

OPINION NO. 269

The duties of an employee of a certain department included the preparation of certain technical materials for the State. On the employee's own time and with his own equipment he also prepared similar materials for applicants for certain licenses issued by the county. A county commission required that these materials be filed with an application for this license.

The employee's division was the basic source of all of this required information. The license materials themselves had to be composed from a number of state materials since the latter dealt with limited segments. This service was not provided by any state or county agency and had to be provided by private persons or companies. The employee indicated that he prepared from twelve to twenty sets of materials a year at a fee of from \$100 to \$500 per set. He also indicated that a number of other employees of the division were also engaged in this work. He therefore asked the Commission to rule on the propriety of his engaging in this business. We stated that our opinion would also apply to all other persons engaged in this work.

There were a number of considerations involved in his request. First, the ethics code prohibits a state employee from engaging in an outside business or undertaking that he has reason to believe may be directly involved in official action to be taken by him (HRS §84-14(b)). For instance, in this particular case, if the employee were to have had some official duties with regard to the license applications or applicants, he would not have been able to engage in preparing those materials. However, since his job had nothing to do with the county commission or its licenses, there was no such conflict. Accordingly, we found that within certain guidelines, he was not prohibited by the ethics code from engaging in this outside work.

The guidelines were provided by HRS §84-13. That section states that no employee shall use his official position to gain an unwarranted advantage by "[u]sing state time, equipment or other facilities for private business purposes." The employee had stated that any work he did in preparing the materials which required his use of information found in his division or his department was done on his lunch hour. We stated that it had long been the view of the Commission that unless activities conducted during the lunch hour impaired the employee's ability to carry out his state responsibilities, this part of the day was not susceptible to state control. As there was no evidence of any hindrance of his performance, we found no violation in his performing this work during his lunch hour. We noted that the employee should, however, be careful that the time he spent on these materials was in fact limited to his lunch time. With regard to the equipment and facilities of the department, we stated that he should also be careful not to conduct his business over his state telephone or use any technical equipment in his office which was not available on an equal basis to the public. We were aware that members of the public had access to the information used in the preparation of these license materials.

It had come to our attention that the county commission referred applicants to the employee's division for the preparation of the required materials. The county commission personnel did not appear, however, to give specific names of individuals who did such work and were careful to indicate to prospective applicants that those members of the employee's office who did this work performed it on their own time and for a fee. The employee indicated to us that people did walk into his state office in search of persons they believed could prepare these license materials. If a person who prepared these license materials were at the front counter at the time, he would either take the request himself or call someone else in the division who was interested in doing this work. If a receptionist were at the reception desk, they at their discretion, called a preparer from the back room to speak to the person seeking this service.

The employee stated that most of his business came from attorneys who knew that he did this type of work and who had clients seeking the licenses. However, he did take some walk-in clients, and he indicated that the other employees of the division who did this work relied primarily on walk-in customers. It was in these instances that a problem with the code arose. It was apparent that unless these people came during the employee's lunch hour or unless he asked them to call him at home, he would of necessity use state time for his initial fact-gathering conference with these persons. In addition, any state employee who conferred with a license applicant under these circumstances would interrupt his state work. We believed that this intrusion of an employee's private business into the functions of a state office had the potential of undermining the integrity of the office and its staff and was, therefore, the kind of use of state facilities that was prohibited by the statute. We realized that the employee did not solicit these persons to approach him at his office and that a person who had been referred to his office would not be at all pleased to be put off again by the employee's having to tell him or her to come back during his lunch time or to call him at home. We were also aware that the problem arose with the initial referral made by personnel of the county commission.

We believed that the best solution would be for the county commission to provide the names and home phone numbers of any state employees interested in preparing these materials along with the names and telephone numbers of any private businesses interested in providing the same services. However, as that commission was a part of county government and, thus, did not fall within our jurisdiction, we could not require that body to take remedial action.

As an alternative we were of the opinion that the employee's department could create a list of all persons or businesses who were interested in preparing those license materials and include the home phone numbers of those persons who were state employees. This list was to be open to any person or business interested in being listed. The list could then be given to any walk-ins seeking a preparer with the simple explanation that some of the persons listed work in the division but must be contacted on non-state time.

In order that the department would be aware of this decision we forwarded a copy of this opinion to the director with the suggestion that either he or a deputy advise the county commission of our action.

We were aware that our decision placed a burden upon the requesting employee and his fellow employees and, in some instances, on the license applicants as well. That inconvenience would have been lessened considerably in our view by remedial action on the part of the county commission. Though we regretted the effect of our actions on the employee's private business, our first thought had to be to the promotion of confidence in state employees and the government they serve. It was our view that the use of state facilities for a substantial private business promoted an attitude of cynicism on the part of the public that seriously disserved the overall best interests of public employees.

We realized that the employee's action in bringing his situation to the attention of the Commission must have been a difficult decision because of the implications our action might have for his interests. But it had been our experience that this kind of attention to matters of ethics had contributed to an improved ethical climate in state government, and we commended the employee for taking this step.

Dated: Honolulu, Hawaii, August 27, 1976.

STATE ETHICS COMMISSION
Audrey P. Bliss, Chairman
Dorothy K. Ching, Commissioner
Gary B.K.T. Lee, Commissioner
I.B. Peterson, Commissioner

Note: Vice Chairman Paul C.T. Loo was excused from the meeting at which this opinion was considered.