

**ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU**



ADVISORY OPINION NO. 116

This advisory opinion concerns the retention of a real estate broker's license [license] by an investigator for a City agency with licensing authority [agency].

The Ethics Commission [Commission] is of the opinion that the investigator should inactivate his license.

The Commission considers the following facts, obtained from the investigator's testimony, to be germane to the applicable standards of conduct found in the Revised Charter of Honolulu 1973 (1979 Supp.) [RCH], and the Revised Ordinances of Honolulu 1978, as amended [ROH], and to the discussion, conclusions, and recommendations herein:

1. He was employed by the City as an investigator for the agency on or about (date).
2. His primary duty as an investigator for the agency is to enforce observance of statutes applicable to licenses and rules and regulations promulgated by the agency, and to enforce observance of the laws. He is assigned by his superiors to inspect property of applicants for licenses.
3. He obtained his real estate salesman's license in (year), and his broker's license in (year).
4. When he obtained his real estate license, he was employed by another City agency, which prohibits employees from having outside employment involving solicitation. He left that agency and was employed by another county, which allowed him to retain his license.
5. When he was employed by the City as an investigator, he had his license. He then filed a form CC-8 with his appointing authority regarding his broker's license. However, since (date), he has not made any real estate sales, but he did not inactivate his license.
6. The investigator testified that he had attained the minimum retirement age.

The Commission is not impugning the employee's integrity or character, nor that of any other member of the agency, with the illustrations and discussion herein. The Commission's conclusion is bottomed on the rule of law in 63 Am.Jur.2d, *Public Officers and Employees*, Sec. 281, which states:

It is generally held that a public officer owes an undivided duty to the public whom he serves and is not permitted to place himself in a position which will subject him to conflicting duties or expose him to the temptation of acting in a manner other than in the best interests of the public. [At 794]

The basic issue in his case is whether the employee's duties as an investigator can be compromised because of his active license. The Commission is of the opinion that his duties as an investigator can be compromised to enhance his real estate transactions. Section 11-102.3, RCH relating to incompatibility of a business or financial interest in relation to his official duties, may be applicable.

Section 11-102.3, RCH, provides that no officer or employee shall:

[E]ngage 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.

The cited provision indicates that the employee shall not have a business or financial interest incompatible with his duties, an interest which would establish a situation or condition in which his judgment may be impaired or cause him to improperly carry out his duties as an investigator.

The Commission can relate numerous hypothetical situations in which his having a license may place him in a position in which he would have to decide between acting on behalf of the public's interest to enforce all laws or the shirking of such duty because of his business or financial interests in real estate. To avoid repetitiveness, the Commission submits two hypothetical situations which might occur because: (1) solicitation is involved in making a sale or purchase; (2) real estate transactions generate lucrative commissions; (3) he is able to target a particular group for his clientele; and (4) he has discretionary authority to issue citations. The hypothetical situations are:

1. The owner of licensed property is the investigator's active real estate client. As the investigator inspects the property for a renewal of the license, he witnesses a violation of a law. Ordinarily, he would issue a citation and submit a report to the agency. However, because the owner of the property is his active real estate client to whom he is trying to sell real estate, he does not issue a citation and submit his report to the agency. In this case, the prospect of a lucrative commission impairs his judgment or causes him to improperly carry out his duties as an investigator.

2. The owner of the licensed property has a business with employees who may decide to use the investigator's services as a real estate broker so that he will be beholden to them and the employer for commissions he may realize from any real estate transactions. Subsequently, in the course of inspecting the licensed property, he witnesses the owner violating the law. He informs the owner that he, the investigator, will have to issue a citation and file a report to the agency for such violation. However, he decides not to do so when the owner threatens to pull out of the real estate transaction if he does issue the citation.

Note that in both hypothetical situations the investigator is forced to make a choice between enforcing the laws or succumbing to his business and financial interests. Under such circumstances, he is in situations incompatible with his responsibility to enforce the law.

The investigator may question the hypothetical situations on the basis that their occurrence will be unlikely, but from the public's perception regarding City employees with off-duty activities relating to real estate, the hypothetical situations reflect occurrences that are more the rule than exceptions to the rule.

Such perception is bolstered by instances in which State and City officers and employees have had financial interests in private land development and ventures. Further, the public is aware of the selective enforcement practiced by State and City officers and employees who have enforcement powers. Moreover, the public is led to believe that such selective enforcement is done to enhance the personal financial interests of such officers and employees. Therefore, the general perception of the public of a government officer or employee with a license plus enforcement powers is that this combination provides opportunities – often taken advantage of – for the officer or employee to enhance his private financial interests to the detriment of the public interest. In short, the public views the situation as being ripe for abuse and assumes the abuses occur not infrequently. The Commission makes the foregoing statement because the foregoing perceptions have been expressed by the public to members of this Commission. When the Commission has responded that no City officer or employee with enforcement power plus a license has been charged with a violation of any standard of conduct, the stock response of the member of the public has been to point out that absence of such charge is no proof such activity is absent. The Commission's position is that he, as a City officer with enforcement powers, is in a particularly sensitive position in terms of potential for abuse of standards of conduct. Consequently, he should avoid any condition which may place him in a compromising position, a position incompatible with discharge of his duties or in which the opportunity for conflict of interest or appearance of conflict may exist. Such a situation is the combination of enforcement power plus possession of a real estate salesman's or broker's license.

To continue – another consideration: The investigator's retention of an outside activity which involves solicitation, such as real estate sales, may involve the use of City time, equipment, or material. City time may be involved should he attempt to contact an active client during working hours or do real property financial calculations during working hours. City equipment may be involved because he may utilize the telephone on his desk to contact a client. As to materials, a pen, pencil, or pad of paper purchased with City funds may be utilized by him for his real estate transactions. The use of the foregoing time, equipment or materials by him may be a violation of Section 11-102.3, RCH, relating to incompatibility. Such use may be in violation on the grounds that his judgment was impaired because he neglected his duty for his real estate activity, or his real estate activity caused him to improperly discharge his duties.

Another section which may be applicable because of his license is Section 6-1.2(2), ROH, relating to official action by an officer or employee. This section provides that no officer or employee shall acquire a financial interest in a business enterprise which any officer or employee has reason to believe may be directly involved in official action to be taken by him. The language, "acquire a financial interest in a business enterprise," is applicable to his license.

The language, "official action," is applicable to his authority such as the issuance of a citation for violation of a law. The language, "which any officer or employee has reason to believe will come before an officer or employee for official action," is applicable to the applicant's being his real estate client. Therefore, since an applicant for a license may turn out to be his real estate client, he has a "financial interest in a business enterprise which may come before him for official action." Consequently, he may be alleged to have acquired a financial interest in a business enterprise which he has reason to believe may come before him for his official action – specifically, enforcement of the laws and citation of owners of licensed property or the owners' employees who may violate such laws.

Other standards of conduct which may be applicable, if the appropriate facts are present, are Sections 11-102.2 and 11-104, RCH. Section 11-102.2, RCH, may apply if he divulges confidential information to an owner of licensed property who is also his real estate client. Section 11-104, RCH, may apply when he makes a decision to issue a citation against the owner or an employee who is not his real estate client, and he does not issue a violation against the owner or employee who is also his real estate client. Under this example, he is not treating non-clients fairly and equally. In both instances, these standards of conduct are applicable regardless of whether or not he has a license and whether the owner is or is not his active real estate client. However, because of his license, the public's perception is that he is more likely than not to disclose confidential information and not to issue a citation to the owner of licensed property who is also his real estate client.

To summarize, the Commission concludes that because the employee's license is a business or financial interest and his enforcement power is his official duty, Section 11-102.3, RCH, and Section 6-1.2(2), ROH, may be applicable in his case. Section 11-102.3, RCH, may be applicable because having a license may be incompatible with his official duty because the situation resulting from having such license may tend to impair his judgment in carrying out such official duty. The incompatibility of such interests is reflected in the hypothetical situations related herein. Section 6-1.2(2), ROH, may apply because he has a business interest which may come before him for official action. The business interest is his license. Such interest may come before him for official action when he has to issue a citation to an active real estate client who is also the owner of licensed property. The official action is represented by his power to issue a citation.

Two additional standard of conduct provisions may apply if the facts warrant such application. The essential facts concern disclosure of confidential information to a real estate client who is an owner of licensed property, thereby enhancing his ability to close a real estate transaction with such client. In the foregoing example, Section 11-104, RCH, may be applicable because he is not treating all owners of licensed property fairly and equally. That is, if the owner is his real estate client, he may disclose to him such confidential information as may prove beneficial to his business interests, while neglecting to disclose such information to owners who are not his real estate clients. Such selective enforcement would be contrary to Section 11-104, RCH.

The Commission's objective is to prevent the hypothetical situations from becoming actual. Moreover, its recommendation to him and his acceptance of same should enhance the

public's confidence in his integrity and that of his fellow investigators which, in turn, enhance the public's confidence in City government.¹ Such objective is expressly prescribed in Section 11-101, RCH, as follows:

Section 11-101. Declaration of Policy -

Elected and appointed officers and employees shall demonstrate by their example the highest standards of ethical conduct, to the end that the public may justifiably have trust and confidence in the integrity of government. They, as agents of public purpose, shall hold their offices or positions for the benefit of the public, shall recognize that the public interest is their primary concern, and shall faithfully discharge the duties of their offices regardless of personal considerations.

In view of the foregoing, the Commission recommends that he inactivate his license so that the key element which may cause him to violate a standard of conduct is removed.² The Commission is confident that he will accept its recommendation, despite the sentiments expressed in his letter to the Commission. Inasmuch as he has testified that he has not sold any real estate since (date), inactivation of his license presumably will not result in a loss of income. Moreover, if he decides to retain his license, he would be in an enviable position because he can retire as an investigator. The Commission mentions retirement because he testified that he meets the requirements with respect to number of years of service and age for retirement.

The Commission appreciates his cooperation in appearing before, and responding to the questions posed by, the members of the Commission. The Commission requests that his decision, whether or not to accept its recommendation, be filed in writing with this Commission within fifteen (15) days after the date noted on this advisory opinion. This deadline has been established by Section 3-2.4(e), ROH.

DATED: March 7, 1983.

ETHICS COMMISSION
Mazeppa K. Costa, Chair

¹ There were two, much publicized cases involving violations of standards of conduct by a State employee and a group of Board of Water Supply employees which the Commission believes affected the public's confidence in government. These two cases are summarized in Exhibit A, Section I, which is attached hereto.

² This Commission has been consistently recommending inactivation of a real estate salesman's or broker's license or recommending denial to obtain a real estate salesman's or broker's license whenever an employee has enforcement powers, or under other circumstances which may be incompatible with the duties of the employee. See opinion numbers listed in Exhibit A, Section 2, which is attached hereto.

EXHIBIT A
SECTION 1

By law, hearings conducted by either the State or City Ethics Commissions are closed to the news media unless the subject officer or employee request an open hearing. However, there were two cases which received much publicity in the media. The City Ethics Commission [Commission] surmises that these cases were leaked to the news media by others, rather than the Commission, but the Commission presents these cases as examples of conflict of interest cases which shake the confidence of the public in the integrity of State and City governments.

A. The case involving the State employee is where he received a car as a gift from a car rental agency. His duty was to administer the parking areas at the Honolulu International Airport assigned to car rental agencies. The car rental agency was a tenant at the Honolulu International Airport with an assigned parking area. In this case, the car, as a gift, was intended to influence the State employee's actions concerning the parking situation affecting car rental agencies. The State employee was disciplined for his infraction of a State standard of conduct.

B. This case involved Board of Water Supply employees who were employed by a private engineer who had a contract to do projects for the Board of Water Supply. These employees did survey, drafting and engineering work for the private engineer. The same survey, drafting or engineering work was reviewed and recommended for approval to their superiors by the same employees who did the original work for the private engineer. The Board of Water Supply employees failed to file their disclosures of outside employment and had a financial interest which was in conflict with their duties as Board of Water Supply employees. They were all disciplined for their infraction of City standards of conduct.

EXHIBIT A
SECTION 2

List of prior opinions in which the City Ethics Commission recommended either inactivation of a real estate license or advised against obtaining a real estate license. These opinions are in the City Ethics Commission's Advisory Opinion Pamphlet (9th Ed. 1980):

Advisory Opinion Number	Date of Issuance	Position of Officer or Employee
1	June 7, 1967	Liquor Investigator
2	May 7, 1969	City Planning Clerk
12	June 26, 1970	Building Inspector Aide
13	February 1, 1971	Deputy Chief of Police

19	September 21, 1971	Housing Programs Administrator
47	October 30, 1975	Civil Engineer V
53	April 15, 1976	Civil Engineer I
54	April 15, 1967	Deputy Corporation Counsel
57	May 11, 1976	Architectural Drafting Technician
60	June 29, 1976	Elected Official
66	January 18, 1977	Civil Engineer
78	February 14, 1978	Fire Captain
83	September 28, 1978	Police Officer
86	November 15, 1978	Rehabilitation Loan Specialist
93	October 24, 1980	Police Officer
94	November 24, 1980	Landscape Architect