

**ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU**



ADVISORY OPINION NO. 119

The question is whether the retention of an active real estate license by a member of the Honolulu Police Department would reasonably tend to create a conflict with the public interest. The Ethics Commission [Commission] is of the opinion that it does.

The Commission considered the following facts, obtained from the testimony of the police officer, 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 recommendation herein:

1. The employee is an officer in the Honolulu Police Department and is required to enforce all laws of the State of Hawaii, the City and County of Honolulu, and any State or City agency rules and regulations having the effect of law.
2. He is an officer in a real estate corporation which was incorporated by his spouse who is a real estate broker [his realty corporation]. He was advised by his attorney that because his spouse is a principal broker of another real estate firm, another officer of the corporation should obtain a real estate license and should subsequently become a real estate broker. He has kept his license active in order to qualify to take the examination for a real estate broker's license.
3. The Real Estate Commission's rules provide that to qualify to take the examination for a real estate broker's license, an applicant must first obtain a real estate salesman's license, which shall be active for at least two years, and the applicant must have completed at least ten real estate transactions within such two-year period. To meet the foregoing requirements, he has had an active real estate salesman's license for the past three years.
4. He did not file a disclosure of interest statement when he became an officer of a real estate corporation, nor did he do so when he obtained his license.
5. There is a provision in the labor contract negotiated between the State of Hawaii Organization of Police Officers (SHOPO) and the City that states that a police officer will be permitted to engage in outside employment activity so long as the Ethics Commission has not rendered an adverse opinion regarding such outside employment. The Commission has issued advisory opinions to the Chief of Police stating that police officers should not be permitted to have real estate licenses.

6. The police officer has testified that he attends real estate "open house" activities primarily for security reasons. Also, he testified that without the license he would not be able to discuss real estate matters. Although he is an officer of a real estate corporation, he receives no salary or stipend. However, any income made by the real estate corporation also inures to his benefit because it is income generated by his realty corporation. The Commission does not seek to impugn the officer's integrity or character, nor that of any other member of the Honolulu Police Department with the illustrations and discussion related herein. The Commission's conclusion is bottomed on the rule of law in 65 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 this case is whether the duties of a police officer can be compromised because of his license and his business and financial interests in his realty corporation. The Commission is of the opinion that the police officer's duties can be compromised because of his license and realty corporation. Section 11-102.3, RCH, relating to incompatibility of a business or financial interest in relation to an officer's 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 police officer may 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 a police officer.

The Commission can relate numerous hypothetical situations in which the officer's having a license may place him in a position of having to decide between a course of action which would be responsive to the public's interest (that of enforcing all laws, which under certain circumstances could mean arresting his real estate client for a law violation) or, on the other hand, a course of action that would, instead, be responsive to his private interest. 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) a police officer is able to target a particular group for his clientele; and (4) he has discretionary authority in the issuance of citations. The hypothetical situations are:

1. The corporation has a North Shore residential property for sale. The officer has a client interested in inspecting the premises to purchase same if it meets his specifications. However, when he takes his client out to the subject real property, he finds there is considerable marijuana growing in the backyard. Under such circumstances, would he arrest the owners of the real property or ignore the criminal violation in an effort to close the real estate transaction?
2. The officer's real estate corporation lists a condominium for sale in the Waikiki district. He has a recent arrival from the mainland as his client who is interested in buying a condominium apartment. He takes his client to inspect the condominium. In the course of his inspection, he stumbles onto a cache of small arms, rifles, and machine guns in a cabinet underneath the kitchen sink. Under such circumstances, would he arrest the owner of the apartment or ignore the violation in the hope of being able to close the real estate transaction?

Note that in both hypothetical situations the police officer is forced to make a choice between enforcing the law or succumbing to his realty corporation interests. Under such circumstances, he is in situations incompatible with his responsibility to enforce the law.

The police officer 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 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 police officer'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 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 the officer's license is Section 6-1.2, ROH, relating to official action by an officer or employee. In his case, an example may arise whenever he issues a traffic citation for violation of the Traffic Code or arrests a person for violating any criminal law. The business or financial interest he has acquired is his license and realty corporation. In the course of his police work he may issue a traffic citation to a real estate client or arrest a real estate client for violation of any criminal law. This phase may be considered as a matter coming before him for official action. The other phase of this section is represented by his license which is the "acquired" business or financial interest.

Other standards of conduct which may be applicable, if the appropriate facts are present, are Sections 11-102.2 and 11-104, RCH. In effect, Section 11-102.2, RCH, may apply if the officer divulges confidential information to a real estate client who is about to be snared in a "hukilau" scam but for his divulging such confidential information. Section 11-104, RCH, may become applicable when he makes a decision whether or not to issue a traffic citation or arrests a person whether he is or is not his real estate client. That is, he is not treating residents of the City who are not his real estate clients fairly and equally because of his selective enforcement.

With respect to the police officer's duties as an officer of his realty corporation, he has the fiduciary duty to enhance the equity of the corporation based on the profitability of the corporation. This means generating more sales for his real estate corporation or adopting policies to enhance his corporate assets. This fiduciary relationship may be contrary to his duties as a police officer. Thus, his status in his realty corporation may be incompatible with his enforcement power as a police officer.

As to the officer's license for his realty corporation, the Commission has been advised that a real estate salesman's license is insufficient to meet requirements of a real estate corporation which holds itself out as a real estate brokerage. Such corporation must have a real estate broker as an officer to qualify as a realty corporation. Consequently, the Commission believes that a real estate salesman's license does not justify retention of his active sales license. The Commission understands that the officer's license was obtained on advice of legal counsel. However, based on a statement made by a spokesperson for the Real Estate Commission for the State of Hawaii, he would have to be a broker and not a salesman for his realty corporation. Thus, the Commission believes there is no valid reason for him to have an active salesman's license for purposes of his realty corporation.

To summarize, the Commission concludes that because the license and real estate corporation are business or financial interests, Section 11-102.3, RCB, and Section 11-102.3,

RCB, may be applicable because having a license or a business interest such as a real estate corporation may be incompatible with the police officer's official duty because the situation resulting from having such license may tend to impair his judgment in carrying out his duties as a police officer. The incompatibility of such interests is reflected in the hypothetical situations related herein. Section 6-1.2(2), ROB, may apply because he has a business or financial interest which may come before him for official action. The business or financial interest may come before him for official action when he has to issue a traffic citation to, or arrest, an active real estate client. The official action is represented by his power to issue a traffic citation or effect an arrest.

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 not be arrested, thereby enhancing his ability to close a real estate transaction with such client. In the foregoing example, Section 11-104, RCH, may also be applicable because the officer is not treating all residents of this City fairly and equally. That is, if the resident is his real estate client, he may decide not to issue a traffic citation or effect an arrest but issue a traffic citation or effect an arrest of a resident who is not his real estate client.

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 The Commission appreciates the officer's cooperation in appearing before, and responding to the questions posed by the members. The Commission requests that his decision, whether or not to accept this recommendation, be filed in writing within fifteen (15) days after

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.

the date noted on this advisory opinion. This deadline has been established by Section 3-2-4(e), ROH.

Date: March 7, 1983

MAZEPPA K. COSTA
Chair, Ethics Commission

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