

ADVISORY OPINION NO. 88-7

A consultant who had been the director of a certain state department requested an advisory opinion from the State Ethics Commission ("Commission") on the question of whether she could be hired by a company ("Company A") to assist and represent the company in its negotiations with the consultant's former department to resolve a dispute concerning liquidated damages and other costs provided for in a contract awarded by the consultant's former department for the construction of a certain project.

The Commission understood the relevant facts of the case to be as follows. While the consultant was serving as the director of the department, she was involved in the award of a contract to a company ("Company B") to build a certain project. As it turned out, Company B was having difficulty meeting the timetable established by the contract, and thus the department was considering canceling the contract with the company. If the contract had been canceled, the bond posted by the company for the project would have been called. The bond was insured by another company ("Company C"). When there was talk of canceling the contract with Company B, Company C contacted the department and stated that it wished to take over the project and complete it. As director of the department at the time, the consultant agreed to the proposal made by Company C and thus the contract was taken over by that company.

Company C accepted the conditions of the contract awarded to Company B. Because the contract was not completed in a timely manner, the department assessed Company C liquidated damages, as provided for in the contract, for every day the project was delayed. However, Company C contested the amount of some of the damages. Furthermore, Company C requested reimbursement for additional expenses it had apparently incurred for "change orders." "Change orders" were changes to the project requested by the department after the project had begun.

Because the department and Company C did not agree on the sums of money to be paid to one another, Company C had hired Company A to negotiate on its behalf with the department to settle the case. Company A, in turn, asked the consultant if she would assist it with its negotiations with the consultant's former department. The consultant indicated that Company A wished to hire her because of her experience in settling construction claims that involved the issue of liquidated damages and other costs.

The State Ethics Code, which is state law, is set forth in chapter 84, Hawaii Revised Statutes ("HRS"). The applicable section of the State Ethics Code was section 84-15(b), which provides as follows:

(b) A state agency shall not enter into a contract with any person or business which is represented or assisted personally in the matter by a person who 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.

This section of the ethics code states that a *state agency* cannot enter into a contract with any person or business if that person or business is represented or assisted personally in the matter by an individual who has been an employee of the state 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. The consultant had indicated that she ceased working for the department as its director towards the end of 1986. Thus, two years had not lapsed since she left the department.

After reviewing the facts of the consultant's situation and the language of section 84-15(b), the Commission believed that section 84-15(b) would prohibit the department from entering into a settlement agreement with Company C if the consultant assisted or represented Company C in the matter. The Commission believed that the settlement agreement did in fact constitute a contract and that the consultant had participated while serving as the director of the department in the matter with which the contract was directly concerned, in that the consultant had been personally involved as director of the department in the award of the contract to Company B and later to Company C.

The State Ethics Commission noted that the apparent intent behind section 84-15(b) was to prohibit an appearance of impropriety that was likely to arise when a state employee participated in a matter as a state employee and thereafter assisted or represented a business in its attempt to secure a contract directly related to the matter. There was an appearance or danger that the former state employee might have special access to information or special access to, or special relationships with, state employees that would provide an unwarranted advantage to the business assisted by the former state employee. Furthermore, the former state employee under such circumstances might receive an unwarranted advantage to the extent that the employee was hired over other possible consultants simply because the employee might appear to have special access to information or might have special relationships with state employees at his or her former agency. Section 84-15(b) was enacted to prohibit questions of impropriety or suspicions from arising. This was not to say that former state employees would necessarily conduct themselves unethically when assisting or representing a company with respect to a matter that they were involved in as a state employee. Nevertheless, ethical questions were likely to arise in such situations, and thus the Legislature had seen fit to prohibit in a per se or automatic manner state agencies for two years from contracting with companies assisted or represented by a former employee of the agency who had participated directly as a state employee in the matter with which the contract was concerned.

The Commission also noted that section 84-18(d) of the post-employment section of the State Ethics Code allows a state agency to enter into a personal services contract with a former state employee, without waiting for any time period to lapse, to act on a matter on behalf of the State. Therefore, the State Ethics Code would not have prohibited the consultant from being hired by the department itself to help it reach an accord in the dispute between it and Company C.

The Commission told the consultant that it appreciated her contacting the Commission for advice regarding this matter before accepting employment with Company A. The Commission also stated that it appreciated the sensitivity that the consultant had shown to the ethical considerations raised in this case.

Dated: Honolulu, Hawaii, May 11, 1988.

STATE ETHICS COMMISSION
Rabbi Arnold J. Magid, Vice Chairperson
K. Koki Akamine, Commissioner
Cynthia T. Alm, Commissioner
Rev. David K. Kaupu, Commissioner

Note: Chairperson Laurie A. Loomis was not present during the discussion and consideration of this opinion.