OPINION NO. 362

We received a request for an opinion from the director of a state department. The department was considering a decision to rent state facilities to private practitioners. The director presented six different variations of such a plan to us and asked us to determine how the ethics code would apply to them.

The basic provision which applied to all of his questions was HRS §84-13, the fair treatment section. That language provides as follows:

> 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 the following:
>
> ....
>
> (3) Using state time, equipment or other facilities for private business purposes.

We stated that, generally, HRS §84-13 will be applied when an individual employee, without the approval of the state department he serves, uses a facility to advantage either himself or another individual in a way which is clearly unfair. This, in our view, is to be differentiated from the use of state facilities that is accorded to a private individual because it serves an overall state policy. In such circumstances, the department itself has weighed the pros and cons of this policy and has made a certain program decision. Accordingly, the employee in charge of administering the program would not be in violation of the statute because the use would not be unwarranted.

Generally, a use is warranted when it results from a specific state program decision; it will be unwarranted when it results from an individual employee taking action which is clearly separate from department policy. This should not be taken as meaning that a use that results from department policy may not be in violation of the statute. The department policy, just as any individual employee's action, must be based on reasonable grounds. But where the grounds are reasonable, the advantage given to a private individual or business will not generally be considered to be unwarranted.

With that rationale in mind, we proceeded to answer the six questions he had raised in his letter.

Situation A. He wished to know if it would be ethical for the department to refer persons it served to a private practitioner who was either renting or leasing a state-owned facility.

We assumed in this situation that the department had determined that it was in the best interest of a particular program to rent space to a private practitioner so that he or she would be near the state facility and thus be readily available to provide services to it. We commented that so long as the department's policy identified a problem that was to be resolved by renting the state facility to the private practitioner, there would be no violation of the statute. We assumed further that the department's decision to refer persons to this practitioner also satisfied a state need. Accordingly, the referral of such persons, if based upon reasonable grounds, would not be unwarranted and so would not be in violation of HRS §84-13.

Situation B. In this case the agency would permit a private practitioner to use a part of a state facility without charge; in exchange the practitioner would provide services to the state agency.

As in situation A, we assumed that the department would have made the judgment that the practitioner's ready availability was beneficial to the state agency and the persons it served. It was assumed here again that the department had identified a problem that would be resolved by taking this action. If these assumptions were correct, the use of the facility by the practitioner would not be unwarranted. And, in return for the free use of the facility, he or she would be providing services to the state agency.

If it were found to be beneficial for certain persons to be treated by this practitioner then it would be appropriate for them to be referred to him. However, we felt that the practitioner should not receive referrals to any greater extent than other practitioners who sought referrals unless the persons so referred were to be given a specific service that this practitioner was uniquely qualified to provide.

Situations C & D. These situations were essentially the same as A and B but, in addition, the facility, rather than being the property of the state, was instead to be rented from a commercial enterprise.

We pointed out that when a state agency rented a facility from either a commercial enterprise or another governmental entity, the facility became the department's own for the purposes of this statute. Accordingly, the use of that facility would be as much subject to HRS §84-13 as if it were owned by the State. Accordingly, our response to situations C and D was the same as that rendered in A and B above.

Situation E. In this situation, the facility would not be given directly to a practitioner but would be awarded through competitive bidding.

We had generally taken the position that bidding processes should be used whenever possible. Accordingly, we favored the use of a bidding process in these situations if that proved to be feasible. However, we advised the director that our answer to his question continued to depend on the specific grounds that the initial decision to rent out space to a private practitioner was based upon. If, for example, the department was serving persons in a certain area such that it needed to have a practitioner available near the state facility then the policy would be appropriate and the referral of those persons who had most need of that service was also proper. However, it was still our view that this practitioner should not be referred persons who did not require the unique service that he or she was being retained to provide.

Situation F. Here we were asked if the department would be permitted to refer patients to a practitioner who had successfully bid for the use of premises that were leased, and not owned, by the State.

Our response here was the same as that given in situation E. As we had noted in our answers to situations C and D, the fact that the area to be rented was not owned by the State was of no consequence. Since it had come under the dominion of the state agency, it was a state facility for the purposes of interpreting the fair treatment section. And, further, while, as in situation E, we recognized that it would be valid and in many ways beneficial to put the use of the facility out

for bids, the persons to be referred to the successful bidder should be specifically set out in the bidding specifications so that there was an understanding of who these patients were to be. And we stated that the rationale for renting out and referring persons to this practitioner should be set out as well.

To summarize then, we ruled that a state agency might rent out facilities to a private practitioner and might make facilities available in return for certain services, but that the agency must demonstrate reasonable grounds for taking this kind of action. While we encouraged open bidding for the use of the facility, such a process would not be required so long as a reasonable procedure was used for selecting the practitioner.

The referral of persons served by the agency to the practitioner would be ethical if it were done on a fair basis. A fair basis would mean either that the practitioner was being offered the facility to specifically treat certain persons that required his or her unique services or that the referrals were made on a rotating basis to all qualified practitioners who desired this business.

Finally, if the offering of referrals was intended to encourage a practitioner to rent the facility we would have to be advised of the specific facts of that situation before we could determine how the law would apply. On its face, such an offer appeared to grant an unwarranted advantage and would be prohibited.

We cautioned the director that because the application of the code in a specific situation might differ from the general rules we had described in this opinion he should advise us when and if the department decided to put this policy into effect.

We commended him for bringing this matter to our attention for a determination. His department's cooperation with the Commission had been most encouraging to us.

Dated: Honolulu, Hawaii, December 4, 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.