OPINION NO. 120

A member of a state committee requested an advisory opinion to resolve the following questions:

1. When he appears before a state agency for a client, the decision of that agency may affect the size and scope of a proposed project, thus affecting his fee for professional services. Is such an appearance a violation of §84-15, HRS?

2. The ethics of his profession forbid entering into competitive bidding for a project. Would there be a violation of HRS, §84-16(a), if he or a firm in which he owned a controlling interest entered into a contract with a state agency without competitive bidding for an amount in excess of $1,000.00?

3. May a business of which he is a part contract with the State within a two-year period following his service to the State without violating HRS, §84-16(b), providing that he did not appear or represent the business?

4. He has asked us to clarify the meaning of "has been an employee of the agency within the preceding two years and who participated while in state office or employment in the matter with which the contract is directly concerned," as used in HRS, §84-16(b).

He has provided us with the following facts. He is an associate in a firm and is called upon to appear before various state agencies. The actions taken by some of these agencies may affect the size of his fee for a given project. He has indicated, however, that a client will be billed for the appearance regardless of the subsequent action of the agency involved.

We initially noted that under the ethics law, we are empowered to render advisory opinions "as to whether the facts and circumstances of a *particular* case constitute or will constitute a violation or probable violation of the standards." HRS, §84-31(a)(2). [Emphasis added.] Since no particular situation was specified, we could only set forth general guidelines for his assistance.

1. When his sole compensation for a project was a percentage of the total cost of constructing the proposed improvements, it would follow that the action of the state agency involved may determine whether or not he was paid. Such an appearance was prohibited by §84-15, HRS.

If, on the other hand, the client were charged a fee for the appearance regardless of the action taken by the state agency, the appearance would not be prohibited by §84-15. However, the Commission reserved the right to decide whether or not the charges for an appearance actually reelected the time and effort involved in that appearance. Nominal charges or mere recitations would not avoid, in our judgment, the prohibitions of the statute.

It was further noted that his employment constituted a substantial financial interest within the meaning of §84-14, HRS. If a member of his firm appeared before his committee

or his commission were called upon to take any official action directly affecting his firm, he should disqualify himself from all participation in the matter involved.

2. Section 84-16(c) provided an exception to the rule stated by HRS, §84-16(a). In Opinion No. 86, this Commission held that a contract involving services of a type not subject to competitive bidding comes within the exception stated in HRS, §84-16(c). (See also Opinion No. 44.) The professional services of this individual seemed to be covered by this exception.

3. His attention was called to the fact that the language of §84-16(b), prohibits not only representation, but personal assistance as well. The personal assistance prohibition would apply to the execution of the contract as well as to the procurement of it. Therefore, he would be unable to take any part in carrying out the contract. We noted that HRS, §84-16(c), would apply if there were a personal contract of employment with the State.

4. In Opinions Nos. 76 and 77 this Commission indicated that whether or not an individual's official involvement with the subject matter of a particular contract was great enough to warrant the application of §84-16(b) must be determined in the light of a specific factual situation.

Dated: Honolulu, Hawaii, October, 4, 1971.

STATE ETHICS COMMISSION
Vernon F.L. Char, Acting Chairman
Gwendolyn B. Bailey, Commissioner
Walters K. Eli, Commissioner
Fred S. Ida, Commissioner

Note: The vacancy created by the resignation of James F. Morgan, Jr. has not been filled.