

INFORMAL ADVISORY OPINION NO. 19

The State Ethics Commission charged several employees of a state department with violations of HRS §84-13 for allegedly using their state positions, time, and equipment to obtain clients for and to further their private business purposes.

They were notified of this charge by certified letter and were also informed that, pursuant to HRS §84-31(b), they could meet with the Commission to explain the conduct alleged to be in violation of the law. Informal hearings were held in connection with this matter and the employees appeared to testify on their own behalf.

We issued this informal advisory opinion pursuant to HRS §84-31(b).

In their private capacities, these employees prepared documents for use by applicants for a particular license. The department took no action with respect to either the applications or the licenses, the licenses being administered by an entirely separate government agency. However, the materials used in the preparation of the required documents were available in the department and particularly in the division that employed them. For this reason, and because of the expertise possessed by these employees, they had, for a number of years, been the primary source for these documents.

In 1976, a private party had complained that the employees were using state time, equipment and facilities to obtain clients and to prepare the documents. The Commission issued an opinion on this matter in which we held that the employees could continue to conduct their business if clients were not solicited on state premises and if state time, facilities and equipment were not used to accomplish this work.

During the summer of 1977 complaints were made to the Commission that the guidelines set forth in the opinion were not being faithfully followed and that clients were still being improperly solicited. This complaint was investigated by the Commission staff and found to be valid. Accordingly, the department was advised and agreed to post proper public notices to assure that this business was neither solicited nor conducted on state premises.

However, complaints were once again filed with the Commission alleging that the employees of the division were unfairly competing with a private business engaged in doing this same work by using their state positions to acquire clients and by using state facilities and records to conduct their business. It was at this point that the Commission filed charges of alleged violation against the employees involved and brought the matter up for hearing.

Testimony received at the hearings described the kind of document that an applicant for a state license was required to file. The licensing agency required that the application be accurate as of the time of filing.

Testimony also indicated that a number of steps were involved in the preparation of the documents. Further, the licensing agency was dependent on the preparers' conscientious attention to the details of preparing the document as the agency did not independently verify the accuracy of the documents. One aspect of this preparation involved the preparation of an extensive name and address list. It appeared to us that the accuracy of such a list was dependent upon how

extensively a preparer researched the available documents. Some of the employees appeared to perform more extensive research than others.

The preparation experience of the employees varied widely. However, of the employees who spoke to the Commission, only one stated that he prepared a large number of documents. This employee stated that he prepared around 20 per year and earned approximately \$4,000. This was far in excess of the income earned by other employees. Of the other employees interviewed, none prepared more than six and most no more than two or three. Only one person, the supervisor of these employees, could not recall how many documents he made or his earnings from this work, but he did indicate that his business was not extensive.

The employees testified that the technical aspects of the work was performed at home with their own equipment and that no use was made of the specialized equipment located at the division office. They also stated that they used only the public areas in the building for doing the research necessary for the preparation of the name and address list and that the work was done only on their own time and not on state time. These employees and other independent preparers also indicated that they were often pressured by their clients to finish the work quickly.

It was our conclusion from the testimony received that the thoroughness of the work varied widely from preparer to preparer but that the basic work required in preparing the documents, and particularly the name and address lists, was extensive. While we recognized that the preparation of a simple document might not require extensive work, we also noted that only small charges were made in such cases and that the income earned from them was negligible.

We noted that it was not unusual for state employees to use their expertise to earn additional income and that such moonlighting was clearly permitted under the law. However, we had, in certain limited cases, found that a state employee's access to records, information and persons might provide him with an advantage over the businesses he competed with in the private sector. Where possible, we had attempted to establish guidelines to eliminate such advantage but had found that in certain instances guidelines were not adequate to eliminate the problem. In this particular case, we found that the employees had a special access to both department records, and, just as importantly, to the persons requiring the service they provided. And, it was our opinion that the guidelines we had established in our earlier opinion had not worked to isolate the employees from these advantages. Certain instances and circumstances bore on this.

Our earlier opinion had advised the department that it should compile a list of those persons and companies that were interested in preparing the documents. However, the list of preparers that was posted at the division was unsatisfactory in that it made reference to the fact that the state employees could be contacted at the division to prepare the documents. That notice did not comply with the advice the Commission had set out in the opinion. While the notice was changed after the Commission staff intervened, the posting of the first sign indicated an attitude toward this problem that, in our view, still persisted.

An independent preparer, a private business, related two incidents to us that were of concern.

First, it was alleged that a supervisory employee, not a preparer, indicated to a principal in this company that, if they too closely observed the activities of the employees, the department would not cooperate with them on other matters of importance to the company. Secondly, the

principals in this company requested that they be listed on the preparer list posted at the division. The listing was made but the address was not as specific as they would have liked. The same supervisory employee indicated to them that their listing could not be made more specific, however, because the employees would not approve of such action.

Finally, the company's representatives testified that they had never received a referral from the preparer's list even though the company's name headed the list and was the only full-time preparer noted.

In addition, another individual appeared at a Commission meeting and testified as to his experience at the division on an occasion when he sought to have a document prepared.

One employee told the individual to wait and then went into a back room. Another employee then came to the counter and discussed the application requirements briefly with this potential applicant. The applicant then commented to the employee that he thought he could prepare the document himself. The employee advised him that this would be very difficult and that he should have someone do it for him. He stated, however, that it could not be done at that time. The employee provided the individual with a name to call. He contacted that person, an employee, the next morning and discussed the preparation of the required document with the employee for 20 minutes over the state phone and during normal working hours. The individual did not pursue the matter and had no further contact with this state employee.

All of the records and materials necessary to the preparation of these documents were located at the department, and most were available in the division itself. Drafting tables and equipment were also readily at hand.

It was our view that the state and private functions of the employees were too interconnected to be effectively monitored and that an advantage thereby fell to the employees that was unwarranted and, in the present context, uncontrollable. This kind of activity not only undermined the confidence of the public in this division and department but may very well have had an effect upon the licensing agency as well. All of the employees indicated from their testimony that they had little knowledge of the rules, regulations and procedures of the licensing agency. While it was understandable that rules that limited an employee's conduct would encourage him to use short cuts in preparing the documents, such a situation poorly served both the needs of the licensing agency and the public.

Further, and of more concern to us, was the likelihood that the performance of this private work intruded upon the employees' performance of their state work. The work involved in preparing the documents was extensive and was often accompanied by a demand for prompt service by the applicants for licenses.

The testimony of the preparers was that, aside from one employee, they prepared very few documents and earned little income from this activity. It was our understanding, therefore, that the prohibition of this activity would have only a negligible practical effect upon them. We realized, however, that the income earned by this one employee was important to him and that this work might be important, if not so vital, to the others as well.

But we could no longer approve a system that gave such advantage to state employees and had such potential for undermining public confidence. It was, therefore, our opinion that HRS

§84-13 prohibited the employees of the division from preparing documents for applicants for licenses and that this activity should be stopped immediately. We stated, however, that documents that were in the process of being prepared might be completed.

We 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 30 years. We were 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.

Because of the implication of this opinion for the department, we forwarded a copy of this decision to the director.

Pursuant to HRS §84-31(b), the employees were advised that they might either (1) agree to comply with the findings, conclusions, and recommendations of this informal advisory opinion or (2) request a formal hearing and opinion. We asked that they inform us of their decision within ten days of their receipt of this informal advisory opinion.

Dated: Honolulu, Hawaii, November 29, 1979.

STATE ETHICS COMMISSION
Paul C.T. Loo, Chairman
Audrey P. Bliss, Commissioner
Dorothy K. Ching, Commissioner

Note: Commissioner Gary B.K.T. Lee was excused from the meeting at which this opinion was considered. There was one vacancy on the Commission.