

OPINION NO. 327

A teacher in a state educational institution was involved in a program whose purpose was to increase the number of practitioners in a specialized area of study. He and two other state employees were also involved with three other individuals in a private company. Because the work of this private company coincided to some extent with their state responsibilities, he had asked the Commission to determine if the ethics code would restrict their private activities.

The primary goal of their company was to provide services to a segment of the community and a resource of specialists whose emphasis would be the use and continual development of techniques especially suitable for this group. The primary emphasis of the organization was to provide research and not individual services. The organization would accept certain state referrals if the Commission found that this was not prohibited by the statute.

Employees A and B had been among his first group of students in the program. A few members of this group came to feel that they had something to offer in this new area of service and judged that they would be able to work together compatibly. Therefore, prior to their graduating from the program, six of them began discussing the possibility of forming their own company. Preliminary plans were made prior to their graduation and ultimately the organization was formally begun in May of 1976. Employees A and B became involved in the organization before they actually took on state employment.

We discussed the application of the statute to each of the state employees individually.

As to the teacher who had requested the opinion, the relevant section of the statute was found to be HRS §84-14(b) which prohibits an employee from acquiring interests in businesses which are likely to be directly involved in action the employee is required to take in his or her state capacity. As a teacher in the state educational system, he did not make referrals to agencies. Accordingly, we could see very little possibility that he would take action in his state capacity that was likely to directly involve the company. Therefore, his acquisition of this interest had been proper and we did not see how his state position could advantage his private company in any significant way.

In employee A's state capacity, he provided services to a segment of the community that would not be served by either his own company or its competitors. Because he was involved in the company prior to beginning state employment, the section of the statute applicable to his situation was HRS §84-14(a). This section provides that an employee may not take official action which directly affects a business in which the employee holds a substantial financial interest. While employee A held a substantial financial interest in the company, the nature of his work was such that he was not in a position to take action in a state capacity which would directly affect the private company. Therefore, he had not been in violation of the statute in acquiring this interest; nor did we see any need for him to restrict either his state or private activities.

Employee B's state position did require him to provide services to a segment of the community that might be serviced by the private business. He made referrals of people he served to private concerns that could be thought of as competitors of his business. However, those of his own clients who might require the particular services of his company were not referred to it because he provided these services personally as a part of his state function. We noted that his fellow workers might, however, be interested in making referrals to his company because it provided a

service that was not otherwise generally available. It was our understanding that only one other private company provided similar services and these were restricted to a very limited segment of the community. Further, the services provided by this company were being reduced because of budget considerations.

It was our view that employee B would not be in violation of the statute if he adhered to certain guidelines. Again, the section of the statute applicable to him was HRS §84-14(a) which we had discussed above in the matter of employee A. Because employee B held a substantial financial interest in his private company, he could not take action directly affecting the organization. For example, he was not permitted to make referrals to the company.

In the past, we had noted that while one clearly may not take action that directly and specifically affects one's own business, one may also not take action that directly affects one's competitors. It was our opinion, here, that employee B did not take such action when he made referrals to other private companies. At the time of our decision, the company was not a true competitor of other private companies in its area of business. The organization was operating on a minimal basis and was primarily engaged in research. The kinds of referrals that would be made to it would be matters that could not be sent to other companies. In reality, therefore, the company could not be viewed as a competitor of these other private concerns. Accordingly, we stated that employee B could make referrals to private companies other than his own. At the same time his fellow workers could make referrals to his company but in those cases employee B could not be involved in providing private services to persons so referred.

Additionally, all three of these employees were made aware of the requirements of HRS §84-13, the fair treatment provision of the ethics code. That section prohibits an employee from using state position to grant an unwarranted advantage to himself or others. This meant that they should not take any action in their state capacities which would unwarrantedly favor their private company. This provision had most direct application to employee B because his agency might make referrals to the company. He was advised to keep his private interest in the company totally separate from his state office.

We had discussed this matter with employee B's supervisor. It was his view that this private business interest would cause no difficulties in the department. He also thought that the company would provide a valuable resource for the department in its referrals and saw no direct conflict between employee B's private position and his state capacity. As we had indicated, we were in agreement with that analysis so long as the guidelines we had set forth were adhered to.

We emphasized that our opinion was based on and restricted to the facts recited in the opinion. It was not to be taken as a clearance for the company to be engaged in activities that affected or were affected by the State in a manner not set forth in the opinion. In the event of such changed circumstances the employees were advised to request additional advice from the Commission. We also indicated that we would review the status of the company with them in twelve months to determine if changes in the business called for a revision of the guidelines we had set forth.

Dated: Honolulu, Hawaii, January 16, 1978.

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

Note: Commissioner Gary B.K.T. Lee was excused from the meeting at which this opinion was considered.