respect to obtaining the outside employment.

HRS, §84-13, also requires a state employee to be scrupulously impartial in the performance of his official duties. In our opinion, the ability of an employee to remain objective in the care of the possession was severely compromised when he was being paid by an owner to perform additional services.

The employees exercised some discretion in performing their duties. We, therefore, concluded that since the duties involved discretionary authority, they constituted official action as defined in HRS, §84-3(7).

HRS, §84-14(2), provides that no employee shall acquire financial interest in business enterprises which he has reason to believe may be directly involved in official action to be taken by him. "Financial interest" includes an employment of an individual, his spouse, or minor children. (See HRS, §84-3(6)(C).) In order to perform his state duties, the employee must take official action with respect to the property. When he accepted the outside employment of performing additional services, he knew, or should have known, that he would also have to take official action in caring for the subject as part of his state duties. Since there was no clear delineation between his private and state responsibilities, he was in a position to exercise discretion in the determination of the extent of services to be performed in his state capacity. The extent of such state services clearly affected the nature and extent of the outside additional service. We, therefore, concluded that the employees' outside additional service would be directly involved in official action to be taken by them. Under these circumstances, we were of the opinion that there was a violation of HRS, §84-14(2).

For these reasons, it was the opinion of the Commission that the performance of outside additional services at the state agency was a violation of the State ethics law.

At this point, it should be noted that we would normally have found a further violation of HRS, §84-13, in the employees' appropriation of state facilities in connection with their private employment.

State equipment and facilities are primarily for the use of public employees in carrying out their public duties. The evidence presented clearly established that the employees involved in this outside employment had appropriated state facilities such as power, water and space for their own private purposes. Further, there was no evidence to show any reimbursement, or offer thereof, to the State for the use of facilities.

In this case, however, we noted that the state facilities were equally available on the same basis to owners, their own private service personnel, or to other outside service personnel. Under these circumstances, we could not find unwarranted treatment; therefore, there appeared to be no violation of §84-13 with respect to the use of the state facilities by the employees.

Our opinion was limited to an application of HRS, chapter 84, to the facts and circumstances presented to us. We did not presume to make any administrative judgment with regard to the time involved, nor did we presume to determine whether the outside employment was, under HRS, §76-106, incompatible with or interfered with the proper discharge of the employee's duties to the State.

Dated: Honolulu, Hawaii, May 2, 1972.

STATE ETHICS COMMISSION
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