

## OPINION NO. 491

A state employee asked the Commission's advice regarding two division programs; the first was the division's referral system and the second was a new program involving the use of consultant professional staff. Both were programs that implemented the division's policy of directing clients to professionals in the private sector, so that the division would be able to concentrate its energies on providing non-compensated services.

The referral system was designed to include the guidelines set out in Advisory Opinion No. 406 because referrals were also made to employees who, in addition to their state responsibilities, had part-time private practices. At the time that advisory opinion was issued, it had been agreed that the Commission would review the system periodically. The Commission had been reviewing the referral records of each of the centers at the time of the request. Accordingly, we deferred our comments regarding the referral system, including the question of appointment of division employees as consultant professional staff, until the Commission had completed its review of the division's present referral system.

The consultant professional staff program was the division's second phase of implementing its policy of referring clients to the private sector. Consultant professional staff would be professionals who were affiliated with but not employed by state centers. As conceived, there would be two types of consultant professional staff: "consultant professional staff I," who provided direct services to clients at state facilities, and "consultant professional staff II," who provided direct services to clients at sites other than state facilities. The program worked in the following manner. First, a client seeking services contacted a center. Then, clients who were eligible for government aid or other private plan benefits and clients who were willing to accept referrals to private practitioners were referred by the center to a member of the consultant professional staff. These private practitioners would provide direct services to the clients and would bill them directly for their services. The center's involvement would be limited to the initial referral to the private practitioner, and, on occasion, if there was center staff involvement, to follow up and review the treatment. There would be no limitations on the fees charged, although there was a presumption by the division that the fees charged would be in accord with the limits on amounts paid by the various benefit plans.

The applicable section of the code was HRS §84-13(3), which states as follows:

**§84-13 Fair treatment.** 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.

The Commission reviewed one center's plan to implement the consultant professional staff program and believed, for the most part, that the plan followed the guidelines set by Advisory Opinion 362. We were, however, concerned about one aspect of the program, particularly the "consultant professional I" portion. The policy and procedure manual did not contain specific minimum requirements for compensation to the State either in rent or services to the center as required by Advisory Opinion No. 362. The center chief noted that section 4 of the consultant professional staff by-laws provided that "consultant professional staff I and II *shall*...[p]articipate in case consultations, staff development programs, and other meetings as appropriate and/or requested." (Emphasis added.) The center chief noted that he and the board of directors of the center had considered setting minimum service requirements by the consultant professional staff members. He stated that it had been decided that minimum requirements would not be set; instead, the request for services would be on an "as needed" basis. This allowed the center to be more flexible in its use of the expertise of the consultant professional staff members. The center chief also emphasized that, at the two centers for which he was responsible, consultant professional staff would be providing services to clients who otherwise might not receive the assistance they needed. For example, in his opinion, several geographical areas did not have sufficient private sector practitioners to service those areas adequately. By implementing the consultant professional staff program, the center chief felt that private practitioners would be encouraged to serve clients in those areas if state facilities were provided for their use on a rent-free basis. He expressed concern that including a minimum service requirement to the centers, in place of a rental charge, would discourage participation in the program. The Commission noted, however, that the center had received twenty-five applications from individuals who were interested in becoming consultant professional staff members. The Commission also recognized that the purpose of this program was to provide a benefit to the State and the public by channeling clients to the private sector so that the State could direct its attention to assisting people with other problems. Nevertheless, in our opinion, not charging a rental fee or setting a minimum requirement of hours of service or participation in the center's programs did not meet the standard set in Advisory Opinion No. 362. Although that opinion did not specifically state that a minimum rental fee must be paid or a certain number of hours of service must be rendered, we believed that this presumption was implicit in the opinion. Accordingly, the Commission determined that a minimum amount of service and/or a rental fee must be provided by private practitioners who used state facilities.

In reaching this conclusion, the Commission commented that the proposed program has already generated a number of questions by individuals both in and outside of the state system. Accordingly, to decrease the possibility of further ethical questions being posed, the Commission determined that the division should adopt a clear standard of compensation to the State for the private use of its facilities.

The Commission appreciated the center chief's candor in discussing this situation and commended the employee for his concern about the ethical considerations of this matter.

Dated: Honolulu, Hawaii, March 24, 1983.

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

Note: Commissioner Gary B.K.T. Lee was excused from the meeting at which this opinion was considered. Commissioner Allen K. Hoe was not present during the discussion and consideration of this opinion.