



HAWAII STATE ETHICS COMMISSION

State of Hawaii • Bishop Square, 1001 Bishop Street, ASB Tower 970 • Honolulu, Hawaii 96813

ADVISORY OPINION NO. 2017-4

October 2, 2017

The Hawaii State Ethics Commission (“Commission”) issued an advisory opinion as to whether the State Ethics Code, Hawaii Revised Statutes (“HRS”) Chapter 84, prohibited a state law enforcement officer (“Officer”) from using a state uniform to perform an off-duty work assignment, which was an extension of the Officer’s state duties (“Off-Duty Work”), when the Officer was to be compensated for the work by a private party. The Commission concluded that, based on the facts of this case, the State Ethics Code did not prohibit the Officer from using a state uniform when performing the Off-Duty Work.

I. Facts

The Officer worked for a state agency (“Agency”) that provided law enforcement services. The Agency had longstanding policies that provided for the Agency’s law enforcement officers to perform Off-Duty Work (“Off-Duty Work Policy”). Pursuant to the Off-Duty Work Policy, Off-Duty Work meant any off-duty work that was an extension to state law enforcement services, performed for compensation by a law enforcement officer for an employer other than the Agency. Private parties who required Agency law enforcement officers for an event submitted requests to the Agency. The Agency, in turn, assigned law enforcement officers to the event pursuant to guidelines set forth in the Off-Duty Work Policy.

The Off-Duty Work Policy required that any Off-Duty Work assignments be routed through the Agency. The Off-Duty Policy further required Agency law enforcement officers to wear their state uniform, including a badge, firearm, and other necessary equipment (collectively, “state uniform”) when performing Off-Duty Work.

According to the Off-Duty Work Policy, law enforcement officers engaged in Off-Duty Work were subject to Agency policies and procedures to the same extent as Agency law enforcement officers who were on duty, and were also expected to abide by safety and other requirements imposed by the off-duty employer. Nevertheless, law enforcement officers were to be paid to perform Off-Duty Work by the hiring party, which could be a private party.¹

¹ Where the hiring party was a governmental entity, payment was made directly to the Agency, which then paid the law enforcement officers.

The Officer had accepted Off-Duty Work assignments in the past and asked the Commission whether the State Ethics Code prohibited the Officer from using the state uniform to perform Off-Duty Work for a large upcoming commercial event, where the Officer would be compensated by a private party that was organizing and managing the event. The Officer also asked the Commission to define which pieces of equipment Agency law enforcement officers could use, consistent with the Ethics Code, when engaged in Off-Duty Work.

II. Application of the State Ethics Code

HRS Chapter 84, the State Ethics Code, applies to all state employees and therefore applied to the Officer.² The fair treatment law, HRS § 84-13, generally prohibits state employees from using state equipment for private business purposes. As discussed below, however, the Commission determined that those restrictions did not prohibit the Officer from using the Officer's state uniform for Off-Duty Work.

The fair treatment law, HRS § 84-13, provides in relevant part:

§84-13 Fair treatment. No . . . employee shall use or attempt to use the . . . 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:

- (1) Seeking other employment or contract for services for oneself by the use or attempted use of the . . . employee's office or position.
- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of the . . . employee's official duties or responsibilities except as provided by law.
- (3) Using state time, equipment or other facilities for private business purposes.

The Commission addressed a related issue in Advisory Opinion No. 127 (1972), as to the propriety of outside (private) employment of State enforcement officers. The Commission approved the practice, provided that the officers were not compensated

² See HRS §§ 84-2 & 84-3.

twice for the same work (by both the private employer and the State). The Commission concluded:

[T]hese state enforcement officers could accept outside related employment . . . if the following conditions were met:

1. The private rules of the private employer did not conflict with state laws and the state laws were enforced at all times.
2. The employee did not use his influence as a state officer to obtain the employment.
3. The employee did not use state time, facilities, or equipment; and
4. The department had determined that such outside employment would not interfere with the needs of the department or affect the quality of the work performed.

Advisory Opinion No. 127 at 2 (emphasis added). However, the circumstances of that case were different from the Officer's situation. Advisory Opinion No. 127 pertained to a state law enforcement officer who worked in his private capacity – outside of any “Off-Duty” arrangement with the State – and thus was not performing any official work as a state law enforcement officer unless he effectuated an arrest or otherwise took official action as a state employee. In that case, the Commission's principal concern was to ensure that the state law enforcement officer was not compensated twice for the same work. In this case involving the Officer, however, double compensation was not an issue.

The Agency's law enforcement officers engaged in Off-Duty Work served an important public safety function. For the commercial event, the Officer was likely to assist with crowd control, traffic, and other duties typically assigned to law enforcement officers. Indeed, permits for such large commercial events typically require the permittee to retain state or county law enforcement officers to perform these public safety functions, with the permittee responsible for the costs of these officers. Accordingly, courts have long recognized that “off-duty” officers in these situations continue to act as agents of the government. See, e.g., Griffin v. Maryland, 378 U.S. 130, 135 (1964) (“If an individual is possessed of state authority and purports to act under that authority, his action is state action.”); Traver v. Meshriy, 627 F.2d 934, 938 (9th Cir. 1980) (off-duty officer who identified himself as such acted under color of law). Furthermore, the Agency's Off-Duty Work Policy made clear the distinction between authorized Off-Duty Work and other outside employment.

The fair treatment law exists, among other reasons, to ensure that state resources are not used to give a private business an unfair advantage. In this case, however, no private business would obtain any kind of unfair advantage over any other business; instead, any business that required law enforcement officers for a commercial event could obtain those services on the same terms as any other business. Indeed, the Off-Duty Work Policy took care to avoid situations in which attendance of law enforcement officers might be perceived as endorsing or promoting a particular point of view.

State law enforcement officers performing Off-Duty Work continue to serve the public at large, even when working for, and compensated by, a private entity. Put simply, law enforcement officers engaged in Off-Duty Work perform a public safety function: the public at large benefits from their services, rather than just the private employer. As such, the Commission determined that the Officer was permitted the limited use of the Officer's state uniform in performing this work. With regard to the Officer's question as to which pieces of equipment law enforcement officers could use when engaged in Off-Duty Work, the Commission believed that decision was best left to the Agency, as the Agency had the expertise to determine what equipment the law enforcement officers required to perform their public safety functions.

III. Conclusion

For the reasons discussed above, the Commission believed that the State Ethics Code permitted the Officer to use the Officer's uniform while performing Off-Duty Work in accordance with the Agency's Off-Duty Work Policy. Thus, the Officer could use a state uniform, including all necessary equipment, as defined by the Agency, to perform Off-Duty Work for the commercial event, when the Officer was being compensated by a private party.

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