OPINION NO. 383

A division chief in a state department raised a question concerning the private employment of state practitioners serving in his division.

A certain state practice required that commissions be established to judge the status of certain persons. These panels were selected on a case-by-case basis and had to consist of a certain number of practitioners. However, at least one member had to be selected from the department. Under the current practice, the state member was generally selected from among the staff of this division.

The practitioners in this division, however, had also placed their names on a list used to fill the private positions on these panels. The persons responsible for selecting the practitioners to serve on the panels had made it a practice to select the state member first so that state practitioners would not be called to serve in a private capacity before the state position had been filled. The result of this practice, however, was that a state practitioner might serve on a commission in either a state or a private capacity. When serving in a state capacity, the practitioners received no additional compensation as they were merely carrying out a state function. When, however, they served in a private capacity they were compensated.

The fair treatment section had direct application to this matter. HRS §84-13(2) specifically provides that a state employee may not be compensated for work he or she is required to perform in a state capacity. It was our view that this section prohibited a practitioner in this division from serving on these panels in a private capacity.

While the panels were divided between state and private practitioners the function of each member was the same, to judge the status of the individual before the panel. Any practitioner in the division could be called upon to serve on the panel as a state representative. In our view, the selection of the state representative did not free the other practitioners in the division for private service on the panel because they were still members of the division that provided the state representative. If, for example, the state representative selected was unable to serve, the person responsible for filling the panel would be required to return to the pool to select another state representative. A state practitioner who had been selected to fill a private slot would not be available to act as a replacement. In addition, we expected that the state member might wish, on occasion, to discuss a subject with his or her division colleagues. A division employee who had been selected for the panel as a private practitioner could not provide this resource.

It was our opinion that the division practitioner should always be available to serve in a strictly state capacity. We, therefore, held that it was improper for a state practitioner to be available to serve in both a state and private role on these panels.

Our ruling here did not apply to those state practitioners whose duties did not include sitting as state representatives. We held that they could continue to serve on these panels and could be compensated for their service.

We commended the division chief for bringing this matter to our attention.

Dated: Honolulu, Hawaii, May 21, 1979.

STATE ETHICS COMMISSION
Paul C.T. Loo, Vice Chairman
Dorothy K. Ching, Commissioner
Edith K. Kleinjans, Commissioner
Robert N. Mitcham, Commissioner

Note: Chairman Gary B.K.T. Lee disqualified himself from consideration of this opinion.