

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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Advisory Opinion 2008-2

I. Summary

A city employee who spent time at home and on personal errands while he was on paid city time violated the city's fair and equal treatment policy, even though his supervisor knew about and effectively condoned his misconduct.

II. Background

A. Complaint

On October 11, 2006, the Ethics Commission received a complaint from an individual alleging that at various times between August 7, 2006 and August 19, 2006, he personally observed "Employee" spending blocks of time during normal work hours at his home and running what appeared to be personal errands in a city truck. The complainant photographed a number of these incidents and provided a log of his observations. In addition to making a complaint to the Commission, the complainant [description of complainant's contact with media].

B. Factual Background

Employee works in [city department and section]. He [description of job duties and informal job title]. Employee has held this position for approximately the last 9 or 10 years. Although the organizational charts indicate that he reports to [supervisor's position], during most of his tenure as [informal job title] Employee actually reported directly to "Supervisor", who was in charge of the [city department and section] until his retirement in 2006.

Employee's job duties and daily routine are relatively simple. He is responsible for [job duties]. According to his written job description, his only other significant assigned responsibility is making mail runs at the end of the day between the [location] and [city department]'s administrative offices.

He works from 6:00 a.m. to 2:00 or 2:30 p.m., six days per week. He described his typical day as follows: He would sign in at [location] in the early morning and check to see if there were any calls for [job assignments] that were logged in overnight. If there were, he would drive a city truck to [job assignment]. If there were no [job assignments], he would be free to do as he chose until it was time to make his mail run at the end of the day. During his idle time, Employee would, for instance, “hang out” at the yard, go to church or to the beach for a walk, read a book, or get breakfast. He said that he would also regularly go home to his residence in town, where he would ice his knee, which he had injured a number of years ago. Employee said that even on the days when he was required to [job assignment], he still frequently engaged in these activities, because he was not required to return to the [location] after his run was completed (he was only required to be available by phone). Employee stated that he has followed this general routine for years.

Employee has regularly run personal errands for other [city department] personnel, including his supervisors. For instance, he said that he would get the newspaper and breakfast on occasion for Supervisor and [co-worker]. He said that he did a number of personal errands for [co-worker], including things such as paying her electric bill and driving her family members to their appointments. According to Employee, this practice of using him as an errand runner dated back to when he first started working as the [informal job title]; his boss then, [name of former supervisor], would essentially use him as a chauffeur at times, having Employee drive him to his home, to the bank to cash his paychecks, to the laundry, *etc.*

To his credit, Employee was very cooperative and forthcoming during our investigation. When he was asked if the allegations contained in the complaint were accurate, he either specifically admitted they were true or he said that he had no reason to dispute their accuracy if he could not specifically recall the incident. Essentially, Employee said that he did not dispute the allegations that he was at home for periods of time during his work day in August 2006, because, as described above, this was part of the daily routine he has followed for years.

1. Employee believes his actions were authorized

While Employee acknowledged spending significant amounts of time doing what could be described as personal activities while on official city time, he contended that he had done nothing wrong because the practice of the [informal job title] structuring his own day had been in place for years and Supervisor was fully aware of and even permitted his schedule and idle time activities. There is significant evidence to support Employee’s contention.

2. [City department] management knew about Employee’s activities

There is no question that [city department] management, particularly Supervisor, knew that Employee was going home for long periods during work time, because there were several complaints made to [city department] management about Employee’s activities.

A supervisor in the [location] notified Supervisor at least a dozen times that he had seen Employee's city truck parked at his home during work hours. According to this supervisor, Supervisor simply said that he would take care of it. Employee himself corroborated that a supervisor had complained to Supervisor, stating that Supervisor told him that despite the complaints he could not "in good conscience" punish Employee because his schedule had been established by "past practice."

In addition to these internal reports, there were also at least two complaints made to the city by Employee's neighbors, questioning why he was at home with his city truck parked in his driveway during work hours. The first complaint was submitted on November 26, 2004. The second complaint was submitted on December 27, 2004. The complaints were forwarded to [division in city department] through the city's Document and Record Tracking System (DART). It is not clear if any action was taken in response to the first complaint. The DART records indicate that in response to the second complaint, "[Supervisor] emailed complainant explaining the City employee assigned to [the license plate of Employee's city truck] is authorized to stop home for lunch but only lunch. Employee was notified future abuses will be addressed." These complaints corroborate Employee's statements that Supervisor knew (for at least a couple of years, if not more) that he was going home during work hours.

Even in the absence of these complaints, [city department] management had to have known that Employee was spending large amounts of time on personal business because his job responsibilities were so limited that he was left with significant unaccounted for downtime.

Employee's job requirements – formalized in his job description -- were limited to [job duties] and making a mail run at the end of the day. These activities did not fill up his entire day. Therefore, he had a significant amount of built-in idle time. As described above, Employee spent much of this idle time away from the yard and he was not required to account for what he did during this time. The fact that he spent large blocks of time away from the yard was no secret in the [location]. This was confirmed by several [city department] workers who stated that it was common knowledge that Employee spent most of his day away from the yard, only coming in to check the logs and pick up the mail for his afternoon mail runs. [Name and position of supervisor] stated that there were frequently days that he did not see Employee at the [location] at all or just very briefly. On those days that he did not see Employee at work, he would simply ask Supervisor if he should be marked as present.

In our opinion, the fact that Employee was allowed to spend long periods of time away from the [location] without being required to account for his time or being assigned duties that would keep him busy on city-related work, leaves no doubt that [city department] management knew, or at least should have known, that Employee was not working while he was on paid city time.

3. **[City department] management failed to take appropriate remedial action despite its knowledge about Employee's activities**

Despite Supervisor's knowledge that Employee was spending blocks of time at home (and elsewhere) during the workday, and despite complaints from the public and at least one co-worker, he clearly failed to take any effective remedial action. This action could have taken several forms.

For instance, Supervisor could have prohibited Employee from going home during the day and disciplined him if he continued to do so. There is no evidence that Supervisor did this, even though this would have been a relatively simple prohibition to impose and to monitor. On the contrary, Employee stated that he talked to Supervisor about his activities on occasion, and the only "rule" Supervisor had was that he could not stray from his assigned geographical territory. Employee said that on at least one occasion Supervisor essentially gave him advice about how to keep a low profile, telling him that if he went home during the day he should not stay there too long, but that he should go somewhere else, too.

Alternatively, Supervisor could have required Employee to stay in the yard when he was not responding to a request to [job assignment] or making his mail runs. Or, he could have assigned additional duties to Employee that would have eliminated or at least reduced his idle time. Again, there is no evidence that any of these measures were taken.¹

Thus, even after receiving complaints from members of the public, Employee was essentially allowed to continue his routine without any intervention or discipline from management. Management's inaction clearly sent Employee the message that what he was doing would be tolerated.

III. Procedural Background

On November 15, 2007, the Ethics Commission issued a Notice of Potential Violation (NOPV) to Employee, which identified the potential ethics violation and the factual basis for the violation. Employee did not request a hearing within 15 days of his receipt of the NOPV. The Commission may therefore render its advisory opinion based on the information available to it. Revised Ordinances of Honolulu § 3-6.7(c).

IV. Analysis

Taking personal time while on paid city time is a violation of Revised Charter of Honolulu (RCH) § 11-104,² because it constitutes the use of city resources for a non-city purpose. See Advisory Opinion 2006-1. Insofar as Employee has admitted that he spent blocks of time at home, at the beach, running personal errands, *etc.*, while on paid city time, there is a basis to find that he violated RCH § 11-104.

Employee can only be held accountable for violating RCH § 11-104, however, if he knew or should have known that his conduct was in violation of the ethics laws. Advisory Opinion No. 2004-7 ("In general, a city officer or employee violates the ethics laws if he or she *knew or*

should have known that his or her conduct would constitute a violation.” (Emphasis in original.)).

On the one hand, we can see how Employee might have believed that he was allowed to take personal time while on paid city time. After all, management’s failure to take any effective action to put an end to Employee’s conduct despite its knowledge about how he was spending his time away from the yard could be seen as approval of his actions. At the very least, we do not think it was completely unreasonable for Employee to believe that he would be allowed to spend this idle time at home, the beach or anywhere else, as long as he could be contacted if he was required to do something.

On the other hand, it is difficult for us to conclude that Employee did not know, or that he should not have known, that being paid for sitting at home or at the beach or at church for hours at a time was inappropriate -- even if his supervisor was willing to tolerate this schedule. Even Employee said that he was told that others had complained about his activities, but that he would not be disciplined only because the practice of the [informal job title] structuring his own day had been going on for years.

We therefore find that Employee simply could not reasonably have believed that it was appropriate for him to spend much of his on-duty time tending to his personal business. He, like any other city employee, must be accountable for his own actions, regardless of the message that was being sent by management. At a minimum, he should have taken it upon himself to find something to do, or at least to have stayed at the yard when he was not required to be in the field for [job assignment] or mail run.

Thus, we conclude that there is a sufficient basis for finding that Employee violated RCH § 11-104.

V. Recommendation

Based on our conclusion that Employee violated RCH § 11-104, we are obliged to recommend to [city department] what form of discipline, if any, is appropriate. RCH § 11-106.

In our view, this case is more about a failure of management than it is about an employee taking advantage of his situation. As outlined above, [city department] management -- primarily Supervisor -- knew about Employee’s ethics violation, but did nothing. This astonishing inaction and indifference, which persisted for years -- even after internal complaints and at least two complaints from the public -- directly enabled Employee’s violations. Were Supervisor still with the city, we would likely recommend that he receive serious discipline for his nonfeasance.

Unlike Supervisor, Employee is still with the city, and he must be held accountable for his own actions. However, given management’s virtual complicity in his misconduct, we believe

his discipline should be relatively mild. In our opinion, his violation of RCH § 11-104 warrants no more than a written reprimand under the circumstances.

Although our disciplinary recommendation is limited to Employee, we trust that [city department] management will take to heart our observations about its own culpability in this matter and take appropriate steps to ensure that this situation does not recur. In particular, we would expect that management would, at the very least, review Employee's job description and duties and make any appropriate modifications.

The appointing authority has 15 days from this receipt of this opinion and recommendation in which to inform the Commission of the action it will take.

Dated: April 1, 2008

/S/
LEX SMITH
Chair
Honolulu Ethics Commission

¹ Following the [publicity relating to this matter], [city department] apparently required Employee to stay in the yard to help answer phones when he was not on [job assignment] or mail run.

² Section 11-104. Fair and Equal Treatment –

Elected or appointed officers or employees shall not use their official positions to secure or grant special consideration, treatment, advantage, privilege or exemption to themselves or any person beyond that which is available to every other person.