

OPINION NO. 248

The director of a state office responsible for making payments for goods and services purchased by the department it served asked us if his office might, under the ethics code, make payment to a state employee for certain equipment he sold to a division of the department between September, 1974 and January, 1975. In his request he indicated that this matter had been brought to his attention by the fiscal officer of the division, the department's disbursing officer, and the state ombudsman because of a complaint from the vendor-employee to the ombudsman that the department would not pay the amounts claimed for the items furnished. He further advised us that prior to this notification he had not been aware of these purchases and he further noted that they appeared to be in violation of department policy and procedure as well as the requirements set forth in HRS §§103-22 and 84-15.

In reviewing this matter, we found the following facts:

1. The vendor-employee went into business in May of 1974. During the months of May, June, and July of that year, he called upon program heads in the division to advise them of the fact that he was in business and that he would be interested in doing business with the division.

2. In August of 1974, he learned that a division program required certain services on a part-time basis. He applied for and was hired for this part-time position and began duties in September of that year. The position ran from September to June of each year and in his first year he was paid \$900 for his services.

3. From September, 1974 to January, 1975, he supplied equipment to the division. Most of the orders that constituted the subject matter of the request had apparently been filled on a rush basis with the order being placed with the vendor-employee directly by a division employee.

4. The orders for program A were in small amounts of from \$30 to \$50. Of the invoices submitted to us seventeen represented purchases on behalf of this program. The total value of these purchases was considerably less than \$1,000.

5. The employee responsible for program A's equipment stated that these small orders resulted from emergency needs of the program. However, in reviewing the dates of the invoices, it appeared that an attempt had been made to "parcel"[†] some of these orders in order to avoid certain department purchasing procedures.

6. Seven of the invoices represented purchases on behalf of program B. One series of orders resulted from the failure of a mainland supplier to deliver equipment ordered several weeks in advance of the program's need for the equipment. When it was not received by late December, the head of program B inquired of vendors in Honolulu as to the possibility of obtaining the equipment on short notice. He was advised by one vendor that it would be impossible to obtain the equipment at that late date. However, the vendor-employee represented a mainland company

[†]We have stated that separate contracts involving the same subject matter will be viewed as one contract if the separate contracts were a method of evading the intent of HRS §84-15(a).

that stocked this kind of equipment on a ready basis and indicated that he would be able to meet the program's needs. On this basis, the equipment was ordered and delivered.

7. The total amount owed for equipment ordered for program B was \$3,971.09. One invoice totaled \$2,300.21; two consecutive invoices, dated on the same date, were each in the amount of \$593.84 and essentially constituted one purchase in a total amount of \$1,187.68. The other invoices were separated by several days and time and even if aggregated for similar pieces of equipment totalled less than \$1,000.

The business manager of the division stated that he had authority to authorize purchases under \$200, while purchases in excess of \$200 had to be approved for payment by the director's office and had to receive a purchase order number. He also indicated that sales were not to be made directly between employees and vendors without the approval of the business manager; he stated that the particular invoices which were the subject of this advisory opinion were not paid because they were arranged directly between division employees and the vendor-employee without his being notified. He advised that in each instance he did not learn of the purchases until a considerable time following delivery of the goods. He further indicated that he had believed that the vendor-employee might have an ethics problem in doing business with the division and had suggested to him that he seek an opinion from the Commission.[†]

The business manager stated that program A's orders could be justified and could have been paid in the early part of 1975. As a result of the backlog in his office, however, these orders were never processed for payment. As to the orders for program B, he stated that no justification was made by the program head for these purchases and, for this reason, these orders were never processed.

We noted that the business manager had been appointed in October of 1974 and that this was apparently a time of considerable confusion in the division.

The vendor-employee's narrative, in the main, coincided with the facts related by the business manager. However, he stated that he had advised the business manager of each sale shortly after making delivery of the items ordered.

In considering this matter, the Commission first gave consideration to the application of HRS §84-13, which prohibits an employee from using or attempting to use his official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for himself or others. We noted that the invoices which were the subject of this request followed immediately upon the vendor-employee's acceptance of a part-time position with the division. However, in discussing this aspect of the matter with the individual who had hired him and with the head of program B, it appeared that no advantage in the rest of the division would have accrued to the vendor-employee by virtue of his part-time position. On the contrary, it appeared that there was virtually no communication between these two programs to the extent that the head of program B was totally unaware of the vendor-employee's involvement in this other program. On this basis, it did not appear credible that the vendor-employee had gained the kind of advantage contemplated

[†]This was, in fact, done and a letter covering this subject was issued in February 1975 to the vendor-employee, but the invoices which were the subject of this opinion had not been brought to the Commission's attention at that time.

by the language of HRS §84-13. We therefore concluded that his conduct in this matter did not constitute a violation of HRS §84-13.

HRS §84-15(a) (Supp. 1975) had most direct application to this matter. That section states as follows:

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.

Initially, we pointed out that despite the fact that the vendor-employee was a part-time employee and paid a small salary, he was nevertheless an employee for the purposes of the ethics code (see HRS §84-3(4)). Further, his ownership interest in his business gave him a controlling interest in that business.

HRS §84-15(a), however, had no application to those purchases which were less than \$1,000 in value. Even if we assumed that program A's orders were parcelled, yet the total amount involved would still be considerably less than \$1,000. This same analysis applied to several of those purchases made on behalf of program B.

We concluded therefore, that, as to those purchases totalling less than \$1,000, HRS §84-15(a) would have no application.

HRS §84-15(a) did apply to those purchases which were of a value in excess of \$1,000. We noted that program B had made a bona fide attempt to order equipment well in advance of its need by the usual department procedures. It was only when this attempt to secure the necessary equipment failed that the program head contacted the vendor-employee directly to order the needed equipment. While the business manager indicated that he had no word from the program head on this matter, the program head stated that he did advise him of this order and made him aware of the circumstances. The program head additionally stated that he looked into the possibility of purchasing the equipment from another vendor without success. The vendor-employee stated that equipment such as this was rarely a stock item. Generally, such equipment had to be ordered well in advance and was then manufactured to specific requirements. As indicated, the vendor-employee represented a supplier that did stock such equipment. Under the circumstances, we did not believe that, despite the lack of public and competitive bidding in this particular matter, that either the spirit or intent of HRS §84-15(a) had been violated. Clearly it would not have been advisable to engage in a competitive bidding process which would have been a mere paper exercise and wasteful of time and money. Accordingly, we stated that we would not proceed to find a violation of HRS §84-15(a) in the purchase of this equipment.

We noted in so finding that the goods ordered were delivered and had been used by the division and that the price charged was a fair and reasonable one. We believed that to find a violation of HRS §84-15(a) in this matter would cause an injustice to the vendor-employee that was not justified by his conduct. In a past opinion (Opinion No. 168) we stated that we would not proceed, in certain circumstances, to find a violation of HRS §84-15(a) even though a state agency had contracted with an employee without submitting the matter of the contract to a competitive bidding procedure. We believed the factors influencing that decision applied to this matter.

Accordingly, we stated that we would not proceed to find a violation of the ethics code should the director determine that the vendor-employee should be paid the full amount of the invoices that had been submitted to us for review. We stated further that our conclusion should not be taken as authenticating these invoices and that his office should make an independent review of the invoices to determine their accuracy.

The Commission, however, was disturbed by the manner in which this entire matter had been handled by employees in the division. We noted that the department purchasing manual set forth specific guidelines for the procurement of goods. It provided an emergency procedure for the placing of rush orders in circumstances where competitive bidding and public notice would not be feasible. This procedure was not utilized in any of the purchases involved in this matter. Under department procedures, employees were not permitted to make purchases directly from the vendor without the authorization of the business manager or fiscal officer of the particular division involved. And yet, in all of the instances represented by the invoices that had been submitted to us that is precisely what had occurred. Further, we noted that the guidelines provided that an individual employee who made a purchase directly from a vendor might be held liable for the full amount of the value of the order. However, we also noted that this long-standing policy was rarely enforced.

We could see no justification for the failure of program heads to abide by rules which had been instituted to insure that public moneys were properly disbursed. We recognized that the business office was understaffed and had not grown in proportion to the development of the division's programs. This had no doubt caused difficulty for the program heads and the business manager but we were not persuaded that the obvious parcelling of some of these purchases and the failure of the division to confront the problems represented by the invoices could be explained by understaffing.

We were concerned that the problems noted in our review of this particular matter might still exist. We stated that the appropriate department officials should communicate the rules, regulations, and procedures that were to be followed and the sanctions that would be imposed when violations occurred. In this regard, the Commission took note of a memorandum from the director's office which specified those individuals who were authorized to place orders for the division. We also took note of a memorandum from an administrator in the department in which he noted the importance of communicating policies and procedures to all levels of personnel within the department and in which he emphasized that those who failed to adhere to the purchasing procedures might be required to bear the costs. We believed that these measures were a positive initial step in making the procedures and the sanctions associated with them known to the proper personnel. We noted, however, that such memorandum would not be effective without proper follow-through and, if necessary, the imposition of sanctions. We recognized that there would, of course, be circumstances where the letter of a procedure could not be followed for practical reasons. We stated, however, that in most instances the procedures established in the business manual would cover such exigencies. In those instances where they did not, then the individuals involved had the responsibility to see that the matter was handled openly. It was only in this way that public employees would earn the confidence of the public they served.

We commended the director for bringing this matter to the attention of the Commission so that the ethical issues involved might be considered.

Dated: Honolulu, Hawaii, April 7, 1976.

STATE ETHICS COMMISSION
Audrey P. Bliss, Chairman
Paul C.T. Loo, Vice Chairman
Gary B.K.T. Lee, Commissioner
I.B. Peterson, Commissioner

Note: Commissioner Dorothy K. Ching was excused from the meeting at which this opinion was considered.