## OPINION NO. 281

An employee in a supervisory capacity with a state department asked the Commission to determine if an employee occupying a position as an inspector, whose duties included supervising and helping certain clients of the department in their business matters, might engage in that same business during his non-state time. The supervisor provided a job description which indicated that the major duties of an inspector included supervising staff and participating in caring for animals involved in the client's business matters, including feeding and disease control; inspecting certain areas to insure the health, safety, and security of animals and the repair of structures as necessary; inspecting each of the client's business operations for compliance with certain lease conditions and department policies; providing advice concerning and demonstrating new methods of operation in the business; and, arranging for buyers' inspection of salable goods. A person filling this position was also responsible for keeping records of and submitting written reports concerning the above activities.

We explained to the supervisor that there were two sections of the ethics code which might be applicable. The first, HRS §84-14(a) (Supp. 1975), is concerned with those interests an individual holds at the time he becomes a state employee. It states that "[n]o employee shall take any official action directly affecting ... [a] business or other undertaking in which he has a substantial financial interest." Official action is defined as including any use of discretionary authority in carrying out one's state duties; an inspector's actions with regard to inspection of or assistance with any aspect of a client's business was official action. Then, an ownership interest in a business came within the definition of a financial interest as found in HRS §84-3(6). For instance, if a client engaged in this business, he had a financial interest in his business. Therefore, if an inspector was also a client of the department, his actions in inspecting his own business would, of course, directly affect his own substantial financial interest. Accordingly, the statute prohibited an inspector from taking any action with regard to his own business.

In addition, we noted that our statements in a past opinion could be read to say that inspecting one's competitor, "while not providing as obvious a direct affect [as inspecting one's own business], still is action directly affecting ... [the client's own] business, because it regulates the existence and extent of competition." (Opinion No. 20.) We stated that a competitive situation occurs when at least two people are in the same business and are offering their products or services to the same markets. Because the markets for products and supplies were undoubtedly the same for all clients located in the same district, we found them to be in a competitive situation. Therefore, an inspector who was also a client could not take any official action directly affecting another client's business. Accordingly, we found that a client engaged in this business would be unable to carry out most of the duties of an inspector and, would, therefore, be ineffective in that position.

It followed then that any inspector who engaged in this business and who sold or bought products or supplies to and from the same sources as the clients he supervised was in competition with the clients. Because an employee was prohibited from taking official action directly affecting a competitor, the Commission pointed out that any person who was engaged in this business in that same geographic area was also prohibited from performing most of the duties of an inspector and should not be hired. A person who was not competing in and for the same markets would not be similarly prohibited. We noted that the requester of this opinion would know the markets of the clients and which persons would be competing for those markets. Therefore, we stated that the final determination of who would be competing with the clients lay with him.

We also stated that if a person hired as an inspector wished to acquire an interest in this business area after commencing his state duties, HRS §84-14(b) (Supp. 1975) would apply. That section states that no employee may acquire a financial interest in any business which he has reason to believe may be directly involved in official action to be taken by him. It was apparent that an inspector could not become a client engaged in this business because his state position would require that he inspect himself, and such action was prohibited by this section.

With regard to the question of whether an inspector who was not also a client could get started in this business, we said that the Commission had held in past opinions that a state employee could not acquire an interest if that interest would limit the performance of his duties. Therefore, an inspector could not acquire a financial interest in this business while he inspected his competition unless it was clear from the particular circumstances that the duties of the inspector could not directly involve the business in which he and the clients competed. (See Opinion No. 266.) In view of the duties of an inspector, however, we did not see how this involvement could be avoided.

In summary, we stated that any person who engaged in this business in the same market area as a client engaging in that business would not be able to carry out most of the duties of an inspector and, therefore, would make an ineffective choice for the position. Further, any person who became an inspector could not then acquire a financial interest in a business of this nature that was in competition with the clients to whom he provided state services.

We expressed our appreciation to the requester for his concern for the ethics questions involved in this situation and commended him for requesting an opinion before any conflict occurred.

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.