

OPINION NO. 199

The head of a division of one of the departments of the State requested us to reconsider Commission Opinion No. 171. In Opinion No. 171, a former state employee with regulatory and disease control responsibilities was advised that he would be in probable violation of HRS §84-14 if he were to accept as private clients individuals whom he had to regulate in his official capacity.

In connection with the employee's request for this advisory opinion, we met with him and with representatives of a professional association and a private practitioner. At another meeting, we met with the representative of the industry involved in this matter.

HRS §84-14(a) (Supp. 1973) states, in part, the following:

No employee shall take any official action directly affecting: (1) A business or other undertaking in which he has a substantial financial interest; or (2) A private undertaking in which he is engaged as legal counsel, advisory, consultant, representative, or other agency capacity

Then, HRS §84-14(b) states:

No employee shall acquire financial interests in any business or other undertaking which he has reason to believe may be directly involved in official action to be taken by him.

In Commission Opinion No. 32, we stated:

There is a more basic conflict of interests problem in this situation. The state practitioner who renders treatment for a private client in his state capacity has the private interest of keeping his client satisfied to assure that his client will continue to retain him. However, in this disease control work, the public interest is best served by impartial and stringent enforcement of disease control measures. In deciding upon the measures to be taken, some of which may be extreme, the state practitioner should be entirely free of concern for his private interests in the matter.

We said that the Commission had recognized only two exceptions to its finding that a state practitioner with regulatory responsibilities was in a conflict of interest situation if he were to accept as private clients persons over whom he would have to regulate or exercise official authority in his state capacity. These exceptions were (1) situations where it is, because of lack of work, impossible to support a private practitioner and (2) situations of emergency where a private practitioner is away or unavailable.

Then, in Opinion No. 171, we stated the following:

During the past four years, there has been no substantial decrease in the dual practice system. In fact, in some situations we have noted private practice grosses two to three times the state salary of a practitioner. From these statistics, we found that the "lack of work" exception should no longer be applicable; these practitioners have been so advised. Therefore, we likewise advised this employee that he would be in probable violation of HRS §84-14 if he were to accept as private clients individuals whom he must regulate in his official capacity. The only time when a violation may be excusable would be in a case of a true emergency where another private practitioner is away or not available. Of course, this employee was allowed to accept as private clients

individuals where there was little likelihood that he would have to exercise official action over such clients.

We reviewed Opinions Nos. 32 and 171 and carefully considered the information that the employee and the others whom we met with provided to us. We then reaffirmed the principle that was stated in Opinion No. 32 that a state practitioner with regulatory responsibilities should not accept as private clients persons over whom he would have to regulate or exercise official authority in his state capacity. Also, it was still our opinion, as stated in Opinion No. 171, that the "lack of work" exception should no longer be applicable.

While we reaffirmed the general principle that was stated in Opinion No. 32, we recognized that it might be impossible for the employee's department to carry out its regulatory responsibilities or to provide the services that it felt were necessary on the island in question if this principle were followed. Thus, we said that we would allow an exception to the general principle that a state practitioner with regulatory responsibilities should not accept certain private clients when the department made a determination that there was no practical way by which it could carry out its state responsibilities and also follow this principle.

With respect to the instant situation, our opinion meant that the employee's department, and not the Ethics Commission, had the primary responsibility to explore the various ways by which the department could carry out its responsibilities on the island in question. The alternatives included having a position on a half-time basis on that island and on a half-time basis on another; flying a state practitioner from the central unit to the island in question as needed; having private practitioners under contract on a piece basis; or allowing the state practitioner on the island in question to have a private practice. We stated that if the department should consider the last alternative, it must conclude that as a practical matter there was no other viable way to carry out its responsibilities.

Dated: Honolulu, Hawaii, December 5, 1974.

STATE ETHICS COMMISSION
Gwendolyn B. Bailey, Chairman
Vernon F.L. Char, Vice Chairman
Audrey P. Bliss, Commissioner

Note: Commissioner Walters K. Eli was excused from the meeting at which this opinion was considered. There was one vacancy on the Commission.