

OPINION NO. 229

A former state employee asked us whether under HRS §84-18 (Supp. 1974) his former state agency might engage him to provide certain professional services in connection with a matter in which he was involved in his former state capacity. He also asked us whether HRS chapter 84 (in particular, HRS §84-18) would be applicable to him if he should be engaged by his former state agency to provide these professional services.

We stated that HRS §§84-18(b) and (c) (Supp. 1974) prohibited a former state employee from assisting or representing someone for compensation during the one year period after his termination of state service on a matter in which he participated as a state employee or a matter involving official action by the state agency which he served. However, HRS §84-18(d) states:

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.

Thus, we concluded that the ethics law would not preclude the individual's former agency from engaging him to provide the professional services in the matter in question.

The individual also inquired whether the standards of conduct adopted in HRS chapter 84 (in particular, HRS §84-18) for state officers and employees would be applicable to him if he should be engaged by his former state agency to provide the services in question.

We pointed out that in a recent opinion, we said that the question of whether an individual who has a contract with a state agency is a state employee for purposes of the ethics law must be answered on a "case-by-case" basis, with consideration of the provisions and terms of the contract that the individual has with the state agency and the actual working relationship between the individual and the agency.

The head of the individual's former state agency informed our staff that a person engaged to fill a position such as the one in question was usually hired for his special competence in a given subject area. We noted that a contract between the State and such a person generally included the following provisions:

1. The individual will render advice to the State and aid and assist in the preparation for and in the argument in all proceedings relating to the case and will cooperate with other employees assigned to the case by the agency head.
2. The agency head may engage other individuals or use members of his staff to render services in connection with the case.
3. The staff of the agency head will be made available and shall be used wherever feasible to assist in research related to the case, and the individual shall perform his services in collaboration with such other persons assigned by the agency head.

4. Appearances in the case will be made and the handling of the case will be by the individual personally. All professional services will be under the individual's general supervision and management unless otherwise directed by the agency head.

5. The individual agrees to supply to the agency head copies of all correspondence, documents, and other work products connected with the case and will tender for prior approval of the agency head those items that he reasonably believes should have the approval of the agency head prior to the release of such items.

6. The agreement between the agency head and the State is for special and temporary services, and the laws applicable to regular and permanent employees, such as those related to vacation, sick leave, retirement, civil service and classification, health benefits, etc., shall not apply to the individual. The individual shall be responsible for all federal, state, and local taxes.

7. The individual shall take an oath of office and will comply with all requirements of HRS ch. 78 (general provisions on public service).

We stated that based on the assumption that the contract that the former state employee might have with the state would be similar to the standard contract discussed *supra*, we held that HRS chapter 84 would be applicable to him if he should be engaged by his former agency in the matter in question. Thus, in answer to the specific question that the individual raised, we said he would have the status of an employee within the meaning of HRS §84-18, and the provisions of this statutory section would have to be followed by him when his relationship with the state agency terminates.

In making this holding, we considered that as a special employee of the state agency, the individual would probably be working with regular employees of the agency in the case. We said that because of the issues in this case, the matter in which the individual would be involved was likely to be a major case of the State. Also, we stated he would probably be privy to information not available to the general public. Finally, we noted that unlike many consultants or special and temporary employees engaged by the State to conduct studies or carry out research activities, the individual would be representing the State with respect to third parties.

We believed that our holding that the former state employee would be subject to HRS §84-18 if he should be engaged by his former agency was consistent with the rationale of this section. We pointed out that in previous opinions, we have stated that the rationale of HRS §84-18 appears to be the prevention of a former state employee from using influence derived from contacts and associations that he made while in government for his personal gain or for the benefit of others. The statutory section also appears to guard against the use for personal gain of knowledge that a former state employee obtained in cases in which he participated. Finally, we have pointed out that an intent of HRS §84-18 appears to be the discouraging of a state employee from using his state position to obtain a future job in the private sector.

Finally, in reaching the above conclusion, we considered the effect of our holding on the recruitment of competent individuals for state service. We believed that our holding would not prevent the agency in question from providing services to all state agencies. We realized that our holding might, at times, discourage a person from working for the agency in question in a case in which a certain state department is involved. However, we said that the person who would probably be discouraged is the person who is likely to have many cases in the future involving the state

agency in question. We stated that it is such an individual who should surely be covered by HRS §84-18.

We emphasized again that our holding that the former state employee would be subject to HRS §84-18 if he should be engaged by his former agency in the matter in question was limited to the particular facts of this case as discussed *supra*. We said that if he should be engaged by his former agency in the matter and his contract with the State and his working relationship with the agency differed substantially from the assumptions made here, we suggested that he seek another advisory opinion.

We expressed appreciation for his concern for ethics of public servants.

Dated: Honolulu, Hawaii, September 15, 1975.

STATE ETHICS COMMISSION
Vernon F.L. Char. Chairman
Gwendolyn B. Bailey, Vice Chairman
Paul C.T. Loo, Commissioner
I.B. Peterson, Commissioner

Note: Commissioner Audrey P. Bliss disqualified herself from consideration and preparation of this opinion.