

OPINION NO. 398

We received a request for an advisory opinion from the manager of a state project. The project was actually a joint venture of the State of Hawaii and private corporations. In constructing the facility upon which the project was based a particular and unique item was required. It had been purchased from a large corporation that happened to be the only manufacturer of this product in the United States. However, the corporation was widely known for its interests in another area of commerce. The corporation had proposed to film a commercial at the project facility. The intent of the commercial was not to advertise the product used in the project but to demonstrate that the company was involved in fields other than the one it was best known for. The company's preferred approach in producing these commercials was to use the people who actually worked on the project rather than actors. Accordingly, the company auditioned several of the employees and the requester of this opinion to perform in the film. After completing the project he had learned that he might be paid a considerable sum for his services. He wished to know if he and other employees who appeared or assisted in the making of this film might accept payment for the roles they had played in the commercial.

HRS §84-13(2) was most applicable to the question he had raised. That section provides that an employee may not accept, receive or solicit compensation or other consideration for the performance of his official duties or responsibilities except as provided by law. We also considered the possible application of HRS §84-13(4) which prohibits an employee from engaging in a substantial financial transaction with a person or business the employee supervises in his or her state capacity. However, it appeared that he would have no further dealings with the company. Therefore, we confined our review to HRS §84-13(2).

We stated that the general approach the Commission takes in matters of this kind is to determine whether the employee might have reasonably been required to perform the duties for which he anticipates additional compensation. If the person's general responsibilities could be seen as including the activity, then additional compensation for performing the task would not be acceptable. If, however, the activity was well beyond the bounds of his or her state employment, then the employee could accept additional compensation.

In this case, the company had approached the employee to solicit approval for this project. He had discussed it with the board of directors that represented the consortium that established and operated the facility. The board had been of the opinion that, while the production of the commercial would constitute a use of state facilities for a private business purpose, the State and the project would receive a significant boost if this commercial was produced and aired nationally. Accordingly, the board advised him to assist the company in carrying out this project.

In a hearing before the Commission the employee had indicated that a considerable amount of time had been spent in assisting in the production of this commercial. The work had been accomplished over the course of two weekends and three work days and, therefore, significant periods of state time had been used in the making of the commercial.

We also considered the nature and scope of the duties of the employees who worked at this facility. The people who were employed on the project were very dedicated to it. He and other members of this team made public appearances to publicize the project and to explain its goals. These and other efforts the employees made in behalf of the project took up considerable extra time, time that was beyond the normal work week. Further, as we had noted above, the board

of directors for the consortium that operated the project had approved the making of the commercial because it was the board's view that it would enhance the project as well as the State. Accordingly, it appeared to the Commission that the tasks he and other state employees had performed in assisting the company were a part of their responsibility to the project. On this point, therefore, we were forced to conclude that he could not accept payment from the company for the services he had performed in the production of the commercial. Our conclusion on this point also applied to the other state employees who had been involved in this project.

We recognized the dedication of the employees of the project and the significant contribution they had made in what was a pioneering effort. However, as state employees, they were subject to certain restrictions that did not apply in many areas of the private sector. These restrictions were an attempt to maintain and promote the integrity of the state decision-making process and, in our view, were reasonable rules.

Because the filming of the commercial had been completed by the time we had learned of the State's participation in it, we did not discuss the propriety of the private company using state facilities to complete this film. This question was appropriate for Commission review under HRS §84-13(2). However, it was the general feeling of the Commission that this endorsement of the company was justified by the significant advantages that would have accrued to the State if the commercial had been shown nationally. Generally speaking, the Commission had, in the past, expressed concern over the endorsement, for commercial purposes, of the products and services of private companies. It was the Commission's view that the State should not be involved in generating goodwill, through commercial means, for private companies. This was to be distinguished from state agencies, on their own initiative, complimenting the work or services provided by private companies. The board that operated the project appeared to have considered the ethical aspects of this question and to have reached an appropriate decision. But we emphasized that our decision in this case should not be interpreted as generally approving the commercial endorsement of products and services by state agencies.

We appreciated this employee's candor and cooperation in bringing this matter to our attention.

Dated: Honolulu, Hawaii, November 27, 1979.

STATE ETHICS COMMISSION
Gary B.K.T. Lee, Chairman
Edith K. Kleinjans, Commissioner
Robert N. Mitcham, Commissioner

Note: Vice Chairman Paul C.T. Loo was excused from the meeting at which this opinion was considered. Commissioner Dorothy K. Ching disqualified herself from consideration of this opinion.