

OPINION NO. 306

The head of a department requested an advisory opinion concerning an employee within his department. The employee was a security guard at a facility operated by the department. This employee had recently begun a private business and had become a member of a local business association which had some control over the areas in which its members could offer their services. Through the association his service did business at the state facility where he worked. While the employee occasionally performed the services himself on his off-duty hours, he had hired someone to generally perform the services for his business. The department head asked the Commission to determine if the state ethics code prohibited the employee from providing the services through his business at the state facility where he worked.

The employee had been advised of this request for an advisory opinion concerning his private business affairs and had discussed this matter with the Commission staff.

In his position with the State, the employee was responsible for police and security activities at the facility and was authorized to exercise certain police powers. In the course of his duties he was to patrol assigned areas of the facility; protect against unauthorized entry, theft and vandalism; enforce all rules and regulations of the division of the department responsible for this facility as well as state laws and county ordinances; direct traffic, enforce all traffic rules and regulations and issue citations for parking, ramp and moving violations. His underlying responsibility was public protection and the safe guarding of state property. He did have jurisdiction over the vehicles necessary to providing the type of services offered by his business and could issue citations to the drivers of vehicles that violated the facility's rules. He stated that because of the cooperation of the vehicle's drivers at the facility he had not issued a citation in over a year.

The section of the state ethics code most applicable to this matter was HRS §84-14(b) (Supp. 1975). That section provides as follows:

No employee shall acquire financial interests in any business or other undertaking which he has reason to believe may be directly involved in official action to be taken by him.

Because the employee was the owner of his business, he quite clearly had a financial interest in that business. The fact that he provided the actual services of the business on only an occasional basis was of no relevance here as it was his ownership interest that was of concern. As an employee of the State, he was subject to the requirements of the ethics code. The question for our determination then was whether or not it was likely that his business would be involved in action he took as a state employee.

We noted that the employee had a broad range of security duties at the state facility. Part of these duties clearly pertained to the vehicles involved in the services offered by the employee's and others' businesses at the facility. As the employee himself stated, it was conceivable that he might be called upon to cite his vehicle and his own employee for a violation of the facility's rules and regulations. Under those circumstances the only conclusion we could reach was that his business would become involved in action he took as a state employee.

Additionally, we noted that we had stated in previous opinions (Opinion Nos. 20 and 266) that action an employee takes that directly affects the businesses he competes with directly affects

his own business as well. In performing his state duties, the employee would certainly affect his business competitors. It was our view, therefore, that HRS §84-14(b) prohibited him from providing his private services at the facility. We did not feel this restriction should go so far as to prohibit him from operating his business generally in other areas of the island. While he still was in a position to affect other businesses offering the same type of services by his action at the state facility, he would not be competing with them at the facility. Therefore, that portion of his business that was not related to servicing the state facility would not come within the restrictions of HRS §84-14(b).

While the employee could operate his business away from the facility, we stated to the department head that he should be advised that the operation of this business should be kept totally separate from his state time and responsibilities. Further, no state equipment could be used in the operation of that business.

We understood that it might be very difficult for the employee to transfer his license and association with the private business organization so that he could serve other areas of the island. To facilitate his accomplishing this transfer, we stated that we would permit him a reasonable period of time to accomplish this result. However, the employee was required to advise the Commission within ten days of his receipt of this opinion of how he intended to comply with our decision and compliance was to be accomplished within thirty days.

We pointed out that the difficulty this opinion created for the employee emphasized the importance of bringing situations such as this to the attention of the Commission before, rather than after the fact. We noted that the Commission had often pointed out the code's clear implication that outside employment was not only permissible but in some instances even desirable from the State's point of view. However, the employee's primary responsibility was to the State and where private interests conflicted with that responsibility, those conflicts had to be resolved in favor of the State.

We commended the department head for requesting an opinion in this matter and indicated our appreciation for the cooperation of all the individuals involved.

Dated: Honolulu, Hawaii, July 13, 1977.

STATE ETHICS COMMISSION
Paul C.T. Loo, Chairman
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