

## OPINION NO. 270

We received a request for an advisory opinion from an individual under contract to a state agency. He was responsible for coordinating the sales of agency units made by private real estate brokers. Pursuant to a request by the Commission that agency employees disclose the interests they held in the private real estate industry, he had filed a disclosure and requested an advisory opinion concerning his private employment with a brokerage firm.

He had been employed with the agency since June 1975. His association with his private employer predated his employment with the state agency. He stated that the agency had been aware of his employment with this company at the time he was hired and had placed no restrictions upon his outside interests. He also indicated that he was not paid a salary by his private employer but received commissions from sales. He received no commissions from the agency.

He asked the Commission to determine if his private employment was in conflict with his duties to the State. He also asked if he might engage solely in commercial transactions on behalf of investors if he took steps to avoid the sale of real property to potential owner-occupants. He also indicated a willingness to permit the Commission to monitor all contracts he made in his sale of realty and all proposed sales agreements. Finally, he wished to know if he could participate in open houses held by his private employer and represent former clients.

In previous opinions issued in this area, the Commission had stated that while it would be appropriate for agency employees in positions similar to his own to continue to maintain their licenses on an active basis, they should not be actively engaged in the real estate market. We had permitted such individuals to engage in the sale of their own personal residences or those of relatives so long as such sales did not indicate an entrance by them into the private real estate market on an active basis. We had noted in those cases that the individuals involved were primarily hanging their licenses with private companies in order to keep their licenses active but had not actually sold property during their state employment.

The employee indicated that he would like to be actively involved in the real estate market to secure additional income; his private association was not simply for the purpose of maintaining his license on an active basis.

The Commission took into account the various factors he presented to us when he appeared at a Commission meeting. We recognized the burden that our previous opinions in this area would impose upon him if applied to his own situation. However, despite the important factors he presented in behalf of his position, the Commission was of the opinion that these restrictions must be applied to his own present situation and to those possible future contacts with the private real estate market that he proposed.

The Commission had become aware of the very real and growing impact that his agency's projects had had and would continue to have on the private real estate market; we also realized that employees in many positions at the agency who had interests in the private real estate market would often deal with the same individuals and businesses in both their public and private capacities and that these employees had continual access to confidential information. We noted in his own case that in his state position he did have contact with individuals in the title business and with employees of mortgage companies and banks. We believed that individuals he dealt with in a private and public capacity who were aware of his dual role might be confused as to the role

he played in any particular situation. We believed that when he was dealing with such individuals in a private capacity that his state position was carried along with him and might have an intimidatory effect on individuals with whom he dealt in private matters. We believed that this effect was an unavoidable one and one that would have a negative effect on the position of the state agency in the community.

Our primary concern was expressed by HRS §84-13 (Supp. 1975) which provides that "[n]o ... 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; including ... [s]eeking other employment or contract for services for himself by the use or attempted use of his office or position." Because in both his private and state capacities he functioned in basically the same market, we believed that such use of position was unavoidable even without any intentional act on his part. Because the use of position that concerned us here inhered in the juxtaposition of his private and state employment, we did not believe that our monitoring of his activities, even if feasible, would cure this difficulty.

We also believed that HRS §84-14(b) would apply to those contacts he might have with private real estate clients. That section prohibits an employee from acquiring financial interests which may be directly involved in official action the employee may take in his state capacity. It was our view that many of the individuals appearing at his private employer's open houses would be potential clients of his agency. Should this occur, he might deal with these individuals in his state capacity. While we recognized that he could abstain from taking action affecting persons he had dealt with in a private capacity, we believed that the statute prohibited an employee from voluntarily placing himself in a position that would restrict his conduct as a state employee. Accordingly, it was our view that his sitting in open houses would involve unavoidable conflicts under HRS §84-14(b).

The employee stated that all sales people for the agency had had experience in the real estate market and held private licenses even though such licenses were not actually required for employment with the agency. He further stated that he saw a contradiction in requiring that an individual accepting employment with the agency relinquish his past business associations. We saw no contradiction in such a requirement and noted that in most industries it was quite usual for an employer to require that a new employee relinquish his past employment and business ties. This was quite common in both the private and public sectors. The intent of such restrictions was to avoid the conflicts that inhere in such dualities, when the functions of the employee in both his old and new positions are inherently the same. We also noted that the agency had required those employees who owned their own firms to divest themselves of such interests. As a practical matter, we were aware that many sole proprietors did less real estate business than individual brokers and salesmen employed by realty firms. It was our view that the restrictions that were applied to individuals owning their own firms prior to agency employment should be applied consistently and across the board to cover all employees employed in similar positions.

We noted that since June of 1975 he had been involved in only two real estate transactions. It therefore appeared that our ruling would have little present effect on his financial interests but would have a potential impact for the future. We were concerned at this impact on both his own interests and those of his fellow employees, but we felt that the Commission's first responsibility was to maintain the integrity of the governmental process. While we were reluctant to curtail the outside business interests of any employee, we saw in his own situation an inherent conflict that could not be avoided. As we had often stated in the past, the employee's primary responsibility is to the State. Outside interests that might conflict with that responsibility or create

an implied or explicit use of position that would further the employee's private interests had to be avoided. We therefore concluded that he might keep his real estate license active but that he should restrict his real estate activity, while he remained an employee of the State, to the sale of his own property or that of relatives. As we had indicated, it was our view that the alternative proposals he had presented would not prevent the use of position prohibited by HRS §84-13 that inhered in his state and private positions.

We recognized that he had been given no specific advice on his outside employment interests at the time he became a state employee. However, we noted that the obligations of the ethics code applied to the individual employee as well as to the department, and that the individual employee was charged with the responsibility for determining the suitability of his continuing to hold or to acquire outside financial interests. The failure of a state agency to advise an employee of the applicability of the ethics code to his outside interests could not waive the standards of ch. 84 as to such an employee. To exempt those employees who had not been specifically advised of the applicability of the code would make a mockery of the statute.

In his own case, however, we recognized that he had been most forthright in presenting his situation to the Commission and that he had shown a very sincere interest in acting in conformance with the ethics code. We very much appreciated that frankness and regretted the burden the findings of this opinion might place upon him.

We indicated that we would forward a copy of this and all other relevant opinions to the executive director of the agency so that the guidelines we had enunciated would be applied equally to all employees.

Dated: Honolulu, Hawaii, September 7, 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.