

ADVISORY OPINION NO. 131

The question is whether the outside employment of a City employee as a consulting engineer would conflict with his duties as an engineer with a City agency whose employees have the responsibility to review and recommend applicants for City contracts.

The Ethics Commission [Commission] is of the opinion that, in some situations, there is a conflict of interest and, in some situations, there is the appearance of a conflict of interest between the engineer's duties and his outside employment which could result in the application of several standards of conduct in the Revised Charter of Honolulu 1973 (1984 Ed.) [RCH] and the Revised Ordinances of Honolulu 1978 (1983 Ed.) [ROH].

Before listing the standards of conduct which could apply in the engineer's case and the discussion relative thereto, the Commission would like to illustrate this situation by using a diagram which is shown in Appendix "A," attached hereto and made a part hereof, indicating either a conflict of interest or an appearance of a conflict of interest based on a definition found in 73 Michigan Law Review 758 (1975):

A 'conflict of interest' may be defined as any circumstance in which the personal interest of a public official in a matter before him in his official capacity may prevent or appear to prevent him from making an unbiased decision with respect to the matter. [Emphasis added]

The application of this definition is discussed hereinafter.

The diagram consists of three blocks. Block One is labeled "City Engineer," while Block Two is labeled "Employee of Consulting Firm." Block Three is labeled "Engineering." Blocks One and Two are joined by a solid line which indicates that the City engineer wears two hats, one as an engineer with the City, and the other as an employee of a private engineering firm. Note that there is a solid line extending from Block One to Block Three, and a similar line joining Blocks Two and Three. Whenever the solid lines emanating from Blocks One and Two converge upon Block Three, this generally indicates that there may be a conflict or an appearance of a conflict of interest. This conclusion is based on the fact that as an engineer for the City and as an engineer for a private consultant, he has jurisdiction over the same subject matter. The existence of this dual jurisdiction is the basis of the Commission's conclusion that a public employee, in carrying out his public duty as engineer, may be affected by his private business or financial interest as an employee of a private engineering firm.

The Commission will henceforth consider the standards of conduct which could apply in this case. The following facts which

are listed from the engineer's testimony, including his position description, a copy of which is attached hereto, are germane:

1. He is an engineer with the City.
2. His primary duties as engineer are:
 - a. Responsibility for the review and recommendation for approval of engineering, design, and construction specifications for both City and non-City projects;
 - b. Participation in the selection of consulting engineers for City projects by submitting his review and recommendations relative to the engineering capabilities of consulting engineers; and
 - c. Participation in preparation of future Capital Improvement Projects and submission of his comments and recommendations relative to engineering components involved in the projects.
3. In addition to the foregoing, he:
 - a. Does responsible professional engineering and administrative work in overall planning;
 - b. Coordinates and directs major structural and related projects;
 - c. Directs and reviews designs, plans, specifications, estimates, and reports;
 - d. Performs technical research in engineering and related fields; and
 - e. Performs other duties as required.
4. He is a part-time employee of a consulting engineering firm and has been for a number of years. His part-time work is similar to that which he does for the City.
5. Only the registered stamp of the subject consulting engineering firm is used for all plans and specifications emanating from that firm. He has no occasion to use his stamp on plans and specifications belonging to the consulting firm. However, he does use his registered stamp on plans and specifications which do not relate to the consulting engineering firm and which apparently relate to small projects, such as retaining walls or drainage ditches. Moreover, his stamp is used as a favor to a friend and he assesses no charges for its use.

Under the foregoing facts, the Commission is of the opinion that the following standards of conduct in the RCH and the ROH could apply:

1. Section 11-102.2, RCH, relating to disclosure of confidential information:

No elected or appointed officer or employee shall:

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Disclose confidential information gained by reason of his office or position or use such information for the personal gain or benefit of anyone.

2. Section 11-102.3, RCH, relating to business or financial interests which are incompatible with his duties or which may impair his judgment:

No elected or appointed officer or employee shall:

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Engage in any business transaction or activity or have a financial interest, direct or indirect, which is incompatible with the proper discharge of his official duties or which may tend to impair his independence of judgment in the performance of his official duties.

3. Section 11-102.5, RCH, relating to appearing before City agencies for private interests:

No elected or appointed officer or employee shall:

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Represent private interests in any action or proceeding against the interests of the city or appear in behalf of private interests before any agency, except as otherwise provided by law.

4. Section 11-103, RCH, relating to disclosure of interest, states that:

Any elected or appointed officer or employee who possesses or who acquires such interests as might reasonably tend to create a conflict with the public interest shall make full disclosure in writing to his appointing authority or to the council in the case of a member of the council, and to the ethics commission, at any time such conflict becomes apparent. Such disclosure statements shall be made a matter of public record and be filed with the city clerk. Any member of the council who knows he has a personal or private interest, direct or indirect, in any proposal before the council, shall disclose

such interest in writing to the council. Such disclosure shall be made a matter of public record prior to the taking of any vote on such proposal.

5. Section 11-104, RCH, relating to fair and equal treatment:

No elected or appointed officer or employee shall use his official position to secure or grant special consideration, treatment, advantage, privilege or exemption to himself or any person beyond that which is available to every other person.

6. Section 6-1.2(1), ROH, relating to participation as a City officer or employee in which he has a substantial financial interest:

No officer or employee of the City, except as hereinafter provided, shall:

Participate, as an agent or representative of a City agency, in any official action directly affecting a business or matter in which (A) he has a substantial financial interest

7. Section 6-1.2(2), ROH, relating to financial interest in a business which may come before an officer or employee for official action:

No officer or employee of the City, except as hereinafter provided, shall:

Acquire financial interest in business enterprises which he has reason to believe may be directly involved in official action to be taken by him.

An examination of the foregoing standards of conduct shows that there are two standards of conduct involving business or financial interests. They are Section 11-102.3, RCH, and Section 6-1.2(2), ROH. An examination of Section 6-1.1(2), ROH, relative to the definition of "business," and Section 6-1.1(6), ROH, relative to the definition of "financial interest"¹ indicates that the engineer's outside employment can be construed either as a business or financial interest.

In order to demonstrate how each one of the seven delineated standards of conduct can apply in the engineer's case, the Commission will consider several hypothetical situations. Each hypothetical case will be geared to some of the specific duties which he is required to carry out as engineer. The Commission will relate the hypothetical cases using third person pronouns in order

¹See attached Appendix B for definitions of "business" and "financial interest."

to avoid any implication that he would take advantage of the opportunities reflected in the cases.

1. This case involves the duty of the engineer to plan and submit recommendations for departmental budgetary requirements for capital projects for the ensuing fiscal year.

On or before October 1st of each year, every department is required to submit its budgetary requirements to the Budget Director for the ensuing year. One of the primary functions of the City agency is capital projects. Therefore, the City agency has a capital budget program and also specific proposed appropriations therefor. One of the duties of the engineer is to plan, review, and submit the proposed costs relative to engineering components of a project. This duty gives the engineer an opportunity to note all of the proposed projects of the City agency for the next fiscal year. The proposed appropriations for the capital projects of an ensuing year are confidential information because they are still internal documents reflecting the City agency's future plans. Such document becomes a public record only after it is filed with the Council on or before March 1st of each year. Since the engineer has access to such confidential information, he decides to make a copy of the agency's Capital Budget Program and proposed appropriations therefor, for the ensuing year. As an employee of the consulting firm, he transmits the copy to it so that it can take advantage of the information contained therein to enhance its income. Having such information before other private engineering firms would give it an advantage not available to other private engineering firms. Such advanced information enables the consulting firm to pick and choose the lucrative projects and develop its cost estimates for such projects. Thus, when the City contacts the firm, it would be able to respond without delay regarding the cost of the planning and engineering phase of a project.

Under this hypothetical case, the standards of conduct which could apply are: (1) Section 11-102.2, RCH; (2) Section 11-102.3, RCH; (3) Section 11-103, RCH; and (4) Section 11-104, RCH.

Section 11-102.2, RCH, could apply in this case because the engineer gave the consulting firm a copy of the proposed appropriation for the capital projects to be undertaken. Such information was confidential because it was not filed with the Clerk for the Council's review and adoption. A breach of Section 11-102.3, RCH, also occurred when a copy of the confidential information was given to the consulting firm. That is, the engineer's outside employment in this hypothetical situation resulted in the impairment of his judgment in the performance of his official duties. Section 11-103, RCH, would also apply if the engineer did not file a disclosure with his agency head regarding his engineering work with the consulting firm. As to Section 11-104, RCH, it could apply because the engineer disclosed the confidential information to the consulting firm, thus placing it in an advantageous position which was not enjoyed by other private engineering firms.

2. This case involves the duty of the engineer to participate in the selection of consulting engineers for projects to be undertaken by the City agency.

The Council adopted the Fiscal Year's Capital Appropriations Ordinance which was subsequently approved by the Mayor. The Chief Engineer circulated this ordinance with instructions to recommend the private engineers for the planning and engineering appropriations contained in the ordinance which were to be undertaken by the City agency. One of the duties of the engineer was to submit names of registered engineers in the private sector to do the planning and engineering for a project of the department. The consulting firm was on the Chief Engineer's list. The engineer recommends the consulting firm for certain engineering components in a project. The engineer filed no disclosure that he is employed by the consulting firm. The Chief Engineer accepts the recommendation of the engineer and awards a contract to the consulting firm for a specific planning and engineering project. Since the engineer had given the consulting firm confidential information regarding the proposed appropriations for capital projects to be undertaken by the City agency, the consulting firm submitted its cost data within a short time. This impressed the Chief engineer so he requested the engineer to select another engineering project for award to the consulting firm.

In this case, the standards of conduct which could apply are: (1) Section 11-102.3, RCH; (2) Section 11-103, RCH; (3) Section 11-104, RCH; and (4) Section 6-1.2(2), ROH.

Obviously, the engineer was partial to the consulting firm when he recommended it to do a planning and engineering project for the City agency. As such, Section 11-102.3, RCH, could apply because the independence of the engineer's judgment was impaired because he was a part-time employee of the consulting firm. Moreover, one can assert that the engineer did not properly discharge his duties as a section head when he failed to disclose to the Chief Engineer his interest in the consulting firm. Section 11-103, RCH, could apply because of the engineer's failure to file his disclosure of his part-time employment with the consulting firm. The Chief Engineer may not have accepted the recommendation of the engineer if he was aware of the engineer's employment with the consulting firm. As to Section 11-104, RCH, it could apply because the engineer gave the consulting firm favorable consideration which was not available to other private engineering firms. Section 6-1.2(2), ROH, could apply in this case because the engineer's financial interest in a private business did come before him for official action when he exercised his duty to recommend private consulting engineers for planning and engineering projects for the City agency.

3. This case involves the engineer's duty to review and submit his recommendations regarding the engineering component of a City project done by a private engineering firm under contract with the City.

The consulting firm obtained a contract to develop plans and specifications for the engineering component for a City bridge project. The standards which were to govern the specifications for the bridge were those established by the federal highway division so that the City might be eligible for federal funds. The federal highway manual was patterned after the Society of American Engineers (hereinafter "SAE") manual, except for higher standards relating to size of the main structural beams. The plans and specifications developed by the engineer as an employee of the consulting firm were based on the SAE manual, rather than the federal highway manual. Subsequently, the engineering components for the bridge were sent to the appropriate engineering section for its review and recommendation. Since the engineer worked on the plans and specifications in his private capacity, he sent it to his superior with a recommendation for approval. The plans and specifications were reviewed and approved by the superior and submitted to the federal highway division. The plans and specifications were returned by the federal highway division, stating that the specifications did not meet federal standards. The consulting firm was then contacted by the superior regarding the discrepancy. The consulting firm then contacted the engineer, requesting that he explain the discrepancy to his superior. He appeared before his superior and admitted his error, and said that he could personally redo the applicable engineering plans and specifications on his own time at no cost to the City. The reason for his offer was to avoid jeopardizing the consulting firm's opportunities to obtain future engineering contracts from the City.

The standards of conduct which could apply in this case are: (1) Section 11-102.3, RCH; (2) Section 11-102.5, RCH; (3) Section 11-103, RCH; (4) Section 6-1.2(1), ROH; and (5) Section 6-1.2(2), ROH.

Section 11-102.3, RCH, could apply in this case because the engineering specifications which were designed and planned by the engineer are subject to review and recommendation by the same engineer, in his capacity with the City. As such, his employment with the consulting firm is incompatible with the proper discharge of his duties because his decision could be biased as shown in the case when he recommended approval without reviewing same to determine whether or not it met federal highway standards. In this case, the Commission can also assert that the judgment of the engineer was impaired when he failed to check the specifications because he took it for granted that the engineering components of the bridge project met the federal standards since he personally designed and planned that portion of the bridge project. In short, his employment with the consulting firm did prevent or appear to prevent him from making an unbiased decision. Section 11-102.5, RCH, could apply because the engineer was representing a private interest before a City agency regarding a discrepancy in the specifications. In this instance, the engineer was not representing a client even though he was a professional engineer and had his own registered stamp. In this case, the client was the City and the consulting firm was the professional engineer. Therefore, the engineer's action does

fall within the exception of Section 11-102.5, RCH. The basis for applying Section 11-103, RCH, is because a disclosure was required of the engineer when he began to design and plan the engineering component for the bridge project for the consulting firm and which was subsequently recommended for approval by him on behalf of the City. Section 6-1.2(1), ROH, could apply in this case because the engineer is participating as a section head regarding review and recommendation of the engineering component for the bridge project which he developed as an employee of the consulting firm. He did take official action in a matter in which he has a substantial financial interest by recommending approval of the defective plans and specifications for the bridge project. The last standard of conduct which could apply in this example is Section 6-1.2(2), ROH. This section could apply because his business interest did come before him for official action. That is, his work as an employee of the consulting firm on the bridge project was submitted to his section for review and recommendation as to the engineering component of the bridge project.

4. This case involves the engineer's duty to review and recommend for approval the engineering components of a private project which is subject to review by the City agency as prescribed by law.

An application for a subdivision was filed by a landowner. The application requested approval for a subdivision of a 50-acre parcel of land into 300 lots. A navigable stream bisected the land, requiring bridges to span the stream for the efficient use of this land. The consulting firm was the engineering firm which drew up the plans and specifications for the infrastructure including the bridges. However, the engineering component for the bridges was planned and designed by another engineer, rather than the engineer who is a part-time employee of the consulting firm. Because the infrastructure, including the bridges, was to be eventually dedicated to the City, it was subject to review by the City agency relative to roadways, curbs, sidewalks, gutters, and the bridges. The engineering plans and specifications were submitted to the City agency for its review and recommendation by the engineer. With respect to the engineering components, the engineer reviewed same and recommended approval, even though the specifications for the extra margin of safety were in doubt. The reason for the engineer not notifying his supervisor of the discrepancy was to protect the consulting firm so as not to jeopardize it from obtaining other private contracts.

In this case, the standards of conduct which could apply are: (1) Section 11-102.3, RCH; (2) Section 11-103, RCH; (3) Section 11-104, RCH; and (4) Section 6-1.2(2), ROH.

Section 11-102.3, RCH, could apply in this case because the engineer withheld information from his superior regarding the specifications governing the extra margin of safety required in the proposed bridges. His failure to inform his superiors regarding the discrepancy was because his employment with the consulting firm

affected his decision not to report the discrepancy to his superior. That is, he did not wish to jeopardize the consulting firm's opportunity to obtain any future engineering contracts. As such, his employment with the consulting firm became incompatible with the proper discharge of his duties. Moreover, the Commission can assert that his employment with the consulting firm affected the independence of his judgment as the engineer for the City because he failed to report the discrepancy to his superior.

As to Section 11-103, RCH, it could apply because the engineer failed to file a disclosure with his appointing authority that the work for the bridges done by the consulting firm was before him for his review and recommendation. If he had filed such a disclosure, the Commission presumes the Chief Engineer would have assigned someone else to review and appraise the engineering specifications for the bridges. Section 11-104, RCH, could also apply in this case because the engineer's failure to inform his superiors regarding the discrepancy in the plans and specifications of the bridges for the subdivision placed the consulting firm in a favored position which another private firm could not have enjoyed. That is, if it were another private engineering firm, it is likely that the engineer would have informed his superiors of the discrepancy because he had no private financial interests to preserve. As to the application of Section 6-1.2(2), ROH, it could apply because his business or financial interests did come before him for official action. That is, the plans and specifications developed by the consulting firm for the bridges did come before him for review and recommendation to his superior. In this case, his actions and bias clearly favored his private employer rather than the City's interests.

5. This case involves the application of Section 11-102.5, RCH, relating to representation of private interests other than the City agency before a City agency.

The consulting firm is the engineering firm for a high-rise condominium project. The construction drawings for the high-rise project are completed and submitted to the Building Department for a building permit. The plan checker of the Building Department discovers a discrepancy in the specifications regarding the engineering component for the high-rise building. He contacts the consulting firm who, in turn, instructs him to contact the engineer. The plan checker contacts the engineer, and he appears before the plan checker to straighten out the discrepancy, if any. He asserts that there is no discrepancy as to the specifications for the engineering component. The dispute goes before the Building Superintendent, and he finds in favor of the engineer without any modifications.

No doubt, the application of Section 11-102.5, RCH, is clear in this case because the engineer did appear before the Building Superintendent and represented the consulting firm as well as the applicant for the building permit, both of whom represent private interests. Although Section 11-102.5, RCH, provides an exception, such exception relates to the representation of clients by professional engineers in this case. However, in the case of the

engineer, he cannot be representing the consulting firm or the applicant because they are not the engineer's clients. The applicant is a client of the consulting firm, while the consulting firm is the professional engineer representing the applicant. The engineer is an employee of the consulting firm. Consequently, the engineer does not fall within the exception. As to Section 11-103, RCH, it could apply in this case because the engineer failed to file a disclosure with the Chief Engineer that he could be representing the consulting firm before the Building Superintendent. This statement is based on the broad language found in Section 11-103, RCH.

6. This case involves the use of City time, equipment and material by the engineer as a part-time employee of the consulting firm.

At about 9 a.m. on a regular working day, the engineer was notified of a telephone call for him. He responded and it was a call from the consulting firm. The conversation relating to one of the projects assigned to him as an employee of the consulting firm consumed about ten minutes. Thereafter, he returned to his desk and began working on a mathematical problem using a slide rule and legal tablet furnished by the City. This work he was doing for the consulting firm, as a result of the telephone call, took away approximately thirty minutes of his time from a City project. Thereafter, he contacted the consulting firm and gave the results of his computations. Later, he got another telephone call from the consulting firm and engaged in further discussion with another engineer regarding the computations he had made earlier. There were other occasions in which the engineer was contacted by the consulting firm for other projects. He, in turn, has contacted the consulting firm during regular working hours making inquiries regarding the progress of certain projects which had been assigned to him.

In this case, Section 11-102.3, RCH, could apply because the use of City time, equipment or material for personal business or financial interests is incompatible with the proper discharge of the engineer's duties.

The foregoing hypothetical cases are intended to show what could happen, rather than what has happened. The Commission's objective in the issuance of this advisory opinion is to identify any potential conflict of interest situation so that they can be avoided.

In view of the foregoing, the best solution to prevent any allegation of a conflict of interest or an appearance of a conflict of interest is to terminate his employment with the consulting engineering firm.

If that solution is not possible at this time, the Commission has attached with this opinion an affidavit to be executed by him and returned to the Commission within ten working days from the date noted on this opinion. If he has any questions regarding this

affidavit, he should submit them in writing to the Commission.

To summarize, the Commission concludes that the engineer's work as part-time consultant falls within the definition of "conflict of interest" as stated in Michigan Law Review, supra. The application of this definition in his case is shown in the diagram found in Appendix A, which is attached hereto and made a part hereof. Since the three blocks in the diagram are connected by solid lines, this indicates that as a consultant and as an engineer for the City, he has jurisdiction over engineering work in both capacities. Because he exercises dual jurisdiction, he may find himself in situations in which his private interests may prevent him or appear to prevent him from making an unbiased decision.

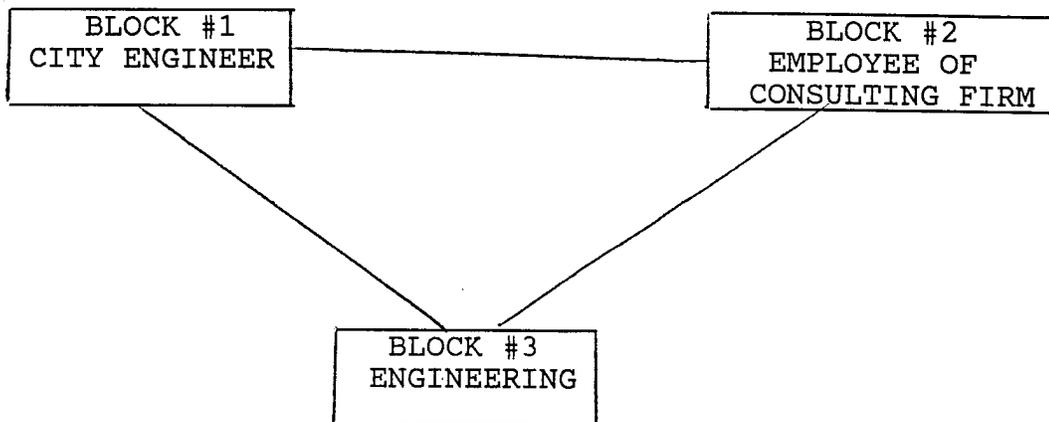
The Commission believes that the confidence of the public in City government can only be retained by eliminating situations in which an officer or employee has a conflict or an appearance of a conflict of interest.

Accordingly, the Commission has made its recommendations as stated herein. The Commission would like to have a decision in writing whether or not the engineer will accept one of its recommendations within ten working days after the date noted in this opinion.

Dated: February 14, 1984

MAZEPPA K. COSTA
Chair, Ethics Commission

DIAGRAM OF A CONFLICT OF INTEREST



APPENDIX A