

INFORMAL ADVISORY OPINION NO. 26

A citizen filed a charge with the Commission against a state agency alleging that the agency had violated HRS §84-15(a) by not seeking a waiver from the Commission for the noncompetitive award of a consultant contract to a state employee. Under HRS §84-15(a), a waiver from the Commission is necessary when a state agency plans to award a contract in excess of \$1,000 to a state employee without using an "open, public process" to advertise the contract so that other interested parties might have an opportunity to apply. In response to the charge, the head of the state agency submitted written statements to the Commission and appeared before the Commission to refute the charge allegations.

After the charge was filed, the Commission began its own investigation of the case. During the course of the investigation, it was determined that the citizen complainant was not interested in further action. The Commission thus dismissed the citizen from the case. The Commission found, however, after its preliminary investigation, that there was cause to believe that violations of the ethics code might have occurred. The Commission therefore issued a Charge and Further Statement of Alleged Violation against the state agency.

The Charge and Further Statement of Alleged Violation alleged that the state agency (1) violated HRS §84-15(a) by awarding a consultant contract to the state employee without using an adequate "open, public process" and (2) violated HRS §84-13 by giving the state employee an unfair advantage in being selected for the contract. In response to the Commission's Charge and Further Statement of Alleged Violation, the head of the state agency filed an answer denying the charge allegations.

After considering the agency head's response, as well as other information before the Commission, the Commission concluded that the evidence in the case was insufficient to warrant proceeding to a formal hearing to determine whether violations of the ethics laws had in fact occurred. However, the Commission concluded that certain aspects of the contract award process and the performance of the contract created at least an appearance of possible violations of the ethics laws. Because the Commission believes that an appearance of impropriety can be just as damaging to the public's confidence in its state officials as actual violations of the ethics laws, the Commission decided to issue an informal advisory opinion in order to comment on the agency's actions or inactions that had created an appearance of unethical activity. The Commission hoped the informal advisory opinion would assist the agency in avoiding situations that might call into question the agency's integrity with respect to the requirements of the State Ethics Code.

I. Requirements for an Adequate "Open, Public Process."

The main objective of the State Ethics Code, as stated in the preamble to chapter 84, HRS, is to preserve "public confidence in public servants." When state legislators or state employees in their private capacities secure state contracts, a question may arise as to whether the state officials were successful in obtaining the state contracts by virtue of their positions in state government. In order to avoid an appearance of impropriety or actual unethical behavior, the Legislature inserted HRS §84-15(a) into the ethics code to require state agencies to use an "open, public process" when state contracts in excess of \$1,000 might be awarded to a state legislator or state employee. HRS §84-15(a) reads in pertinent part 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 has been awarded through an open, public process. A state agency may, however, enter into such contract without resort to a competitive bidding process when, in the judgment of the agency, the property or services should not, in the public interest, be acquired through competitive bidding; provided that written justification for the non-competitive award of such contract shall be made a matter of public record and shall be filed with the state ethics commission at least ten days before such contract is entered into.

The purpose of the "open, public process" is to ensure that all interested candidates are aware of the availability of state contracts--not just state legislators and state employees. When all interested parties are given a chance to apply for state contracts, state officials are given no special advantage simply because of their status as state officials, assuming the subsequent selection process is objective.

The Commission noted that the head of the agency contacted the Commission's executive director concerning the proper procedures for the award of the contract. The executive director informed the agency head that the agency would have to use an "open, public process" when awarding the contract because one of the candidates for the contract was a state employee. The agency placed an advertisement in the newspaper for the contract position.

The Commission stated that it believes that newspaper advertising is an excellent way to meet the requirements of an "open, public process." The Commission noted that newspaper advertisements, however, must reasonably reflect the nature of the available position in order to give adequate notice to all interested parties.

After reviewing the newspaper advertisement published by the state agency, the Commission noted that the newspaper advertisement asked for extensive experience and expertise. Furthermore, the duties to be performed under the contract within the contract period were quite extensive and elaborate.

Given the requisite level of experience and expertise and the duties to be performed, the Commission was hardly surprised to find that only two individuals responded to the newspaper advertisement.

More troublesome to the Commission, however, was the apparent disparity between the newspaper advertisement and the actual scope of services required for the performance of the contract. The Commission believed that there were probably many people who might have applied for the contract had the advertisement more accurately reflected the scope of services.

Because of the apparent disparity between the newspaper advertisement and the contract with respect to duties, experience, and expertise, the Commission believed that the "open, public process" used by the state agency was defective because all individuals possibly eligible for the contract were not given adequate notice of it. The Commission advised the state agency to draft contract advertisements more carefully. The Commission told the state agency that if advertisements are to err at all, they should err on the side of encouraging many applicants, thereby heightening competition for contracts. The Commission stated that this competition lessens the appearance of unethical activity when state officials in their private capacities are successful in obtaining state contracts.

II. Fair Selection Process.

While HRS §84-15(a) requires an adequate "open, public process" when state agencies may be awarding contracts to state legislators or state employees, HRS §84-13 requires that the selection process be conducted fairly. HRS §84-13, the fair treatment section of the ethics code, reads in pertinent part as follows:

No legislator or 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 [Emphasis added.]

Again, the Commission was just as concerned with the appearance of unwarranted favorable treatment as with its actual occurrence. The Commission noted that although the newspaper advertisement required two letters of recommendation from every applicant, the employee did not submit any and apparently was never asked to do so. The other applicant for the contract submitted two letters of recommendation.

The fact that the state agency did not request letters of recommendation from the employee created the impression to the Commission that the interviewing for the contract was not done evenhandedly. The state agency's administrative services officer stated to the Commission that "[g]enerally, if an applicant fails to provide letters of recommendation we give them an opportunity to bring them in." The head of the agency, on the other hand, stated:

As administrator, I have not enforced this requirement in many cases. I do not place much importance on letters of recommendation since they are usually given by people who present only favorable comments about the applicant. *Moreover, letters of recommendation play no part in any decision to hire or not hire an individual.* [Emphasis added.]

If letters of recommendation "play no part" in the hiring process, the Commission wondered why the state agency had a policy of soliciting them. Clearly, one contract applicant went to much trouble to obtain letters, and the authors of the applicant's letters went to a great deal of trouble to write thoughtful letters on the applicant's behalf.

Because the administrative services officer stated that applicants who do not submit letters of recommendation are generally given an opportunity to bring them in and since letters of recommendation were solicited in the newspaper advertisement, the failure to request letters of recommendation from the employee strongly suggested unwarranted favorable treatment in violation of HRS §84-13. The Commission therefore asked that in the future the state agency establish a uniform selection process in order to prevent appearances of impropriety.

It was also alleged that unwarranted favorable treatment was given the employee in selecting her for the contract in view of her lack of the necessary training and experience. The Commission noted that the training and experience called for in the newspaper advertisement was in fact quite extensive.

After looking over the employee's resume, the Commission was convinced that there was some disparity between the experience and training specified in the newspaper advertisement and that apparently possessed by the employee. To the Commission's mind, this disparity raised a legitimate question as to whether the employee was in fact a qualified contractor. The Commission again asked that in the future the state agency take steps to prevent such appearances of unwarranted favorable treatment.

III. Performance of the Contract.

The citizen alleged that the employee had not performed the contract because no written work had been submitted to the state agency by the employee by the end of the contract term or by the time the citizen's charge was filed with the Commission some nine months later. The citizen therefore asserted that the employee was not entitled to the compensation she received. The fair treatment section of the ethics code, HRS §84-13, would have been violated if payments had been made to the employee when it was known that the contract work had not been performed.

Both the head of the state agency and the employee maintained that written work was not called for by the contract. The newspaper advertisement published by the state agency, however, appeared to clearly indicate that the contractor would be submitting written work.

The contract itself was somewhat ambiguous on the question of whether written work was required. However, the Commission noted that if the contract were read together with the newspaper advertisement, one could reasonably assume that written work was called for. On the other hand, if the contract was accurate and written work was not called for, then it appeared that the newspaper advertisement specified duties not in fact required by the contract.

The Commission believed that the disparity between the newspaper advertisement, the contract, and the agency head's and the employee's understanding of the contract created an appearance of possible unethical activity. The Commission advised the state agency to draft contracts and newspaper advertisements more carefully so that appearances of impropriety would not be created.

The Commission also noted that the contract required the contractor to submit "invoices" with a "detailed breakdown" of "charges by the Contractor, which charges shall be supported by statements indicating the type of work completed." Because no invoices with statements indicating the "type of work completed" were submitted, there was no written record of the nature of the work performed. The Commission believed that the state agency should have required complete invoices, as required by the contract, so that the performance of the contract could not have been so easily brought into question. Furthermore, the Commission noted that when contract provisions are not enforced, accusations of unwarranted favorable treatment can easily arise.

IV. Reimbursement of Per Diem for an Off-island Trip.

While under contract, the employee traveled off-island on behalf of the state office that was her regular employer. On the same trip, the employee also performed work in furtherance of her contract with the state agency.

Before leaving on the trip, the employee obtained authorization from her regular state employer for payment of airfare and per diem. After returning from the trip, the employee requested another per diem payment from the state agency she was under contract to. The agency head approved the request.

In accordance with the fair treatment section of the ethics code cited in section II of this opinion, the Commission believed that a violation of the fair treatment section of the ethics code would occur if an agency head awarded a per diem payment to a contractor when there was reason to believe that the per diem payment would or might be unauthorized. Under such circumstances, the agency head would be granting an unwarranted privilege to the recipient of the per diem payment.

The agency head maintained that when he authorized the contractor's per diem payment, he was unaware that the contractor had received another per diem payment from her regular state employer. The Commission noted that the fact that the contractor applied to the state agency only for reimbursement of per diem would suggest, however, that her airfare had been paid for by another source. The Commission noted that it would seem that the agency head would have wanted to ask at the time why the source paying the airfare was not also paying the per diem.

When asked about the double per diem payment, the agency head told the Commission that he believed the contractor was entitled to his agency's per diem payment because the agency's contract entitled her to reimbursement of "out-of-pocket" expenses. Although the agency head asserted that he was not aware that the contractor had received another per diem from her regular state employer, it appeared that even had the agency head known, he would have made the per diem payment anyway, on the basis that the contract entitled the contractor to reimbursement of "out-of-pocket" expenses. Indeed, after learning of the duplicate per diem payment, the agency head apparently took no action to ascertain whether his agency's per diem payment had been warranted.

The Commission noted that the contract did in fact entitle the contractor to reimbursement of "out-of-pocket" expenses. However, with respect to lodging and meal expenses, it was apparent that the agency's policy was to reimburse those expenses with a per diem payment rather than pay the actual costs of lodging or meals. This was evidenced by the agency's use of the "Completed Statement of Travel" form, which explicitly stated that travel expenses paid by the agency were to be paid in accordance with HRS §78-15 and the "Rules and Regulations" governing travel expenses promulgated by the Department of Accounting and General Services (DAGS). HRS §78-15 and the travel rules promulgated by DAGS provided that expenses for lodging and meals were to be paid at a per diem rate rather than by reimbursement of the actual expenses incurred. The fact that the agency's policy was to reimburse expenses with a per diem payment rather than with a payment to cover the actual expenses was also evidenced by the contractor's lack of receipts indicating her expenses. It would seem that had the agency intended to reimburse the contractor's expenses, the agency certainly would have instructed the contractor to obtain and turn in receipts for her expenses, and she would have done so.

The Commission further noted that the agency's policy to provide a per diem payment for lodging and meal expenses was consonant with the practice of the entire State. The per diem was established by law to cover lodging and meal expenses that the State believed were reasonable and appropriate for those staying overnight to conduct state business while away from home. Rather than reimburse state employees for actual lodging and meal expenses, which might vary considerably, the State had chosen to adhere to a fixed per diem rate.

The Commission believed that HRS §78-15 and the travel rules promulgated by DAGS, which were used by the agency to pay per diem, established the rules by which the appropriateness of the agency's per diem payment to the contractor should be evaluated. The Commission noted that although the agency did not fall within DAGS's jurisdiction, the agency had apparently voluntarily chosen to follow HRS §78-15 and the DAGS travel rules in determining payments for travel expenses. Again, the Commission noted that this was in keeping with the universal state policy.

Having reviewed the travel rules, the Commission noted that duplicate payments for meals were not allowed in certain instances (§3-1-10(5)) and that reimbursement for lodging was discretionary with an agency head when lodging was provided at no cost to a state employee

(§3-10-10(b)). The Commission also noted that the travel rules repeatedly stressed economy when determining the appropriate amount for reimbursement. In light of these policies, the Commission believed that the State would certainly disfavor the award of duplicate per diems.

The Commission believed that the agency head's assertion that the contractor was entitled to two per diem payments from the State was inconsistent with state law and the DAGS travel rules. The Commission believed that the authoritative source in the State on per diem policies was DAGS. The Commission believed that the award of duplicate per diem was certainly unusual and questionable and thus the question of the appropriateness of the award should have been presented to DAGS for either a formal or informal opinion. The Commission believed that the deputy attorney general assigned to the agency should also have been asked whether the contract provided for the payment of per diem when per diem had in fact been received from another state source.

The Commission was disturbed by the fact that the payment of duplicate per diem was not seriously questioned by the agency head. The Commission believed that the agency head had a duty to protect the agency's resources and ought to have exercised greater circumspection in the matter.

The Commission told the agency head that it believed he should seek advice from DAGS and the Office of the Attorney General on the appropriateness of awarding duplicate per diem. Furthermore, the Commission stated that the agency head should consider whether agency contracts should be drafted to differentiate between expenses that are reimbursed on the basis of the actual expenses incurred (to be supported by receipts) and lodging and meal expenses, which are reimbursed by the use of a per diem whatever the amount of the actual expenses incurred.

V. Conclusion.

The Commission believed that allegations of unethical activity brought against the agency were not unwarranted. Because of the appearance of unethical activity that was created, the agency and the Commission had to spend substantial time reviewing the contract award process and assessing the degree of contract performance. The Commission hoped that the agency would exercise greater care when drafting newspaper advertisements and contracts, when selecting contractors, and when monitoring contract performance. The Commission stated that such care is especially critical when the agency contracts with state legislators or state employees. Finally, the Commission suggested that the agency may wish to consider seeking outside expertise in contract drafting, employment advertisement drafting, and accounting procedures so that appearances of impropriety or unethical activity could be avoided.

Dated: Honolulu, Hawaii, November 20, 1985.

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