

## OPINION NO. 230

The director of a state office with responsibility for executing consultant contracts requested an advisory opinion on the propriety of an agreement between a state employee and a state agency.

The consultant was employed in a division of a state agency. According to his superior, although his primary responsibility was to his division, his position description also required him to perform services outside of the division. On a number of occasions, he had, with his superior's approval, assisted the chief of another division in the same department in matters relating to the subject matter of the consultant agreement. It was not unusual for his division to provide such assistance to other divisions.

Another state agency submitted a proposal for study to the other division in March or April of 1975. The proposal was approved but a more complex study was recommended. The chief of this division then sought the employee's advice on how to best formulate the study and then asked the department that submitted the original proposal if it would be in a position to complete such a study prior to June 30. The department agreed to conduct the study and further discussions concerning its formulation were held at the end of April between a representative of the department, the chief of the division, and the employee. The employee indicated that the services required were too extensive for him to perform on state time.

The division chief indicated that he would determine if funds were available to pay him for the work to be done on his own time. Approximately one week after this discussion the funds for the study were formally released and the employee was hired as the consultant for a fee of \$1,500. The employee was in effect hired by the division chief though the performer agreement was actually signed by the chairman of the department that was to conduct the study. The fiscal officer in charge of this agreement indicated that prior to the end of May the propriety of the agreement was under discussion. However, the employee was not asked to sign the contract until June 20; it was submitted to the director for his approval on July 1.

The Commission staff found that the services contracted for would not usually require the consultant to have a background in the subject matter of the study and that other consultants might have been available to perform the work. The staff of the department was aware that another state employee who might have performed these services was not available at this time. No attempt to determine the availability of other consultants was made. The individuals associated with the program concluded that because work on the study could not extend beyond June 30, sufficient time was not available to hire another consultant and that because of this time pressure, it was important to have someone of the consultant's background on the project. It was conceded that none of the individuals were aware that a problem under HRS chapter 84 might be involved. Despite the June 30 restriction, much of the consultant's work had not been performed by that date and was not to have been completed before the end of August.

The consultant's work on the project involved approximately 150 hours; approximately twenty hours of this work was performed during state time. In those instances he compensated his division by working extra hours at his state position; the department also compensated the division for some of this time by forwarding certain payments to it.

The Commission held that the agreement was in violation of the state ethics law and found that HRS §84-15 was applicable to the facts of the case.

HRS §84-15(a) (Supp. 1974) provides that

[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.

HRS §84-15(c) provides an exception for a personal contract of employment. In Opinion Nos. 86 and 120, the Commission held that a contract involving services of a type not subject to competitive bidding comes within this exception. We expanded upon that ruling in this case to hold that HRS §84-15(c) applies only to services that are not subject to competitive bidding. The chairman of the department, a member of the director's staff, and firms in the private sector specializing in the services provided by the consultant, indicated that competitive bidding was both permissible and the usual practice in this field. There being no disagreement on this point, we found that the agreement did not come within the exception and was to be judged by the requirements of HRS §84-15(a).

We did take note of the several factors that influenced the hiring of the consultant. There was a limited period of time within which the project had to be completed. There was a concern that if a consultant unfamiliar with the subject matter's terminology was retained, there would not be sufficient time to familiarize such a person with the terminology that would be required to formulate the questionnaire and evaluate the data. There was also the opinion that the bidding procedure would require two to three months, which would put the project beyond its June 30 deadline. The Commission staff, however, received information indicating that consultants in this specialty are usually able to formulate questionnaires and perform other programming tasks in unfamiliar areas; except in very specialized fields a consultant should be able to acquaint himself with the particular area in a very short period of time. The subject of this study was not considered to be a specialized field. Further, the time required for notifying competent individuals of the existence of this particular contract would have required less than two weeks. This was particularly so in this case since a contract involving less than \$4,000 is not put out to bid, but, instead, requests for proposals are sent to individuals and firms that it is expected, from past experience, will be interested in the particular contract. The weight of the information we received persuaded us that the usual procedures for retaining a consultant on this project should have been pursued. Accordingly, we found the agreement to be in violation of HRS §84-15(a).

In reaching our decision, we also considered the application of HRS §84-13. HRS §84-13(1) prohibits the use of one's position in seeking employment; HRS §84-13(2) prohibits the acceptance of compensation for the performance of official duties; and HRS §84-13(3) prohibits the use of state time, equipment or other facilities for private business purposes.

We did not find that the consultant specifically requested that he be retained as the consultant on this study, nor did we find the authority in his official position that would imply an unwarranted use of power in obtaining the position with the study. We expressed concern at his failure to recognize the potential ethical problems raised by the context of the agreement; i.e., his long-standing association with and interest in the program in his state capacity and his close association with the division chief and representatives of the department in the formulation of the

study. Nonetheless, we did not find in these circumstances sufficient evidence to justify a finding of a violation of HRS §84-13(1).

As to HRS §84-13(2), the Commission concluded that though the work performed came within the duties and skills set forth in his position description, the performance of these particular services would not have been assigned to his division. Accordingly, we found no violation of HRS §84-13(2).

In considering the application of HRS §84-13(3) we noted that though the services were performed primarily on the employee's own time, a portion of the work was accomplished during state office hours. Because he compensated his division for this time, we did not find that his work on the study violated the statute. However, we did express the view that he risked creating an appearance of misconduct that could have been easily avoided. The better course of action in circumstances such as these would have been to secure the approval of the appropriate superior.

If the individuals involved, including the consultant, had been more sensitive to the questions raised by his employment on this project, the issue would have been brought before the director and this commission early enough so that a decision, in light of all the circumstances, could have been rendered without interfering with the progress of the study.

The Commission expressed concern at the failure of individuals in the state agencies involved to manifest an awareness of the ethical problems raised. The Commission was aware of the fact that the consultant was particularly well suited for the work in this project and that his duties toward its completion were accomplished with a high degree of competence. We were also aware that pressures of time were involved. Nevertheless, it was the Commission's opinion that the consultant should have been aware that his acceptance of a position in the study raised questions of propriety that required consideration. The Commission took particular note of the fact, while not making it a basis of its opinion, that his superior indicated that he was unaware of his employment on the project. We also noted that the agreement between the consultant and the department contained a clause in which the contractor declares that he is not a state employee and that he has not participated in a state capacity in the subject matter of the contract in the past two years.<sup>†</sup> There were indications that ethical problems existed and there were means to properly deal with them, but no such awareness was shown by the facts of this case.

The Commission indicated that it had no wish to impede the employment of competent persons by state agencies, and if attempts to contract with other consultants had proved fruitless, we would have had no objection to the agreement. But the failure of the parties to have actively pursued usual procedures in this case prior to the consultant's employment undermines the public confidence in state employees that is at the heart of chapter 84. In accordance with our findings, it was our opinion that the director should not execute the contract and that compensation for the consultant's services should be withheld.

While the consultant bore the brunt of our decision, we were very concerned to note the ignorance of ethical standards displayed by the state agencies involved. Accordingly, we requested that the director advise the agencies of the procedures to be followed where employment of state workers is contemplated.

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<sup>†</sup>The consultant signed the agreement apparently without considering the significance of this clause.

Pursuant to Rule 4.1 of the Rules and Regulations of the Ethics Commission, the consultant was given the opportunity to review the facts submitted by the director and to present his view of the factual circumstances.

We commended the director's continued concern for the ethics of public employees.

Dated: Honolulu, Hawaii, September 15, 1975.

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