

OPINION NO. 400

We received a request for an advisory opinion from the director of a state program. Several months prior to this request he had been asked to take over the direction of this program because of the death of the previous director. The department's participation in this program was pursuant to a contract with an agency located in another state. He had decided, however, to return to the private sector and requested the Commission's opinion as to the propriety, under the ethics code, of his being retained by the department as a consultant to the program.

He had notified the department of his intention to resign several months in advance of his termination date. His purpose was to pursue a career in the private sector as a consultant. He had been previously employed in the private sector in a similar capacity.

The department had been unable to find a suitable replacement for him. Accordingly, the department had proposed that he be retained as a consultant to continue to assist the department on the project. There were several reasons why the department was seeking this means of resolving this particular problem. A critical time schedule had been imposed upon the department by both the primary contractor for the program and by the circumstances that obtained in this matter. Studies were to be made that would have considerable impact upon significantly larger projects. The value of these projects would have long-range economic effects upon the State.

The department claimed and the primary contractor confirmed that extensive work would have to be performed to meet the requirements of the contract and to expedite the deployment of the larger projects.

Both parties were concerned that if the retiring employee were not permitted to assist the department in a consultant capacity, a considerable period of time would be lost to the project while a suitable replacement was sought. While the employee indicated that other persons could carry on the necessary tasks, after a period of training, the primary contractor expressed the view that the employee possessed a unique combination of talents that would be very difficult to replace. He apparently had technical experience and, in addition, because he had run his own business and had been employed in the private sector, he was also aware of the management and accounting problems and responsibilities that were a part of this kind of project. Accordingly, the project had operated much more efficiently under his supervision than it would have if the director had been a technician who did not possess this employee's managerial experience. It was the primary contractor's view that without the employee's participation the State might lose larger projects.

Two sections of the ethics code seemed to have contradictory application to the situation raised in this request for an advisory opinion. HRS §84-15(b) provides as follows:

- (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.

HRS §84-18 has specific application to persons who have left state employment and who engage in private activities that concern state agencies. While HRS §84-18(b) and (c) provide that employees may not assist or represent businesses on matters in which they had participated or on matters requiring official action by the agency they had been employed by, HRS §84-18(d) provides that these sections shall not prohibit a state agency from contracting with a former legislator or employee to act on a matter on behalf of the State.

Accordingly, HRS §84-15(b) and 84-18(b) appeared to be consistent in their approach to the problem the employee presented. HRS §84-15(b) appeared to prohibit the department from entering into a consultant contract with him to work on the project. On the other hand, HRS §84-18(b) provided a very similar restriction which specifically applied to persons leaving state service. The primary difference between the sections was that HRS §84-15(b) provided a two-year restriction while the post-employment provision restricted such activities for one year. It was clear that HRS §84-15(b) was logically applied to post-employment situations even though it was not described as a post-employment provision.

We commented that, prior to June of 1978, the contracts section, HRS §84-15, had contained a provision that excluded personal contracts of employment from its coverage. However, effective June, 1978, the contracts section was amended to provide that contracts between state employees and state agencies could be entered into without a competitive bidding process if the agency and employee involved could justify such a contract as being in the best interest of the State. It was felt that this justification process obviated the need for the personal services exemption. As a result, however, HRS §84-15(b) became an absolute prohibition against a state agency entering into a contract with a person who had participated in the subject matter of the contract as a state employee for the two-year period following such participation. The justification procedure referred to above was not applicable to HRS §84-15(b) but applied only to HRS §84-15(a), a provision that was not relevant to this matter.

However, it was the Commission's opinion that the Legislature, in deleting the personal contract exemption from HRS §84-15, did not intend to limit the exemption to the post-employment section provided in HRS §84-18(d). The intent of this exemption, which was quite common in post-employment provisions, was to permit the State to continue to use the services of a former employee to continue a project that could not be effectively carried on by a replacement.

It was, therefore, the opinion of the Commission that HRS §84-18(b) and (d) and HRS §84-15(d) should be read together to provide a logical result. Accordingly, we ruled that HRS §84-18(d) would be interpreted to exempt contracts for personal services between state agencies and former state employees from the restrictions of HRS §84-15(b) and HRS §84-18(b) so long as there was no evidence that the employee and the agency had colluded to provide an unwarranted benefit to the former employee or other persons. It appeared to

the Commission that the Legislature intended that the relationships that arose between former employees and the state agencies that employed them should be governed by HRS §84-18 and that, where an inconsistency might appear between that section and other sections of the code, the post-employment provision should apply.

Our review of this matter indicated that the employee had taken no action to initiate the department's overtures to him to serve in a consultant capacity. On the contrary, the fact that he had notified the department several months in advance of his termination date indicated an attempt on his part to facilitate the department's finding a replacement for him. It did appear to us that the department had not expended the effort we would have liked to have seen in finding a replacement for the retiring employee. And we were concerned, as we had expressed on other occasions to department officials, that there might be a tendency on the part of this department, and other departments as well, to take what would be the easier route in solving post-employment problems by hiring post-employees on a consultant basis rather than by making the additional effort required to find suitable replacements. We did not believe that such action was in the best interests of the State, and we were not condoning such action in this opinion. However, we were also aware of the atmosphere that was created in this program by the death of the former director. We were well aware that the department and the primary contractor were concerned about the consequences that might befall the program if an individual who was hired to replace this employee was not able to perform to the very high standards that had been established during the time the employee had been director. Regardless of the basis for such a fear, the fact that such anxiety existed was understandable. Accordingly, we ruled that the department could proceed to hire the retiring employee on a consultant basis to provide services to the department on this program.

We commended the employee for being sensitive to the ethics question raised in this matter.

Dated: Honolulu, Hawaii, January 2, 1980.

STATE ETHICS COMMISSION
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