

OPINION NO. 283

An auditor in the enforcement branch of a division of a state department asked if he could work as an income tax preparer during his non-state hours.

In his position, his responsibilities lay primarily with auditing certain programs in which local employers participated. In this regard, his duties included, but were not limited to, conducting field and office examinations and audits relative to the wage reporting and dissemination of correct assessments to a certain fund; contacting employers and examining their ledgers and financial statements to determine employer and employee coverage; reviewing and approving employers financial solvency for determining their self-insurance ability and if necessary determining if and in what amount a security bond was needed for such a program. He also advised employers of their duties according to the law with regard to those programs and he audited employers' records to determine whether they were withholding the proper amount of funds from employees. He could also compel an employer to return amounts withheld in excess of the statutory limit and could recommend legal action against noncomplying employers. The employee stated that in choosing businesses to audit, the department gave top priority to those businesses about which they had received complaints. In addition, his office had a computer which was programmed to point out businesses whose reports indicated such problems as employers deducting excessive amounts for a program. When such indications appeared, those businesses were then audited.

We found that the section of the ethics code most applicable to his question was HRS §84-14(b) (Supp. 1975). It states that

[n]o employee shall acquire financial interests in any business or other undertaking which he has reason to believe may be directly involved in official action to be taken by him.

We pointed out that under HRS §84-3(6) an employment as well as an ownership interest in a business was a financial interest for the purposes of the ethics code; if this employee were to become employed by a firm as a tax preparer or to work on his own, either on a fixed fee or employment basis, these interests would fall within the meaning of HRS §84-14(b). We noted that his duties almost always involved the use of discretionary authority and thus fell within the definition of official action as defined by HRS §84-3(7).

Accordingly, we stated that he could not become an employee of any business or tax-preparing firm or begin his own tax preparation business if he had reason to believe that as an auditor in his division he might be called upon to take action directly involving that business, firm or his own business.

We pointed out that the Commission had stated in the past that there must be a strong probability rather than a mere possibility that an employee would take action involving his potential employing firm or his own business for the HRS §84-14(b) prohibition to apply. This meant that if there were a strong probability that he would take official action with regard to his own business if he were self-employed, or with regard to a tax preparation firm which hired him to prepare their clients' returns, or with regard to any other business or firm which employed him for the purpose of preparing its return, he could not engage in that work. Since it was doubtful that his division would have any dealings with a self-employed person, it appeared that he might easily be able to prepare returns on his own. With regard to the other two possibilities--employment by a

tax-preparing firm and employment by a business to prepare its taxes--we stated that he and his supervisor should first evaluate the probability of such businesses being involved in official action to be taken by him. In those instances where that probability existed, he could not seek employment with that firm or business.

The Commission had stated in prior opinions that an employee should not place himself in a position which would require that he disqualify himself from taking official action. However, we recognized that what might initially appear to be a mere possibility of involvement might later become a real probability. The employee's supervisor had indicated to us that should this occur and it appeared that the employee would be required to take action involving a business by which he was employed, the supervisor could assign one of the four other auditors in his division to investigate and/or audit the business. We stated to the employee that he should be careful to notify his supervisor promptly if such a probability arose so that the operation of his office would be disrupted as little as possible.

We pointed out to the employee that he should also be aware of HRS §84-13 which prohibits a state employee from using state time and facilities for private business purposes. We warned him that he should be very careful to carry out his tax preparation solicitations and activities on his own time.

We noted, in addition, that this section also prohibits an employee from using his position to secure an unwarranted advantage for himself or for others. That meant that he should not solicit business from persons or businesses with whom he had dealt in his state capacity or from fellow employees in his office. Conversely, he was required to abstain from taking action in any matter which involved a person or business whose tax return he had prepared. In order to avoid the recurrent abstention which would diminish his effectiveness as a state employee, we stated that he should avoid preparing the returns of those persons or businesses which, through his experience, he knew were likely to be involved in matters before his state office. In practical terms, this meant that he should generally restrict himself to preparing individual and small business returns.

In summary, we told the employee that he could work as a self-employed tax preparer, as an employee of a tax preparing business or as an employee of a business which required him to prepare its own taxes *unless* there was a strong probability that he would take official action involving these financial interests. If there was only a mere possibility that his private employer would be involved in official action taken by him and that later became an actuality, he must abstain from taking any action affecting that employer and notify his supervisor so that he could assign another auditor to the task. We advised the employee that he must also abstain from taking any action directly affecting any person or business whose return he had prepared and that he should be careful when agreeing to prepare certain forms not to jeopardize his effectiveness in his state position.

When we gave this opinion to this employee we enclosed a copy of Opinion No. 234. We indicated that that opinion dealt with a situation very similar to his and might be of assistance to his complete understanding of the application of the statute to his question.

We appreciated the employee's concern for the ethics questions involved in his engaging in this proposed business and we commended him for requesting this opinion.

Dated: Honolulu, Hawaii, December 22, 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.