

OPINION NO. 243

A state employee with regulatory and disease control responsibilities asked us to review a private business relationship that he had personally had with a certain corporation.

His state responsibilities included planning, implementing, and supervising disease control programs; investigating disease outbreaks; and inspecting private businesses for compliance with accepted sanitary practices.

He was the 100 per cent owner of a private business in the area of his state work. In January 1974, he began providing private services to the subject company. The general manager of the company solicited him to do this work. Between April 1974 and December 16, 1975, he received \$4,297.04 in fees for consultation work of a private nature. In his state capacity, he had regulatory responsibilities with respect to this company and provided regulatory services to the company at no charge. The company had received substantial sums in loans from the State.

The employee informed us that he had terminated his private business relationship with the company. Nevertheless, he asked us to review his previous business relationship with the company. Because we believed that an opinion reviewing this relationship would have precedential value, we proceeded to issue an advisory opinion to him.

We found that HRS §84-14(a) and (b) were relevant to this case. HRS §84-14(a) (Supp. 1975) 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, advisor, consultant, representative, or other agency capacity

Then, HRS §84-14(b) (Supp. 1975) 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.

The Commission recognized only two exceptions to its finding that a state practitioner with regulatory responsibilities is in a conflict of interest situation if he accepts as private clients persons whom he regulates 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.

Finally, in Opinion No. 199, we reviewed Opinion Nos. 32 and 171 and 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 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, in Opinion No. 199, that in certain cases it might be impossible for a department to carry out its regulatory responsibilities or to provide the services that it felt were necessary if this general principle were followed. Therefore, in Opinion No. 199 we stated 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 makes a determination that there is no practical way by which it can carry out its state responsibilities and also follow this principle.

Following the issuance of Opinion No. 199, we were informed that the department employing this practitioner, at a meeting on January 29, 1975, adopted a five-year plan to phase out its "dual capacity policy." Under this plan, at the end of the adjustment period, a deputy state practitioner, in accordance with Opinion No. 32, would be prohibited from accepting private clients with respect to whom he has regulatory responsibilities in his state capacity.

In connection with the practitioner's request for an advisory opinion, we met with officials of the department to discuss its five-year plan to phase out its dual capacity policy. We were informed that most of the deputy state practitioners had only limited practices; this practitioner's private practice was the exception.

Based on the facts presented at the meeting with the department officials and facts previously gathered by the Commission, we concluded that the department's dual capacity policy should be terminated prior to January 29, 1980, the date adopted by the department. We believed that a three-year phase out period was reasonable. Therefore, after January 29, 1978, all deputy

state practitioners with the department would have to comply with Opinion No. 32. We stated that we would notify the department of this conclusion.

Accordingly, we stated that we would not proceed to find that his previous business relationship with the company was in violation of the ethics law. We believed that factors with regard to regulatory services on the neighbor islands justified this conclusion despite the fact that the dual role he occupied with respect to the company created a conflict under HRS §84-14.[†]

HRS §84-13 was also relevant to this case. This section prohibits, among other things, the use of state time for private business purposes. In accordance with this restriction of HRS §84-13, a state practitioner should not do private work on state time.

The practitioner indicated that his regular state hours of work were approximately 7:00 a.m. to 11:00 a.m. and 12:00 noon to 4:00 p.m. He further indicated that he provided private services to clients either before 7:00 a.m., during his lunch hour, or after 4:00 p.m. He usually provided private services to the company that was the subject of this opinion during his Tuesday lunch hours. Based on these facts, we did not find that he had violated HRS §84-13 in connection with his previous business relationship with the company.

Finally, we noted that a policy of the department stated the following in regard to outside employment:

Outside employment is permissible so long as such activities do not result in conflict of interest, embarrassment to or criticism of the Division, or interfere with the efficient performance of official duties; except that, in extenuating circumstances due to a lack of available [practitioners] in the district, it may be necessary to provide treatment and carry on work which may be of a private nature. Under such special circumstances, a full report shall be submitted to the Ethics Commission with a copy to the [department]

We acknowledged the receipt of recent reports filed by him pursuant to this policy statement.

We thanked him for bringing this matter to our attention.

Dated: Honolulu, Hawaii, February 20, 1976.

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

Note: There were two vacancies on the Commission.

[†]The fact that the company received substantial loans from the State was not relevant to a determination of whether he might or might not provide private services to the company.