

**ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU**



ADVISORY OPINION NO. 118

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

The Ethics Commission [Commission] is of the opinion that the investigator's license should be inactivated.

The Commission considers the following facts, obtained from the investigator's testimony, to be germane to the applicable standard of conduct provisions 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 recommendation herein:

1. The employee is an investigator and heads a section of a City agency. He was formerly employed by another City agency for a number of years.
2. His primary duties germane to this opinion are:
 - a) Assignment of staff to investigate applicants for licenses;
 - b) Review of reports submitted by staff regarding applicants for licenses; and
 - c) Attendance at agency meetings to participate in matters concerning licensing.
3. Information available to him which is germane to this opinion includes:
 - a) Financial worth of applicants for licenses, including any other business interests of applicants;
 - b) Economic relationships of applicants for licenses with other business entities; e.g., directorships of other corporations; and
 - c) Existence of any criminal or police record of an applicant.
4. He has the authority to enforce any State statutes relative to the rules and regulations of the agency [laws]. He has the duty to enforce the laws when he witnesses a violation of a law by a licensee.

5. He obtained a real estate salesman's license on or about (date), and is associated with ABC Properties, Inc., a real estate broker.
6. Since he obtained his license, he has not closed any real property transactions and has not, therefore, enjoyed any income from real estate sales. The reason he did not close any real estate transactions is because his license was inactive.
7. Within the last two or three years, he reactivated his license so that he could qualify to take the real estate broker's licensing examination. To qualify for the broker's examination, he is also required to close ten real estate transactions within the two-year period.
8. Application for a license requires a criminal abstract, if any is applicable, on any person involved in such application. By State law, such information is confidential.
9. The processing of applications follows the first-in, first-processed rule, unless there are extenuating circumstances surrounding a particular application.

The Commission is not impugning the investigator's integrity or character, nor that of any other member of the staff 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 has 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 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 an employee shall not have a business or financial interest which is 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 having a license may place the investigator in a position in which he would have to decide between acting on behalf of

the public's interest to enforce the law or the shirking of such duty because of his business or financial interest 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. Among the real property listed for sale by the employee's broker is business property with a vacant building. "A," who is looking for business property, sees the listing, and the employee is given the opportunity to sell the property to him if he can. Negotiations have come to a state where "A" is almost ready to sign the DROA contract. "A" advises the employee that he is waiting for some cash and as soon as he gets it, he will execute the contract. In his office, as the employee thumbs through applications for licenses, he finds that one of the applicants is "A". He calls "A" to verify whether he has filed an application with the agency. "A" gives him an affirmative answer and adds that he would like to get the license before he executes the DROA contract. The employee knows that a license can be withheld until all requirements are met. He is anxious to make the sale, and he processes "A's" application ahead of others. He also urges his staff to expedite the investigations and submit a report as soon as possible. In doing so, he takes "A's" application out of turn and utilizes his supervisory power to have his staff expedite the investigation and report.
2. The employee's staff investigation of an applicant reveals that the applicant, who is president of a corporation, has a felony conviction record. The same investigation reveals information regarding the financial worth of the applicant. His criminal record results in automatic denial of the license. The employee contacts the applicant by phone during business hours and advises him that he cannot obtain a license because of his felony criminal record. He advises him further that he can name other individuals as officers of the corporation and that he can still remain a principal stockholder in the corporation. The employee's decision to give this advice is based on his desire to make a lucrative commission. Because of his knowledge of the applicant's financial worth, he decides to do him a favor and then solicit the sale of real property listed under his broker's name. Based on the employee's advice, the applicant becomes an indirect owner – that is, he places large blocks of stock in his child's name. The applicant, however, remains the real power in the corporation, which now has the way cleared for getting the license. Because of the favor the employee has done the applicant, he has perhaps been able to close a real property transaction with him; but whether he does or not, his duty to the public has been compromised. By advising the applicant as he did, he permitted an individual with a felony criminal record to obtain a license. This is contrary to the policy established by the State Legislature's enactment of the laws to prevent criminal elements from obtaining a license.

Note that in both hypothetical situations, the employee's license caused an impairment of his judgment or a failure to properly carry out his duties as the primary investigator. In other words, he took advantage of his official position as the primary investigator "to earn, or try to earn, a lucrative commission. In short, as stated in the rule of law quoted hereinbefore, he did expose himself to the temptation of acting in a manner other than in the best interests of the public.

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 statements 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 the investigator, 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 a violation on the grounds that his judgment as 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 the investigator's 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 an officer or employee. 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, such as his review of applications for licenses and submitting a report to the agency.

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 the employee divulges confidential information which is detrimental to the applicant and which is to remain confidential until it is filed with the agency. As to Section 11-104, RCH, relating to fair and equal treatment, an allegation may be made that he may have violated this section when he processed the application of his real estate client in the first hypothetical situation ahead of other applications which he filed before the subject application. Such allegation is based on the agency policy of processing applications for licenses based on the first-filed, first-processed rule. Moreover, there is no necessity to have a business or financial interest to violate these sections.

To summarize, the Commission concludes that because the investigator'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 review applications and submit reports and recommendations to the agency involving license applicants who are active or potential real estate clients.

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 so that such client would receive a license, 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 applicants fairly and equally. That is, if the applicant is his real estate client, he may process his application for a license before other applications which he filed before that of his real estate client. 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, the Commission's recommendation to the investigator 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 the investigator inactivate his license so that the key element which may cause him to violate a standard of conduct is removed.² Although he testified that he activated his license because he wanted to qualify for the broker's examination, the Commission has been informed by the Real Estate Commission that he would have to close a minimum of ten real estate transactions involving different classes of zoned real property. The Commission believes that he may be better able to attain such objective by reactivating his license after his retirement when he can devote full time to his real estate activities.

The Commission appreciates the investigator's cooperation in appearing before, and responding to the questions posed by its members. The Commission requests that his decision, whether or not to accept the recommendation, be filed in writing 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

MAZEPPA K. COSTA
Chair, Ethics Commission

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