OPINION NO. 240

Shortly after his appointment as a state employee, the individual in question filed a disclosure of financial interests with this Commission. In this disclosure, the state employee disclosed, among other financial interests, his 100 per cent ownership of a certain company. Pursuant to Rule 3.5 of the Commission's Rules and Regulations, the Commission treated his disclosure as a request for an advisory opinion and issued him an opinion giving him caveats for two of his financial interests. Because the Commission was not aware that a certain state agency, "Agency A," was a client of his company, the advisory opinion did not discuss this matter. The employee now asked us to review the business relationship between his company and the state agency.

As a state employee, the individual in the instant case was the chief administrative officer for a certain State board. Final decision on all matters, however, rested with the board; his function in most matters was a recommendatory one.

The employee's company had been doing business for about ten years. For over five years, Agency A had been a major client of his company. For a recent one-year period, total business between Agency A and the employee's company totaled approximately $200,000. In the past, Agency A had used the employee's company exclusively to obtain the service in question; staff members of Agency A had been directed to use the company. However, Agency A had, in the last year or two, begun to spread a small amount of business to two other companies. At the request of one program director of Agency A, Agency A approved the use of another company for the director's program. The program director felt that this other company would provide better service to the program. Then, at the request of a third company, Agency A decided to use, and so advised the employees involved, the third company for another program of Agency A.

Other major clients of the employee's company included another state agency, "Agency B," and other private companies that had business relationships with the employee's state board.

In connection with the employee's request for an advisory opinion, the Commission met with various individuals, including officials of Agency A and a representative of the employee's company. We were informed that Agency A had a general policy to rotate its large requirements for the service in question among different companies. We were also informed that the extensive use of the employee's company had been based primarily on the fine services the company had provided to Agency A and, secondarily, on the strong financial support that the employee had given to one program of Agency A.

HRS §84-13 (Supp. 1974) states:

> No ... 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 ....

In past cases, we have held that this section is violated in circumstances where a reasonable man can infer that a state employee is using or attempting to use his official position to grant unwarranted advantages or contracts to himself or others.

Based on the facts presented at this time, we found that the employee had not violated HRS §84-13.[†] In our consideration of whether the employee had violated HRS §84-13, we noted that Agency A became a client of the employee's company many years before he assumed his staff position. We further noted that certain final decisions in which Agency A would be interested were made by the employee's board rather than the employee. Based on these facts and other facts presented by the employee and other individuals, we found that he had not used his position to grant undue advantages to his company or Agency A.

It was unclear to us, however, whether the state employee had fully informed his board of the scope of the operations of his company and of its business relationship with Agency A. We said that it might be prudent of the employee to inform his board of these matters.

HRS §84-15(a) had most direct application to this case. It states:

> A state agency shall not enter into any contract with ... an employee or with a business in which ... 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.

We stated that the purpose of this statutory provision, in our opinion, is to promote public confidence in the contracting procedures of the State. If a state agency enters into a contract with a state employee, or with a business in which a state employee has a controlling interest, there may be an erosion of public confidence because there may be a suspicion that the state employee obtained the contract either through inside information or contacts in government. This suspicion may exist even though the state employee did not in fact use his state position to obtain the contract. Additionally, there may be greater erosion of public confidence when a state agency has a business relationship with a state employee who, in his state capacity, has some discretionary authority over the agency. We said that HRS §84-15(a)'s requirement of public notice and competitive bidding for large contracts between a state agency and a state employee is intended to demonstrate to the public that state employees are not being favored for state contracts.

In this case, regular bidding procedures, including public notice and sealed bids based, for the most part, on prices, were not possible because prices for the service in question were "noncompetitive." Therefore, for this case we construed the phrase "public notice and competitive bidding" in HRS §84-15(a) to mean an open and public process. Thus, pursuant to HRS §84-15(a), we said that Agency A might not enter into any contract for the service in question with a company in which a state employee had a controlling interest when the service had a value in excess of $1,000 unless the contract had been awarded through an open and public process.

Because the nature of the service in question was such that it was not susceptible to traditional forms of competitive bidding, we did not proceed to find that past contracts between the employee's company and Agency A were in violation of HRS §84-15(a). We did find, however, after a careful consideration of all the facts presented and after discussions with officials of Agency A and other individuals, that responsible officials of Agency A had been insensitive to ethics in regard to its use of the employee's company on an almost exclusive basis. We indicated that Agency A had too quickly relied on the concept that the service in question was not a biddable item and had not sufficiently considered alternative means of distributing this substantial business in a more equitable and open manner.

[†]Based on the facts presented at this time, we also did not find any violation of HRS §84-13 by the employee in connection with his company's business relationships with Agency B and certain other companies that had business relationships with the employee's state board.

The state employee had a controlling interest in his company. Thus, we said Agency A had to comply with HRS §84-15(a) before it could utilize the employee's company for services having a value of over $1,000.[†] Although HRS §84-15(a) is applicable only to contracts between a state agency and a business in which a state employee has a controlling interest, we believed that a state agency should consider using an open and public process to select a company for the service in question whenever practicable.

We stated that it would be the responsibility of Agency A, and every other state agency, to develop an open and public process for the selection of a company for the service in question. Agency A would also be responsible for determining a reasonable time table within which to implement the Commission's recommendations.

We pointed out that the process of selecting a company for the service in question had to be equitable and had to be one which promoted public confidence in the contracting procedures of Agency A. We said that a process where only one or a very limited number of companies were considered by Agency A or a process based upon the amount of financial support that a company gave to Agency A could not be viewed as an open and public process. We said public confidence was not promoted under circumstances where a business organization believed that it might be disadvantaged in the obtaining of business from Agency A if it did not give financial support to Agency A.

We said it would be the responsibility of Agency A to develop an open and public process for the selection of a company for the service in question; the Commission, however, would review this determination to insure that the process that is selected satisfies the requirements of HRS §84-15 (a).

We emphasized thai we were not saying that Agency A might or might not use the services of the employee's company or any other company. We were merely saying that Agency A should use an open and public process in selecting a company, or companies, for the service in question.

Because HRS §84-15(a) is directed to state agencies, we said we would notify Agency A of the requirements of this provision with respect to the selection of a company, or companies, for the service in question.

We thanked the employee for meeting with us on this matter.

Dated: Honolulu, Hawaii, December 31, 1975.

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

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

[†]We stated that HRS §84-15(a) also had to be followed by other state agencies if they wishes to use the employee's company for services totalling over $1,000.