

## OPINION NO. 291

An employee asked us to determine whether his public and private employments created a conflict of interest. He was a full-time temporary employee of a department and also a licensed counselor engaged in a part-time private practice with a private clinic. The clinic had a contract with the department to provide therapy to certain persons who requested it. Although at that time the therapy was provided to the persons as a group, it had been determined that some individual therapy was needed in certain cases. The funds for the individual therapy would be provided through the above-mentioned contract. The employee also wished to know if he could accept some of the people requiring individual therapy as his private clients.

The employee stated that he was employed by the department shortly after he became an associate of the clinic and that, at the time of his hiring, the department had been aware of this association. The section of the ethics code applicable to his question was HRS §84-14(a) (Supp. 1975). It states that "[n]o employee shall take any official action directly affecting ... [a] business or other undertaking in which he has a substantial financial interest ...."

A financial interest is defined by HRS §84-3(6)(C) to include "[a]n employment, or prospective employment for which negotiations have begun." His association with the clinic was a type of employment although his hours were not set and he received income only upon seeing clients. Therefore, we noted that he had a financial interest in the clinic.

In determining whether this interest was substantial, we stated that we looked to a number of factors including, but not limited to, the amount of money he received, his financial dependence upon this interest and whether the interest was one which would have a possible influence on his actions. He stated to the staff that because of his present state position his work at the clinic was less than five hours a week. However, he emphasized the importance of maintaining his association with the clinic because should the department's program on which he was working not be funded for the upcoming fiscal year, his state employment would terminate; he would then rely upon his work at the clinic for his support. Without that association he might very well be placed in an awkward financial situation in the near future. Clearly then his association with the clinic was a substantial interest of his. Therefore, we stated that he should not take any official action in his state position that would directly affect the clinic. We indicated to him that official action is defined by the statute to include "... a decision, recommendation, approval, disapproval, or other action including inaction, which involves the use of discretionary authority."

He indicated that he was employed by the department to help develop a certain program for people confined to certain facilities in Hawaii. This program, based on one presently operating in another state, would allow these individuals to draw up a contract with the help of their counselors and with the concurrence of their facility's officials, and to present that contract to a state board. This contract would establish specific objective goals which, if followed completely by the person, would ensure that he or she would be able to leave the facility. We found that his action in setting up this program was clearly official action as defined by the statute, but we could not see a probable situation where this action would affect the private clinic. Therefore, we did not see any conflict in his accepting individual persons for counseling while the program was in its development stages.

The employee indicated, however, that once the program was established he might then serve as an advocate presenting this contract to the board and acting as a negotiator on the

confined person's behalf. In this role he might find himself in a situation where as a negotiator he would suggest to the person that he or she should add a therapy provision to his or her contract so that the board would look more favorably upon it. We noted that although the person had to agree to the provision and that this employee could not require that it be added to the contract, the employee's suggestion to the person would have great weight and would be official action.

The employee stated that any person who wanted to receive therapy as part of his or her contract must use the services provided by the department. In other words, the person could only receive therapy through a clinic that had contracted with the department to provide that service. Presently, those services were provided by the clinic with which this employee was associated. Since we found he had a substantial financial interest in that clinic, we stated that HRS §84-14(a) would prohibit him from suggesting to any person for whom he was an advocate that he or she insert a therapy provision in his or her contract if the clinic which employed him would provide those services.

Because the details of the advocate's role in the contracting process had not been established with any certainty, we were unable to foresee how often the situation would arise when this employee might, as an advocate, be called upon to take action affecting the clinic. If it was a frequent occurrence, we pointed out that his abstention would greatly hamper his effectiveness in this position. We stated that he might have to disqualify himself as an advocate for any person for whom a therapy provision would be suited so as not to disadvantage that person. Because of this uncertainty, we suggested that once the exact role of an advocate was determined, he should request a further opinion from the Commission concerning his role as an advocate.

We commended the employee for his concern for maintaining an ethical posture with regard to his two positions.

Dated: Honolulu, Hawaii, February 18, 1977.

STATE ETHICS COMMISSION  
Paul C.T. Loo, Chairman  
I.B. Peterson, Vice Chairman  
Gary B.K.T. Lee, Commissioner

Note: Commissioners Audrey P. Bliss and Dorothy K. Ching were excused from the meeting at which this opinion was considered.