

OPINION NO. 308

The Ethics Commission had learned that certain state employees were using state facilities and equipment to execute commissioned works. This matter was investigated by the staff of the Commission with the director of the division that employed them as well as members of the department's administration. Accordingly, the director requested an advisory opinion to determine how the state ethics code applied to the use of these particular facilities by employees of the division in the production of commissioned works. However, the Commission enlarged this inquiry to include the use of the department's facilities for the production of all private works.

It appeared that three different kinds of activities were engaged in by certain division employees. First, works were produced by employees in the course of demonstrating techniques and other teaching goals to students. Secondly, a small portion of works were produced by some employees, using state facilities and equipment, that were commissioned by another state agency, other governmental institutions, and private businesses and patrons. Thirdly, a larger body of work was produced by employees, again using department facilities and equipment, but at the employees' own initiative and with the thought of possible sale in the future but no certain commission.

The director indicated that most of the employees maintained their own private offices at which they produced their private works. Such employees used state facilities to produce only that work which was necessary to the teaching of their courses. It appeared that there were only three groups of employees using state facilities and equipment for private works to any significant extent. This, according to the director's testimony, was largely the result of the fact that large and specialized facilities and equipment were necessary for the production of these works.

The question for our determination then was whether these particular employees could use state facilities and equipment for the production of commissioned and non-commissioned works. The applicable provisions of the state ethics code seemed fairly clear in this area. The most relevant section was HRS §84-13(3) (Supp. 1975). That section states as follows:

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; including but not limited to ... [u]sing state time, equipment or other facilities for private business purposes.

The term "business is quite broadly defined in HRS §84-3(1) to include a "corporation, a partnership, a sole proprietorship, a trust or foundation, or any other individual or organization carrying on a business, whether or not operated for profit." It was clear to us that this term would include the activities of a person in producing and selling the type of works produced by these employees. At the same time, we stated that it would not include those objects occasionally produced in the course of teaching a class even if the particular work should eventually be sold.

We noted that this section of the code had been applied by the Commission on a number of occasions. In exceedingly few instances had the Commission found exceptions to the application of this section's restrictions. Its basic philosophy appeared to be quite clear. Taxpayers provide the funds to construct, maintain, and support state facilities to provide certain public benefits and to achieve particular state goals. These monies provide salaries for the personnel who maintain state facilities and execute state policies, goals and programs.

The fair treatment section assumes that taxpayers do not anticipate that individuals supported for state purposes will use state facilities and equipment for their own private purposes. There must be some overriding consideration in order for this section not to be applied to the full extent of its language in situations where state facilities are used for private purposes.

The director and one of the employees appeared together to discuss this matter with the commissioners; the director argued that the present department policy should be continued because it brought certain advantages to the division. First of all, it was his view that the students gained a particular advantage by watching these employees work on their own projects. He indicated that this experience helped them to see how a professional would work on a real project. They also learned what negotiating for a commission was about and they came to understand the demands of meeting the constraints of a budget, of time, and of the requirements of a contract. The director indicated that most of these students were not business oriented and were often not well enough schooled in this little understood but important aspect of being a professional in this field. Secondly, the director noted that commissions sometimes gave these employees the chance to work in directions they might not normally take because a commission provided the employee with funds to purchase materials and depart in directions that he or she might not otherwise have the resources to follow. Thirdly, the director and the employee who testified both commented that it was a fairly universal practice for these employees to use state facilities for producing private works.

The Commission also solicited the comments of other professionals in this field, both locally and on the mainland. Some of these individuals held positions with academic institutions while others worked exclusively in private capacities. All of these professionals felt that it was a bad practice for these employees to use state facilities to produce private works.

The views in favor of limiting the use of state facilities were based on certain broad principles. Most of the individuals interviewed by the Commission felt that it was in the nature of being a professional in this field to maintain one's own facilities. Some of these individuals were of the view that an employee of this division who worked on his or her own projects with the aid of state facilities presented an example of dependence to students that should not be encouraged. While the individuals conceded that there would be advantages to students in watching the employees work at the department's facilities, they felt that the disadvantages outweighed this benefit. They also felt that these particular state employees should be able to give this experience to the students without having to work on private works with the use of state facilities. They noted that these employees could make their own private offices available to the students for this purpose, and, if the employees were open about this, would find that the students would respond.

Some of the individuals we discussed this matter with also felt that there was an element of unfair competition with individuals who were required to maintain their own facilities. One group interviewed particularly noted that the maintenance of facilities and the purchase and rental of the specialized equipment often needed in their field were very expensive and that free access to such facilities and equipment as well as access to student help at near minimum wage rates gave the state employee a significant monetary advantage over a local non-affiliated professional. These individuals noted a particular concern with regard to state commissions. Commissions that they might not be able to accept because of the cost of production would be acceptable to this division's employees because of their access to facilities at no cost to themselves.

The Commission gave full consideration to all views expressed on this matter. It was our view, however, that in most instances, no facts or views presented to us could justify the granting of an exception to the employees of this particular division to the requirements of HRS §84-13(3). We emphasized that the Commission had always viewed this as one of the most important sections of the ethics code, because the failure to adhere to its language signified that a state employee was using taxpayers' resources to further his own private interests. We recognized that many actions that were in violation of the ethics code might have some beneficial effects on the individual's state employment. However, unless those benefits were of an overwhelming advantage, an exception could not be granted to the requirements of this section. We did not find that overwhelming advantage in this particular case.

We noted, in the first place, that only a handful of the division's employees were presently using the state facilities for the production of their private works. We recognized that certain of these employees required specialized facilities that would be considerably more expensive to maintain. However, we felt that when professionals in state employ competed with other professionals for state and private commissions and when they produced works intended for large showings of their works, they passed from the status of a state employee environment to that of the private professional. It did not seem unreasonable or unfair to require them to work in the latter environment without the advantages of the state facilities. The individuals the Commission interviewed felt that competition was not generally an aspect of the type of work these individuals performed. On the other hand, it was quite clear that the money available for works of this nature was very limited. There could be little doubt that an individual with facilities such as this department had to offer had a tremendous advantage over professionals in the community who had to maintain their own facilities and purchase or rent their own equipment.

Secondly, it had been stated that students would receive some advantages from watching certain of the state employees produce works at the department's facilities. However, it would have followed then that these students were receiving an advantage that students of other division employees who worked in different fields did not receive because of the fact that most of those employees worked in their own private offices. If such a disparity in experience presently existed, it was up to the division to see that that difference was minimized and that the experiences of the students were equalized and maximized to the greatest extent possible. We also believed, in this same context, that division employees who had outside offices where they executed their private works might well make those facilities open to students so that they could see the individuals work in the real environment of a professional in that field. Those employees who were open and sympathetic to students would make such experiences accessible to them. Those employees who did not have this kind of temperament would probably not make their work experience accessible to the students even if that work was produced on the state facilities and with state equipment. Further, we did not believe it was asking a great deal of students to show sufficient maturity to endeavor to visit and work with both professionals practicing locally and state employees in their own offices on both commissioned and non-commissioned work.

Finally, the point was made that students should have the experience of seeing professionals in this field as they produced their works and that this experience would be more accessible at the department than it would be in the private offices of the professional. We commented on this to some extent in the second point, but we noted further that in our view, after discussing this matter with many different people, that the more realistic professional experience was that of the professional working in his or her own private office without the support of expensive and sophisticated state facilities. Few students would have access to such facilities once they

completed their training with the department, and it seemed to be a more valuable experience for them to come to understand what it meant to support oneself in one's own office. A number of people had commented that this difficult experience was one that was in the nature of pursuing this particular profession. We made these comments not because it was in our domain to determine what the experience of this type of professional should be, but rather to point out that these factors led us to believe that there was no reason to grant the exception to the ethics code that the department had asked for in this case.

We then made some additional comments to make clear our views on this question. The restrictions we noted in this opinion applied to commissioned works whether those commissions came from governmental or private sources. We also believed that this restriction should apply to those works produced by an employee for a particular exhibit of his or her own works. At the same time, we did not believe this restriction should apply to those works which were produced for demonstration purposes in the teaching of classes, even if such works were sold by the employee at some time in the future. We did recognize that the duties of this division's employees constituted an endeavor that was quite distinct from most other state professions. At this point, therefore, we agreed to exempt from the restrictions of this opinion and of the relevant sections of the ethics code the occasional works that these employees produced on state facilities. We recognized that such works while not explicitly for demonstration purposes might nevertheless be a valuable teaching tool in the education of a particular group of students. We anticipated that this division and its employees, acting in good faith, should be able to make this exception workable.

We recognized that there might be instances in which it would be difficult for an employee to determine which works he or she should be able to perform on the state facilities and those which must be accomplished in private studios. In such instances the employee, the division, and the department administration were advised to contact the Commission to obtain a determination of these ambiguous areas. We noted that we did not believe that ambiguities should arise very frequently.

Additionally, the Commission pointed out that where state facilities are made available to the public state employees might also make use of such facilities. In such an instance the use by the state employee was not unfair as he or she was gaining this access equally with private citizens. Accordingly, we stated that if this department's facilities were made available to other professionals in the field, then the division employees might also make use of such facilities. Where such a practice could be adopted it would be of benefit to everyone as we recognized that there was a significant advantage in maximizing the use of state facilities.

We recognized that the practices we discussed in this opinion were fairly universally accepted and in this context we explained that we could well understand why this department had approved of these practices. We nevertheless felt, as we had noted in some detail, that this practice was not acceptable under the Hawaii State ethics code. Further, the fact that it was a universal practice did not mean that it was an ethical one.

We received extensive and significant cooperation from all the people involved in this matter including the department administration and employees. We realized that there might be hardships in the implementation of this decision and we offered to assist the director to the extent possible in resolving any difficulties.

Dated: Honolulu, Hawaii, July 19, 1977.

STATE ETHICS COMMISSION
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