

OPINION NO. 344

Three researchers associated with a particular product development program requested an opinion from the Commission.

They performed the bulk of their work at a state facility that serviced individuals in the industry that was the object of their research. The facility provided these individuals with materials to assist them in getting started in the industry. The three researchers were not actually part of the staff that was responsible for running this facility. The production and extension services provided by this facility were carried out by a separate staff. While they worked at the facility and had a relationship with the staff, they were not responsible for the production and extension services.

They had organized themselves into a company that had two primary business purposes. First of all, they were interested in getting involved in the industry they had been studying. Secondly, they wished to offer their services as consultants to producers of this and related products. Because these two pursuits involved somewhat different aspects of the ethics code we discussed them separately.

To become involved in the industry they would have to establish a business relationship with the facility where they did their research. They would, as others, enter into agreements with the facility under which they would receive material, at no cost, to start their production. Their responsibility under the agreement would be to provide the facility with certain data.

Two sections of the statute were relevant to this relationship, HRS §84-13, the fair treatment section, and HRS §84-14, the conflicts section. HRS §84-13 provides that a state employee may not use his position to grant himself an unwarranted advantage or treatment. The most important factor with respect to their becoming involved in the industry was the availability of the start-up material. The head of the facility had advised us that there had never been a waiting list for the material. Further, the facility would soon have the capacity to produce significantly more of this start-up material. Therefore, despite the fact that they had undoubtedly established a relationship with the staff of the facility we did not see that this would give them an advantage over other producers.

The conflicts section also had application to their establishment of a production facility. HRS §84-14(b) prohibits the acquisition of financial interests in businesses which are likely to be directly involved in action to be taken by the state employee. In their research activities they reviewed the data the producers furnished to the facility. They would, therefore, be reviewing data that was provided by their facility just as they reviewed all such data. However, we did not see this as directly involving their business and noted that this data was not confidential but was generally available to the public. Accordingly, while their data might be directly involved in their state capacities we did not see that their facility would be directly involved in the work they did as researchers. Nor did we see any likelihood that they would be in a position to grant to their business unwarranted advantages as they carried out their state responsibilities.

Accordingly, it was our view that they might proceed to acquire start-up material from the facility to establish their business. We did advise them that they must scrupulously guard against using their state positions to advance their private business pursuit.

Their proposed consultant services also came under the guidelines established under HRS §§84-13 and 84-14(b). As we had stated earlier, as researchers, they were not directly involved in the production and extension services provided by the state facility. Nevertheless, they had established a relationship with the employees who were assigned there and, in addition, the private producers who received material from the facility. Indeed, they had indicated that they provided free advice and consultation to those producers who stopped by their office to seek their assistance. We saw this as a necessary and logical adjunct to their research for the work they were involved with had the very practical and specific goal of enhancing production of this product in the State of Hawaii. Therefore, it would not be sensible to divorce themselves from the producers and they had not done so. The giving of this advice was to a specific part of their formal duties but it had certainly become a part of their state responsibilities.

It was our opinion, therefore, that they should not engage in a private consultant relationship with any producer that was involved or was likely to be involved with the facility. There were two aspects of such a relationship that concerned us.

First of all, if they engaged in such a consultant relationship, they would on occasion be required to tell a producer that while they were able to provide certain free advice in their state capacities there would be a point at which the producer would be required to compensate them for their services. They would be in the anomalous situation of determining for themselves the line between the free state advice they were required to give and the private advice for which they expected compensation. We saw the line between their state and private functioning here as being very ambiguous and difficult to determine. Certainly, the state employee involved should not be the one to make that determination.

Secondly, the producers who sought their advice in their state capacities were directly involved in work they did as state employees. We pointed out that the statute specifically prohibited their acquiring such persons as private clients. Accordingly, while they might engage in consultant work, that work had to be limited to those persons who were not involved with the state facility. The same rule, however, would not apply to producers of products who did not have such a relationship with this facility as there would be no possibility that these employees would take state action with respect to such persons.

It was with reluctance that we limited the outside activities of state employees. However, as we had noted in the past, the employee's primary responsibility was to the State and, where outside activities might limit or conflict with a person's state functioning, the state duties must take priority. In this case, they had an overriding responsibility to the research program they were serving. It was our view that consultant relationships between their business and persons doing business with the facility would create both in appearance and in fact a conflict between their state duties and private interests. Accordingly, we advised them to restrict their activities to the extent we had noted. They had advised us that there were other consultants available to provide consultation to those persons they might be prohibited from serving.

We recognized the fact that they had brought this matter to our attention and had discussed it candidly prior to becoming involved in their private business. This kind of forthrightness was most encouraging and we commended them for it.

Dated: Honolulu, Hawaii, August 8, 1978.

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

Note: Commissioner Gary B.K.T. Lee disqualified himself from consideration and preparation of this opinion. Commissioner Audrey P. Bliss was excused from the meeting at which this opinion was considered.