

OPINION NO. 232

An employee of a state agency requested an advisory opinion as to possible conflicts of interest on the part of state practitioners working within an area served by the agency. He asked us three distinct questions:

1. Was one of the practitioners, a director of one of the agency's facilities, in violation of the state ethics code by virtue of his employment as a practitioner with a private affiliate under contract to the agency?

2. May a full-time state practitioner see private clients during the lunch hour?

3. May state practitioners use state facilities to service private clients?

1. The state practitioner was a director of a facility participating in a program of the agency. His contract with the State ran from July 1, 1975, to June 30, 1976. However, he began work with the facility in May of 1974. He was originally a full-time employee; however, at his request, his contract was changed to an 80 per cent time arrangement. His responsibilities to his facility were quite broad and included consultation and community education; administration; and research and demonstration; he also provided case and program consultations with agencies and individuals as requested; participated in planning and execution of in-service and external training for other agencies; and made visits to affiliated and other agencies. Shortly after he began his association with the facility, he made the judgment that his state salary would be inadequate for his family's needs. He then consulted the head of his agency to discuss the possibilities of additional part-time work. The head of the agency indicated that he must avoid conflict with his state duties and must not deal with clients residing in the agency's catchment area. He then entered into discussions with the staffs of several private agencies and finally accepted an offer made to him by one of them. He worked as a consultant to that agency on a 20 per cent time basis. His responsibilities included making evaluations on all clients and providing program consultation to the program director of the agency and administrative and program consultation to the administrative staff. His employment began on December 1, 1974. His time at this agency consisted of two hours each day between 12:00 noon and 2 o'clock p.m., though there appeared to be some variation in the hours that he worked.

Both his state facility and the private agency participated in a program of the state agency. The state facility also served other needs of the agency.

The written agreement between the state agency and the affiliate agency ran from March 1, 1975, through April 30, 1976, and was renewable for additional periods of six months upon agreement of the parties; either party could terminate the agreement upon 30 days' notice.

Because the private affiliate was located within the catchment area of the state program, the state practitioner exercised responsibilities toward the private affiliate by providing direct services to those of its clients who might be in need of them. The director's state facility also saw clients who might be appropriate candidates for referral to the private affiliate. In addition, clients from the private affiliate were sometimes referred to the state facility and the state practitioner would often be the referring agent. While he had no specific decisional responsibility with respect to contracts between affiliate agencies and the program, he was a member of the administrative staff which conferred on program issues on a weekly basis. His supervisor indicated that as a

member of the administrative staff of the state program it was expected that he would give input on the performance of affiliate agencies and would make recommendations as to whether or not an agency should be retained in the program.

The Commission held that the practitioner's services to the private affiliate were in violation of the state ethics code.

HRS §84-14(b) provides that:

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.

Under HRS §84-3(6) a "financial interest" means an interest held by an individual which is an employment. HRS §84-3(7) defines "official action" to mean "a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." The state practitioner's employment relationship with the private affiliate gave him a financial interest in the organization. His position description indicated that in his role as director of the state facility he exercised a broad range of responsibility and authority. To individual clients he provided clinical services and he also made referrals of clients to other agencies, including the private affiliate. He was also authorized to turn clients away from the facility and thus deny them access to it. Discretion is generally defined as individual choice or judgment or a power of decision, while authority implies the power to influence or command thought, opinion, or behavior. The employee's position satisfied all these criteria. In Opinion No. 95 we found that the giving of examinations and the act of grading on the part of teachers constitute official action. The exercise of responsibility was at least as broad in this case and, therefore, we found that he took official action in the performance of services to the clients of the state facility. Opinion No. 154 contained dicta that might be interpreted as holding that certain practitioners do not exercise official authority. We overruled that portion of that opinion. While it is clear that even under the reasoning of that case this employee would have been found to have exercised discretionary authority, we now believe that the practitioners in that case also exercised the kind of authority that constitutes official action.

We found that the employee also exercised official authority with respect to the private affiliate itself as a member of the administrative staff of the state program. While retention or termination of a particular agency's contract with the program was not a decision he was empowered to make, he did have a recommendatory function as a member of the administrative staff, and that was sufficient to constitute "official authority" under the definition of HRS §84-3(8).

The employee had occupied his position with the state facility long enough to have been aware of the fact that some clients of the private affiliate would be referred to his state facility and that the state facility would refer some of its clients to the private affiliate. Indeed, he indicated to the Commission staff that this in fact did occur. We also took note of his superior's advice that he not counsel residents of the catchment area and his superior's assumption that his role at the private facility was solely a consultative one. Accordingly, we found that, in violation of HRS §84-14(b), he had acquired a financial interest in a business which he had reason to believe would be directly involved in official action to be taken by him.

We were particularly concerned by the questionable posture his acceptance of the position at the private affiliate placed him in as a number of the administrative staff of the state program. It appeared that he might have significant input regarding the retention of the private affiliate in the program. As he had indicated that the income from his private position was important to the maintenance of his family, termination of the contract with the affiliate would seemingly have been of considerable concern to him. Any input he would have had into such a decision could not reasonably have been made solely on the merits of the affiliate's program. We were concerned by the employee's apparent insensitivity to this problem, particularly in the light of his position as director of the state facility. His effectiveness as a public employee was compromised by his actions in this case.

We stated that the employee should sever his relationship with the private affiliate as soon as feasible. We recognized that a reasonable time would be required for the private affiliate to find a replacement.

2. It was the Commission's opinion that so long as activities conducted during the employee's lunch hour did not interfere or conflict with the performance of his state duties, this part of the day was not susceptible to control by the State. Accordingly, we held that a state practitioner may see private clients during his lunch hour.

3. HRS §84-13 prohibits the use of "state time, equipment or other facilities for private business purposes." Accordingly, we stated that it was not permissible for a state practitioner to use state offices or any other state facilities to service private clients.

Dated: Honolulu, Hawaii, October 3, 1975.

STATE ETHICS COMMISSION
Gwendolyn B. Bailey, Vice Chairman
Audrey P. Bliss, Commissioner
Paul C.T. Loo, Commissioner
I.B. Peterson, Commissioner

Note: Chairman Vernon F.L. Char was excused from the meeting at which this opinion was considered.