

OPINION NO. 437

We received a request for an advisory opinion from an employee of a state department whose duties included the preparation of certain technical materials for the State. He prepared similar materials for applicants for certain licenses issued by the county by using his own equipment and time. A county agency required these materials to be filed with an application for this license. The license materials themselves had to be drafted based on a number of state materials, and the employee's division was the basic source of all of this required information. The service was not provided by any state or county agency and had to be provided by private persons or companies. The employee had been doing this type of work for several years. The employee had been recently informed by his director that he should stop the preparation of the materials for the licenses. The director had relied on previous Commission rulings on the propriety of preparing such licenses using state materials.

The preparation of these licenses by employees of this department has been previously discussed in Advisory Opinion No. 269 and Informal Advisory Opinion No. 19. The applicable section of the State Ethics Code was HRS §84-13, which states in relevant part:

No legislator or 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 the following:

....

- (3) Using state time, equipment or other facilities for private business purposes.

In Advisory Opinion No. 269, the Commission had investigated the problem and concluded that these employees could prepare these licenses so long as they adhered to certain guidelines. The Commission had noted that it could not control what an employee did during his lunch hour as long as the activity did not impair the employee's ability to carry out his state responsibilities. The Commission had provided the following guidelines: The employee could not 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. The employee also could not conduct his initial fact-gathering conference in the state office except during his lunch hour.

To reduce the walk-in traffic into the state office for the preparation of these licenses, the Commission suggested two alternatives. We asked that the county agency provide the home telephone numbers of the state employees and private individuals interested in preparing applications, or, in the alternative, that the state office itself provide the names of those interested in preparing applications with a note that those individuals who worked for the State had to be contacted on non-state time.

When the problem came to the attention of the Commission two years later, we found that the problem had not been resolved. The state employees had maintained an advantage over private individuals because of the employees' access to records and persons not available to private individuals. Further, the guidelines set out in Advisory Opinion No. 269 had not been followed. We concluded that the state and private functions of the employees were too

interconnected to be effectively monitored. As a result, we issued Informal Advisory Opinion No. 19, which stated that the employees could finish the documents on which they had been working, but were prohibited from accepting any new applications.

In response to a request for reconsideration of Informal Advisory Opinion No. 19, we later reaffirmed Informal Advisory Opinion No. 19, but gave the requesting state employee the option of preparing the portion of the license application that could be done at home. The Commission, in the interim, had continued to receive complaints about state employees using state time to prepare portions or all of the license applications.

In Informal Advisory Opinion No. 19, the Commission noted a reluctance to restrict the outside income of state employees and stated as follows:

We had noted in reaching our conclusion that we had permitted this activity to continue for an extended period of time and that the practice itself had gone on for nearly thirty years. We are aware that any decision to restrict an employee's outside income, regardless of the amount, would have a significant effect upon him, and it was felt that a decision to take such action should be made only after it appeared that the system was clearly inconsistent with the guidelines of the ethics code. And, that is the conclusion we reached in this matter.

The Commission reaffirmed Informal Advisory Opinion No. 19 and found that the preparation of any portion of license applications by state employees was too related to the state functions of these employees to be kept separate. As long as those employees gathered any information or advised their employers about the applications during the day, we determined that the employees' state responsibilities and private work could not be separated. Those employees had an unwarranted advantage over private individuals and, in our opinion, public confidence in those employees could have been undermined. The Commission, therefore, decided that the state employee should cease all aspects of the license application preparation. We allowed him to complete documents that had been in the process of being prepared.

The Commission realized that bringing the facts of the employee's situation to the attention of the Commission might have been difficult for him because of the impact its action might have had on the employee's interest. It had been the Commission's experience, however, that this kind of attention to matters of ethics had contributed to an improved ethical climate in state government, and the Commission commended the state employee for taking this step.

Dated: Honolulu, Hawaii, May 11, 1981.

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