



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 19, 1998

Ms. Rachelle Martin  
Executive Director  
Texas Department of Licensing  
and Regulation  
P.O. Box 12157  
Austin, Texas 78711

Letter Opinion No. 98-065

Re: Definition of "management search consultant" in  
article 5221a-7, V.T.C.S., section 1(11) (RQ-982)

Dear Ms. Martin:

Your predecessor asked this office's opinion concerning the interpretation of article 5221a-7, V.T.C.S., section 1(11), in conjunction with sections 2(b) and 7 of the same act, which act the Department of Licensing and Regulation ("the department") is charged with enforcing.

Article 5221a-7, V.T.C.S., governs the conduct of personnel employment services. Section 7 of the act provides the registration and bonding requirements for such services. Pursuant to section 2(b) of the act, "Section 7 . . . does not apply to a management search consultant." "Management search consultant" is defined by section 1(11) of the act as

a personnel service that is retained by, *acts solely on behalf of*, and is compensated only by an employer and that does not collect directly or indirectly any fee from an applicant on account of any service performed by the personnel service. [Emphasis added.]

The department has argued that there is some inherent contradiction in section 1(11), because "finding employment inures to the benefit of the applicant" and accordingly, since both employer and employee are provided services, the management search consultant cannot be said to be acting solely on behalf of the employer. We must reject this interpretation.

First, we can accept an interpretation which would in effect read section 1(11) out of the statute book only if it is ineluctable. We are charged with giving force and effect to statutes if it is at all possible to do so. *See* 67 TEX. JUR. 3D *Statutes* § 123 (1989). In our view, the department's interpretation of section 1(11) is not so compelling as to require us to regard the definition as self-contradictory.

We note that the definition does not require that the management search consultant not *provide* services to the employee; it requires that the consultant not take money directly or indirectly

for providing such services. The phrase "acts solely on behalf of" means, in our view, "acts solely as agent for." The management search consultant, that is, is compensated by the employer and *only* by the employer. The consultant's fiduciary obligations, if any, run only to the employer; its negotiations with the employee are arm's length transactions. The management search consultant cannot bind the employee. But this does not mean, and in the nature of things cannot mean, that the benefits of the bargain the consultant strikes run solely to the employer.

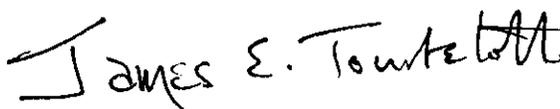
In any brokered deal, while the broker may act as agent for one party or the other, both parties must perceive themselves as benefitting from the bargain, or there is no bargain. Certainly it is true that an employee benefits by finding a job. It is also true that a house purchaser benefits by finding a house, and that a corporation may benefit if its stock is purchased. But that does not mean that the real estate agent compensated by the seller has become the buyer's agent, or that the stockbroker is the agent of the corporation. Nor here does the fact that the employee acquires a job or a better job make the management search consultant the agent for the employee.

Nor does the fact that the consultant may negotiate the terms of the employee's compensation alter the argument. It may be of benefit for the employee for such negotiations to go forward, but the hallmark established by the definition of section 1(11) is the payment of the consultant. As this office noted in Attorney General Opinion DM-36, "management search consultants, as defined, do not accept fees from applicants for employment." Attorney General Opinion DM-36 (1991) at 2. So long as a personnel firm acts as an employer's agent, rather than an employee's, and receives compensation only from the employer, the fact that the bargain the firm strikes between the parties is of mutual benefit to both of them does not take the firm out of the definition of management search consultant contained in section 1(11) of article 5221a-7, V.T.C.S.

### S U M M A R Y

So long as a personnel firm acts as an employer's agent, rather than an employee's, and receives compensation only from the employer, the fact that the bargain the firm strikes between the parties is of mutual benefit to both of them does not take the firm out of the definition of management search consultant contained in section 1(11) of article 5221a-7, V.T.C.S.

Yours very truly,



James E. Tourtelott  
Assistant Attorney General  
Opinion Committee