

OPINION NO. 354

We received a request for an advisory opinion from the chief of a state facility which provided a range of services to an area on one of the neighbor islands. His request concerned the propriety of one of the center's staff members participating, for a fee, in another state program.

Another department had received funding to perform tests on persons to whom the department provided services. These tests were to be quite extensive requiring around four hours of work per person tested. The department had asked private persons in the community to perform these tests but they had declined. The department had, therefore, asked this staff member to perform these tests for a fee. The staff member was agreeable to entering into a contract to do a certain number of these tests if this work would not be in conflict with his state responsibilities. Accordingly, the chief requested the Commission to review the applicability of the ethics code to this situation.

In a separate question, he also asked the Commission to comment on the propriety of his permitting certain private organizations to make use of specialized equipment as well as the state technician who operated it. He indicated that it had been his practice to permit non-profit organizations to use the equipment and the services of the technician for purposes related to the goals of the facility. Because he had been advised that, generally, state equipment may not be used for private business purposes, which would include the goals of a non-profit community oriented organization, he wished to know if his policy was in conformance with the state ethics code, and, if not, if the program could be continued under definite guidelines.

Several sections of the ethics code were applicable to a staff member performing the tests for a fee. First, HRS §84-13(2) provides that a state employee may not receive additional compensation for work that is expected of him in a state capacity. This means that if the administering of the tests could have been considered to be the responsibility of the facility, a staff member could not contract with the department to give these tests to its clients. As indicated above, the work involved in the performance of a test was quite extensive. We also understood that there was some disagreement over the suitability of these tests for making determinations about the people who were tested. For this and other reasons related to the workload of the facility, the chief advised us that the facility did not perform these tests except in unusual circumstances. The facility, therefore, would not perform these tests as part of its normal functions. While staff members did on occasion perform these tests they were done only in emergency situations and usually at a frequency of no more than one a month. The department, however, wanted 50 of these tests administered each six months.

We were persuaded that a staff member who performed these tests would not be doing work in a private capacity that he should have been doing in a state capacity. The program that was being considered here was not one that could be accomplished by the facility with its staff, funding and priorities.

The conflicts section, HRS §84-14(b), also had application here. That provision prohibits an employee from acquiring an interest in an undertaking or business which may be involved in work he does in a state capacity. The staff member was a state employee and so was covered by the ethics code. Further, his administering of these tests for a fee would constitute a financial interest in an undertaking. However, it appeared unlikely that this undertaking would be involved in the work of the facility. While it was possible that some of the persons he might test would come

to the facility for services, it appeared that the staff member would not be acquiring a client interest in the person tested but only in the program itself. In other words, the individual would not have a financial or client relationship with the person he actually tested. Payment would not come from the individual but from the governmental funding of the program that would be provided to the department. Accordingly, we found that the staff member could become involved in this program without violating the conflicts section of the code.

The contracts section, HRS §84-15(a), amended by the Legislature shortly before the decision in this case, also had application here. That section provides that a state agency may not enter into a contract with a state employee for services having a value in excess of \$1,000 unless the contract has been awarded through an open, public process. It appeared here that the kind of services being discussed were not susceptible to bidding. It also appeared that the department had sought other persons to perform these services. The statute does provide an exception for this kind of service if the state agency that desires it justifies the contract to the Commission before the contract is awarded to the state employee. Accordingly, we stated that if the department and this employee wished to enter into a contract for testing, the department would be required to notify the Commission and indicate why the contract was being awarded to this state employee. This justification was to be made available for public review and was to be in the hands of the Commission at least ten days before the contract was actually entered into.

Finally, if the staff member wished to enter into this contract, and Commission approval was given to the department to proceed on a non-bid basis, then we advised the chief of the facility that he should notify the staff member that he must keep this private endeavor separate from state time, equipment, and facilities. We did note that to the extent that the department's facilities would be made available to any person who performed these tests, the staff member might also make use of these state facilities.

The second question concerned the fair treatment section of the ethics code which, as outlined above, prohibits the use of state equipment for private business purposes. As we had indicated, the term business, for the purposes of the ethics code, includes non-profit organizations and eleemosynary community oriented organizations as well. We noted that such organizations are as capable of mismanagement as profit making entities and, in addition, competed with such organizations as well as other charitable institutions for state services and funding. Accordingly, any state action which would unwarrantedly and unfairly favor such an organization would be improper.

It was, nevertheless, our view that use of the facility's specialized equipment and state personnel that was directed towards serving the needs of the community would not constitute an unwarranted use. We did state, however, that guidelines should be established, in writing, which would be made available to groups seeking the use of the equipment to be certain that its use was properly restricted. The chief had advised us of one incident whereby equipment was made available to a group sponsoring an event that did not serve a community need. While this use had been inadvertent, such incidents were detrimental to state programs. We felt, however, that, so long as equitable and reasonable guidelines could be drawn for the use of this equipment, there was no reason why the statute should prohibit the use he had conceived for it. Such use did seem to fall within the mandate of his department and his facility.

We commended him for bringing these questions to our attention for review. We asked him to forward to us a copy of the guidelines that were developed for the use of the equipment. We also

asked that he advise us if the other state department and the staff member decided to proceed with the testing program. We emphasized that such a contract could not be valid without the approval of the Commission.

Dated: Honolulu, Hawaii, October 27, 1978.

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

Note: Commissioners Dorothy K. Ching and Gary B.K.T. Lee were excused from the meeting at which this opinion was considered.