

OPINION NO. 360

We received a request for an opinion from an employee who was assigned to a state facility to provide services as a practitioner. He had been associated with the facility for a number of years and had conducted a private, part-time practice for most of that time. In the early part of 1979 he was to take a leave of absence of twelve months. Certain clients of his at the state facility had expressed a strong desire to continue seeing him during the time he would be on leave. He wished to know if it would be acceptable for him to treat these patients for a fee during the period of his leave.

His question was dealt with quite explicitly by HRS §84-14(b), the conflicts section of the state ethics code, and by HRS §84-13(4), the fair treatment section.

The language of HRS §84-14(b) is as follows:

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.

Despite the fact that he would not be receiving a salary during the time he was on leave, he was nevertheless a state employee and, as he was aware, still received considerable benefits. In addition to the expectation that he would be able to return to his position, he would also be able to participate in the state health fund and would continue to be a member of the employees' retirement system. Accordingly, there was no question but that he continued to be a state employee for the purposes of this statute and, therefore, was subject to the ethics code. While many sections of the code had practical application only to an employee who was actively engaged in his or her duties, there were instances where the code would apply to an employee on leave; this appeared to be such a case.

The financial interests mentioned in HRS §84-14(b) included his employment by a client as a private practitioner. Secondly, there appeared to be little doubt but that once he returned to his state duties, he would continue to treat these individuals in a state capacity. Accordingly, his clients, in whom he would have a financial interest, would be involved in official action he expected to take in the future.

At the same time HRS §84-13(4) also had relevance to the situation he proposed. It provides:

No legislator or employee shall use or attempt to use his official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for himself or others; including but not limited to ... soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom he inspects or supervises in his official capacity.

A state client of this employee was someone he supervised in a state capacity. And, the fee arrangement that was settled upon, which essentially established his employment, constituted a substantial financial transaction between him and his private patient.

Accordingly, HRS §§84-14(b) and 84-13(4) seemed to decree that he could not accept as private clients those persons he had been serving in a state capacity. Nevertheless, we recognized that the services he provided were unique and that there might be justification for granting an exception to these restrictions.

First of all, he had indicated that he had neither solicited nor encouraged these persons to seek out his services while he was to be on leave. We believed this was proper and was in accord with HRS §84-13 which prohibits use of position for unwarranted advantage.

Secondly, it appeared that no more than five clients would continue to receive his services while he was on leave. While we recognized that the fees he might charge would constitute substantial income, it would not be so large as to raise any suspicion of improper conduct.

Thirdly, the individuals involved had expressed a strong desire to continue with his services. And we could appreciate the fact that strong feelings of anxiety might be caused by a person being prematurely separated from his services. It did not appear to us that he had in any way encouraged this request for his services.

Accordingly, it was our view that a limited exemption should be granted to him in this unique situation so that he might treat privately those individuals who had expressed a strong desire to continue treatment with him. However, we cautioned him that he and his fellow employees and his supervisors should scrupulously guard against offering his services to state clients. Only those individuals who expressed a strong desire or need to continue to see him during the time of his leave should be taken on as his private clients. He was also advised to be careful to charge fees that were within the reasonable limits set in his profession; we also suggested that he should encourage clients to return to a state facility for services when that seemed appropriate.

We emphasized, again, that the statute seemed to prohibit the activity he was about to engage in. Nevertheless, because we felt that this was a unique set of circumstances that would not likely be repeated in other areas, we felt that it would be in the best interests of his clients to establish this exemption in his case.

We commended him for showing a sensitivity to the questions raised here and for bringing this matter to our attention at an early time.

Dated: Honolulu, Hawaii, December 8, 1978.

STATE ETHICS COMMISSION
Paul C.T. Loo, 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. There was one vacancy on the Commission.