

OPINION NO. 168

An employee of an organization which conducted programs financially supported by the State of Hawaii through a state agency submitted a request for an advisory opinion. He disclosed that he and his spouse were the owners of a parcel of real estate which has been occupied and leased to the organization for the past several years. Since the organization was now a state program, the real estate was to be leased by the state agency for the use of the organization. He indicated that the lease would be for a period of one year with the option to renew contingent upon the availability of funds and unavailability of state-owned space. The monthly rental included water and electricity. He indicated that the rental had not been increased over the past several years and that no increase was reflected in the current year's rent.

It was our understanding from telephone conversations with officers at the state agency that this type of lease rental agreement was usually negotiated for rather than placed out for bid. It was our further understanding that the agency followed various procedures by which it determined the accuracy of the justification for the lease prepared by the program agency and that another state agency made further checks as to the availability of space and the appropriateness of the lease rental. The officers indicated that state space was unavailable and that the proposed rent was a fair one.

It was our further understanding that the employee had participated in preparing the justification sheet which strongly emphasized the fact that the organization had been located on his property for the past several years and that there was no other space available in the vicinity to satisfy the function of the organization; it was also our understanding that the effort to find other available space had been only of a general nature and that no other specific property had been seriously considered.

It was our opinion that under HRS §84-15, the state agency should not enter into this contract since it involved a contract with a state employee involving a contract amount in excess of \$1,000 without competitive bidding. Moreover, the employee had been involved in the subject matter of the contract by virtue of his participation in the justification sheet for the contract.

However, since such contracts, if entered into, are voidable, it was our opinion that it might be reasonable under certain limited circumstances for a state agency to enter into such a contract. We stated that we believed that such a situation should not occur frequently and should occur only when it is in the best interest of the State and when there is little likelihood of undermining public confidence in public servants. Some factors which should be considered are the following:

1. Whether the circumstances of the situation are such that requiring a bidding procedure would be a meaningless exercise;
2. The cost of the bidding procedure versus the value of the contract;
3. The likelihood of obtaining better terms through a bidding procedure;
4. The urgency of the situation;

5. Whether there was any violation of §84-13, relating to fair treatment in obtaining the contract;
6. Whether or not the processing procedure of the agency was strictly complied with;
7. The disruptive effects on the governmental program;
8. The potential effect of the contract in undermining public confidence in public servants.

In this case, there were some facts before us which suggested that it might be in the State's interest to enter into the contract without bidding procedures. We therefore recommended that if the state agency, upon evaluation of the facts, determined that it was in the best interest of the agency and the State to execute the contract, the agency should prepare a justification letter discussing the above enumerated considerations subject to approval by this Commission. Under §84-16, the Attorney General cannot initiate legal action to void a transaction until the Ethics Commission has determined there has been a violation of the chapter. Our approval of the justification sheet would serve as an intention by the Commission to not proceed with a charge of violation because of extenuating circumstances.

Finally, we pointed out that we viewed preparation of a justification sheet as recommendatory action, which is "official action" within the meaning of the ethics law. We found that the employee violated HRS §84-14(a)(1) when he assisted in preparing it and advised him to refrain from doing so in the future.

Dated: Honolulu, Hawaii, September 27, 1973.

STATE ETHICS COMMISSION
Vernon F.L. Char, Chairman
Gwendolyn B. Bailey, Vice Chairman
Walters K. Eli, Commissioner

Note: Commissioner Audrey P. Bliss was excused from the meeting at which this opinion was considered. There was one vacancy on the Commission.