

## OPINION NO. 223

An individual asked us to review two contracts of a certain state agency and to advise him on the applicability of the state ethics law to parties entering into these contracts with the state agency.

### The "Consultant Contract".

The individual indicated that he had executed a "consultant contract" with the state agency in question. He further indicated that he was still maintaining a private business. He asked us whether he might maintain this private business and whether he might enter into contracts with firms dealing with his state agency after his contract expired or was terminated.

We reviewed the copy of the consultant contract that he had provided us. We noted that under the contract, the individual did the following, in addition to other things, on a full-time basis:

1. Coordinate certain projects.
2. Evaluate the various options relating to a project and recommend a course of action.
3. Control projects of the agency.

The individual's supervisor informed us that in carrying out these responsibilities, the individual was subject to control and direction by the agency.

We also noted that under the contract the state agency was required to provide the individual with all the supplies, office space, equipment, and stenographic or clerical assistance that he needed.

Based on the facts presented, we held that the individual was an "employee" for purposes of the ethics law. HRS §84-3(4) (Supp. 1974) defines an "employee" as

... any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, and *employees under contract to the State*, but excluding legislators, justices and judges. [Emphasis added.]

We pointed out to the individual that in reaching the conclusion that he was a state employee, we considered the substance and terms of his contract and his actual working relationship with his state agency. We believed that these factors, rather than the title of a contract or how an agency characterized an individual, were of primary importance in determining whether an individual who had a contract with a state agency was a state employee for purposes of the ethics statute. We said that this question, in our opinion, had to be determined on a "case by case" basis.

We stated that as an employee, HRS §84-14(b) was applicable to him. This section states:

No employee shall acquire financial interests in any business or other undertaking which he has reason to believe may be directly involved in official action to be taken by him.

We said that this section would prohibit his private business from acquiring clients who he had reason to believe might be directly involved in official action to be taken by him. We noted that official action was defined in HRS §84-3(7) as "a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority."

We stated that he must also be careful to avoid violating HRS §84-13. This section states:

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:

(1) Seeking other employment or contract for services for himself by the use or attempted use of his office or position.

...

(3) Using state time, equipment or other facilities for private business purposes.

Then, we said that HRS §84-18 would be applicable to him when his contract terminated. This section states:

(a) No former legislator or employee shall disclose any information which by law or practice is not available to the public and which he acquired in the course of his official duties or use the information for his personal gain or the benefit of anyone.

(b) No former legislator or employee shall, within twelve months after termination of his employment, assist any person or business or act in a representative capacity for a fee or other consideration, on matters in which he participated as an employee.

(c) No former legislator or employee shall, within twelve months after termination of his employment, assist any person or business or act in a representative capacity for a fee or other consideration, on matters involving official action by the particular state agency or subdivision thereof with which he had actually served.

(d) This section shall not prohibit any agency from contracting with a former legislator or employee to act on a matter on behalf of the State within the period of limitations stated herein and shall not prevent such legislator or employee from appearing before any agency in relation to such employment.

We said that although HRS §84-18 would not prohibit him from entering into all contracts with firms dealing with his state agency, he would be prohibited for a period of one year from the date that his contract expired from assisting or representing these firms on matters in which he participated as an employee of his state agency or assisting or representing these firms on matters involving official action by his state agency.

We brought one further section of the ethics law to his attention. HRS §84-15 provides the following:

(a) A state agency shall not enter into any contract with a legislator or an employee or with a business in which a legislator or an employee has a controlling interest, involving services or property of a value in excess of \$1,000 unless the contract is made after public notice and competitive bidding.

(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.

(c) This section shall not apply to a personal contract of employment with the State.

We said that because he had a controlling interest in his company, any state agency would not be able to enter into a contract involving services of a value in excess of \$1,000 with his company unless the contract was made after public notice and competitive bidding or the contract was a "personal contract of employment".

#### **The "Employee Contract".**

The individual also asked us to review an "employee contract" and advise him on the applicability of the ethics law to a party entering into this contract with his state agency.

We noted that a party entering into this contract with the state agency in question was referred to as an "employee" and was engaged on a full-time basis. Under the contract, the State would withhold taxes, and the employee would be entitled to all benefits of regular employees.

We held that an individual entering into this contract with the state agency in question would be an employee for purposes of the ethics law. Thus, we said that the individual would be required to follow the provisions of HRS chapter 84, including HRS §§84-13, 84-14, and 84-18, discussed *supra*.

We expressed appreciation for the individual's concern for ethics of public servants.

Dated: Honolulu, Hawaii, July 8, 1975.

STATE ETHICS COMMISSION  
Vernon F.L. Char, Chairman  
Gwendolyn B. Bailey, Vice Chairman  
Audrey P. Bliss, Commissioner  
Paul C.T. Loo, Commissioner

Note: Commissioner I.B. Peterson was excused from the meeting at which this opinion was considered.