



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI- 04-4*

INTRODUCTION

You are the Tax Collector-Treasurer in the Town of Groton ("Town"). The Town has accepted the provisions of General Laws chapter 59, § 5K^{1/} pursuant to which it established a Senior Citizen Property Tax Work-Off Abatement Program ("Abatement Program"). Pursuant to the Abatement Program, an individual over the age of sixty (60) may volunteer to work a number of hours in various Town departments in return for which he will receive an abatement on his real estate tax bill. You supervise the Assistant Tax Collector-Treasurer who is the administrator of the Town's Abatement Program. You have asked whether Town employees may participate in the Abatement Program.

QUESTIONS

1. May Town employees participate in the Abatement Program if they are otherwise qualified?
2. Is an individual who participates in the Abatement Program considered a municipal employee for purposes of the conflict of interest law?

ANSWERS

1. Otherwise qualified Town employees may participate in the Abatement Program as long as they are able to secure an exemption to § 20 of G.L. c. 268A. With limited exceptions, full-time Town employees will be eligible for a § 20(b) exemption. Special municipal employees in Town will be eligible for either the § 20(c) or § 20(d) exemption depending on which Town agency employs them.

2. Every participant in the Abatement Program whether or not they are already a Town employee will be considered a municipal employee for purposes of the conflict of interest law during the time they participate in the Abatement Program. All Abatement Program participants must comply with the restrictions of the conflict of interest law applicable to municipal employees. Finally, Abatement Program participants are eligible to be designated as special municipal employees by their Board of Selectmen, Town Council or City Council.

FACTS

A. The Statute

In G.L. c. 59, § 5K,^{2/} the Legislature enacted a local option statute that allows the board of selectmen, town council or the mayor with the approval of the city council, to establish a program to allow persons over the age of sixty (60) to volunteer to provide services to the municipality in exchange for a reduction in their real estate tax bills. Participants in such programs may earn a maximum reduction of \$750 per tax year, based on a rate per hour of

service that cannot exceed the Commonwealth's minimum wage.^{3/} The reduction under the program is in addition to any exemption or abatement to which the person is otherwise entitled.^{4/}

The municipality is responsible for maintaining a record of each taxpayer participating in the program including, but not limited to, the number of hours of service and the total amount by which the real property tax has been reduced.^{5/} The municipality is also responsible for providing a copy of that record to the assessor to ensure that the actual tax bill reflects the reduced rate as well as to the taxpayer.^{6/} A municipality accepting § 5K shall have the power to create local rules and procedures for implementing § 5K in any way consistent with the intent of that section.^{7/}

B. The Town's Abatement Program

At the Town Meeting on October 16, 2000, the Town voted to accept G.L. c. 59, § 5K to allow the Town to establish an Abatement Program with abatements to begin in fiscal year 2002. The Assistant Tax Collector-Treasurer is the administrator of the Abatement Program.

In order to participate in the Town's Abatement Program, volunteers must meet two criteria. First, they must be sixty (60) years of age by July 1st of the fiscal year in which the abatement would be granted. Second, they must own and reside in the domicile to which the abatement will be applied.

The rate of volunteer compensation is \$6.75 an hour. The maximum number of hours that may be worked by any volunteer is 74.07 for a total work abatement credit of \$500 per year.^{8/} The hours must be worked between January 1 and December 1. The Abatement Program is limited to forty (40) people on a first come, first served basis.^{9/}

A volunteer must fill out a Work Credit Program Abatement Application ("Application") and submit it to the Assessors Office. The Assessors Office date stamps and logs the Application upon receipt. It then reviews the Application and either approves or rejects it. An Application is rejected only if the individual does not meet the age requirement or does not own and live in the property that is the subject of the real estate tax bill.

The Assessors Office gives the Tax Collector-Treasurer's Office a copy of the Application and approval form. The Tax Collector-Treasurer's Office makes a file for the volunteer and sends out a Volunteer Questionnaire form to be completed and returned. The Volunteer Questionnaire provides the information necessary to match the volunteers with the jobs that best fit their preferences and abilities.

Participating Town Department Heads fill out a Departmental Job Request Form for each task. Based on the information provided by the Department Head and the volunteers, the Assistant Tax Collector-Treasurer tentatively matches volunteers with jobs.^{10/} The type of work that a volunteer may do includes the following: covering and shelving books; answering telephones; filing; clerical work; copying; organizing; alphabetizing census forms; parking attendant at the beach; raking; sorting recyclables; grounds cleaning; maintenance; mailing; data entry; repairs; carpentry; and painting.

The Assistant Tax Collector-Treasurer then contacts the Department Head to discuss the prospective match. The Department Heads do not generally interview candidates and are

not responsible for matching volunteers, although they may request a different volunteer better suited to their needs. Once the volunteer and the Department have been matched, the Assistant Tax Collector-Treasurer contacts the volunteer with the details about reporting to work.

Time sheets are completed for the hours that are worked by the volunteers. The hours are recorded daily by the volunteer and initialed by the supervisor. Completed time sheets must be signed by the Department Head and the volunteer. Time sheets must be turned into the Tax Collector-Treasurer's office when ten (10) days have been worked or when the job is finished, whichever is sooner.

The Tax Collector-Treasurer's Office keeps a running total of all volunteers and their hours worked. After all time sheets have been recorded, the Tax Collector-Treasurer's Office submits a Work Completion Report to the Assessors Office. The Assessors then process the abatement equivalent to the number of hours worked by \$6.75.

DISCUSSION

A. Town Employees Participating in the Abatement Program

Section 20 of G.L. c. 268A, the conflict of interest law, prohibits a municipal employee^{11/} from having a "financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, in which the city or town is an interested party." Any individual participating in the Abatement Program, including a Town employee, has an obvious financial interest under § 20 in their participation because the amount of their tax liability to the Town is reduced based on the number of hours they work. In order to determine whether Town employees may participate in the Abatement Program, it is necessary to determine whether the work-for-tax abatement exchange under the Abatement Program constitutes a "contract" for purposes of § 20.

"A contract is simply a promise supported by consideration, which arises . . . when the terms of an offer are accepted by the party to whom it is extended."^{12/} The term includes any type of arrangement between two or more parties under which one party undertakes certain obligations in consideration of the promises made by the other party.^{13/}

The Commission, as well as the courts, "have given the term 'contract' a broad meaning to cover any arrangement in which goods or services are to be provided in exchange for something of value."^{14/} The elements of a contract are offer and acceptance, consideration and mutual assent to essential terms.^{15/} Consideration is "[t]he cause, motive, price, or impelling influence which induces a . . . party to enter into a contract."^{16/} The requirement of consideration is satisfied if there is either a benefit to the promisor or a detriment to the promisee.^{17/}

Based on these facts, we conclude that the work-for-tax abatement exchange under the Abatement Program is a contract for purposes of § 20. There is an offer and acceptance. The Town makes an offer to qualified residents to work in return for a reduction in their property tax bills. A resident may accept the offer by submitting an Application and working in the Abatement Program. The element of consideration is also present. In exchange for providing services to a Town department or agency, a participant receives something of value, a reduction in the amount owed on his property tax bill that corresponds to the number of hours worked

multiplied by the hourly rate for such work. As such, there is a benefit to the participant, a reduction in his property tax bill, and a cost to the Town, a reduction in the property tax revenue that it would otherwise receive.

Further, we do not consider the Abatement Program to be the type of government benefit program that we have said does not constitute a contract. In the Commission's prior opinions that reviewed state benefit programs and discussed whether there was a contract for purposes of § 7, the state employee counterpart to § 20, the Commission found that cash grant public assistance program benefits as then existing^{18/} that were administered by state or federal government agencies were not contracts.^{19/} The Commission relied on the fact that none of the program benefits at issue were supported by consideration and each was made available pursuant to statutorily defined criteria and eligibility guidelines.^{20/}

A recipient of the benefit programs reviewed by the Commission received only what they qualified for by statute. In other words, a recipient was not required to work or otherwise provide any bargained-for exchange in order to receive the benefit to which they were entitled. In that situation, there was no consideration and, therefore, no contract. Although the Abatement Program is similar in one way to such programs because it does involve statutorily defined eligibility guidelines, it is markedly different in that it is supported by consideration in the form of work in return for the benefit received. The benefit of the abatement is not available simply to those who qualify, but rather only those who qualify and who actually provide services to the Town. There is also an additional bargained-for exchange because the amount of the reduction in a participant's property tax bill is based on the number of hours that a participant works.

Having determined that the work-for-tax abatement exchange under the Abatement Program is a contract, any qualified Town employee who wants to participate, must secure an exemption to § 20.

1. Exemption Available to Full-Time Municipal Employees and Certain Part-Time Municipal Employees

In general, full-time employees of the Town who do not work for the Tax Collector-Treasurer's Office or an agency that regulates the activities of the Tax Collector-Treasurer's Office, may rely upon an exemption under § 20(b) to participate in the Abatement Program provided that they satisfy all of the requirements of that exemption. This exemption is also available to part-time municipal employees whose positions have not been designated as special municipal employee positions.^{21/} In each instance, the Town employee must be able to satisfy all of the requirements of the § 20(b) exemption as follows.

As a Town employee, he must not participate^{22/} in or have official responsibility^{23/} for any of the activities of the contracting agency for the Abatement Program. Based on the facts presented, we conclude that the contracting agency in Town for purposes of the Abatement Program is the Tax Collector-Treasurer's Office.^{24/} The Town employee may not be employed by the Tax Collector-Treasurer's Office. In addition, the Town agency for which the employee works must not regulate^{25/} the activities of the Tax Collector-Treasurer's Office. The Abatement Program must be publicly advertised.^{26/} The Town employee must file a written disclosure with the Town Clerk describing his interest in the Abatement Program.

In addition, because a Town employee participating in the Abatement Program will be providing personal services to a Town department, he must comply with the following additional restrictions. The services for the Abatement Program must be provided outside of his normal working hours as a Town employee. The services may not be required as part of his regular municipal duties. He may not be compensated for his work in the Abatement Program for more than 500 hours during a calendar year. The head of the contracting agency, the Tax Collector-Treasurer's Office, must make and file with the Town Clerk a written certification that no current employee of the Town department in which the participant is working is available to perform the work as part of their regular duties.²⁷ Finally, the Board of Selectmen must approve the § 20(b) exemption.

Any full-time Town employee or part-time employee whose position has not been designated as a special municipal employee position, who satisfies all of the requirements for a § 20(b) exemption, may participate in the Abatement Program at the same time that he is holding a job with the Town. If he fails to satisfy any of these requirements, he may not participate.²⁸

For example, a full-time employee of the Town's Public Library may participate in the Abatement Program using the § 20(b) exemption. In addition, a part-time assistant in the Town Clerk's office or a School Committee member whose positions have not been designated as a special municipal employee positions, may participate using the § 20(b) exemption.

2. Exemptions Available to Special Municipal Employees

Two exemptions are available for special municipal employees. A special municipal employee who does not participate in or have official responsibility for any of the activities of the contracting agency, in this instance, the Tax Collector-Treasurer's Office, may use the § 20(c) exemption. Section 20(c) provides that § 20 does not apply to a special municipal employee who does not participate in or have official responsibility for any of the activities of the contracting agency and who files with the city or town clerk, a full disclosure of his interests in the contract. A special municipal employee in Town who wants to participate in the Abatement Program and who qualifies for the § 20(c) exemption, must file a written disclosure of his financial interest in the Abatement Program with the Town Clerk. He may then participate in the Abatement Program. For example, if the members of the Town's Board of Health have been designated as special municipal employees by the Board of Selectmen, they may participate in the Abatement Program by using the § 20(c) exemption because they do not participate in or have official responsibility for any of the activities of the Tax Collector-Treasurer's Office, the contracting agency.

In contrast, a special municipal employee in Town who participates in or has official responsibility for any of the activities of the Tax Collector-Treasurer's Office, must obtain a § 20(d) exemption. That exemption requires the special municipal employee to file a written disclosure of his interest in the Abatement Program with the Town Clerk. In addition, the Board of Selectmen must approve the exemption. If he does not obtain the Board's approval, he may not participate in the Abatement Program. For example, a part-time employee in the Tax Collector-Treasurer's Office whose position has been designated as a special municipal employee position, may participate in the Abatement Program only by using the § 20(d) exemption.

If an employee who holds more than one position or office in Town also wants to participate in the Abatement Program, he needs to secure an exemption to § 20 to cover each of his positions. We suggest that an employee in this situation contact the Commission for further advice on how to comply with § 20 before participating in the Abatement Program.

B. Non-Town Employees Participating in the Abatement Program

You have inquired only whether Town employees may participate in the Abatement Program. We note, however, that every participant in the Abatement Program, including those who do not hold a Town position or office, will be considered a municipal employee for purposes of the conflict of interest law during the time that they participate in the Abatement Program.^{29/}

The conflict of interest law defines the term municipal employee broadly. It provides in relevant part that a municipal employee is any "person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis."^{30/}

A participant in the Abatement Program will be providing services to, and on behalf of, a Town department or agency. As such, every participant in the Abatement Program will be considered a municipal employee for purposes of G.L. c. 268A. This includes Town employees who participate as well as Town residents who do not already hold a Town position or office. Because of the limited hours that participants may work, the Abatement Program participant positions are eligible to be designated as special municipal employee positions by the Board of Selectmen.^{31/}

Our conclusion that all participants in the Abatement Program will be municipal employees for purposes of G.L. c. 268A is consistent with the purpose of the statute. The purpose of G.L. c. 268A "was as much to prevent giving the appearance of conflict as to suppress all tendency to wrongdoing."^{32/} To effectuate this purpose, the Legislature adopted a broad definition of municipal employee that includes not only the traditional employment relationship, such as a "contract of hire." The definition also includes individuals who perform services for or hold an office or position in a municipal agency who serve without compensation or who serve on a part-time or intermittent basis. The plain meaning of the definition of municipal employee in the conflict of interest law includes individuals who participate in the Abatement Program.

Further, § 5K of G.L. c. 59 provides that participants in the Abatement Program will be public employees for certain purposes. The statute provides that any participant in an Abatement Program while providing such services shall be considered a public employee for purposes of G.L. c. 258, the Tort Claims Act.^{33/} As such, the Town is liable for damages for injuries to third parties and for indemnification of participants to the same extent as it is in the case of injuries caused by regular municipal employees.

We note that G.L. c. 59, § 5K also provides that

[i]n no instance shall the amount by which a person's property tax liability is reduced in exchange for the provision of services be considered income, wages or employment for the purposes of taxation as provided in chapter 62, for the purposes of

withholding taxes as provided in chapter 62B, for the purposes of unemployment compensation as provided in chapter 151, for the purposes of workers' compensation as provided in chapter 152 or any other applicable provisions of the General Laws.

However, this language reflects different purposes than G.L. c. 268A.

In each of these instances, § 5K provides that participants will not be Town employees for certain taxation and insurance purposes that are part of the traditional employment relationship. These provisions, in effect, preserve the benefit of the bargain for both parties. Participants in an Abatement Program will not lose the benefit of their bargain of a reduction of their property taxes with a rise in other taxes on the amount of that reduction. In addition, the Town limits its financial exposure if the participants were considered municipal employees for the purposes of workers' compensation.

Finally, § 5K is silent as to whether participants will be considered municipal employees for purposes of the conflict of interest law. In light of this silence combined with the explicit statutory language in the definition of "municipal employee" in G.L. c. 268A, we will consider Abatement Program Participants to be municipal employees for purposes of the conflict of interest law.

CONCLUSION

Town employees may participate in the Abatement Program as long as they can comply with § 20(b), (c) or (d) of G.L. c. 268A as applicable. In addition, all participants in the Abatement Program will be municipal employees for purposes of G.L. c. 268A and they will be subject to the restrictions of that statute applicable to municipal employees.^{34/} However, the Town may reduce some of the restrictions on Abatement Program participants under G.L. c. 268A by designating them as special municipal employees.^{35/}

DATE AUTHORIZED: June 15, 2004

*Pursuant to G.L. c. 268B, § 3(g), the requesting person has consented to the publication of this opinion with identifying information

^{1/} Section 5K allows a municipality accepting its provisions to "establish a program to allow persons over the age of 60 to volunteer to provide services to such city or town. In exchange for such volunteer services, the city or town shall reduce the real property tax obligations of such person over the age of 60 on his tax bills"

^{2/} G.L. c. 59, § 5K was added by Chapter 127, § 59 of the Acts and Resolves of 1999.

^{3/} *Id.* § 5K.

^{4/} *Id.* See, e.g., G.L. c. 59, §§ 5 & 5C.

^{5/} *Id.* § 5K.

^{6/} *Id.*

^{7/} *Id.*

8/ In the case of multiple owners of a parcel, all owners may earn an abatement as long as the total abatement per parcel does not exceed \$500 per year.

9/ Preference is given to individuals who have never participated in the Abatement Program before.

10/ If a Department Head has already discussed a particular job with a volunteer, he is required to include that information on the Job Request Form.

11/ Municipal employee is defined as "a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution." G.L. c. 268A, § 1(g).

12/ 17 C.J.S. *Contracts* § 2 (1999) (footnote omitted). See *Restatement (Second) of Contracts* § 1 (1981) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.").

13/ EC-COI-95-07.

14/ EC-COI-92-35; *Quinn v. State Ethics Commission*, 401 Mass. 210, 215-16 (1987). See EC-COI-89-14 (agreement need not be formalized in writing to be a contract for G.L. c. 268A, § 7 purposes); EC-COI-81-64 (state grant is a contract).

15/ 17 C.J.S. *Contracts* § 2 (1999).

16/ *Black's Law Dictionary* 306 (6th ed. 1990).

17/ *Marine Contractors Co., Inc. v. Hurley*, 365 Mass. 280, 286 (1974); *Fall River Housing Joint Tenants Council, Inc. v. Fall River Housing Authority*, 15 Mass. App. 992, 993 (1983).

18/ EC-COI-92-35 (Aid to Families with Dependent Children; Emergency Aid to the Elderly, Disabled and Children; Supplemental Security Income).

19/ *Id.*

20/ *Id.*

21/ Special municipal employee is defined as "a municipal employee who is not a mayor, a member of the board of aldermen, a member of a city council, or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of aldermen if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of [G.L. c. 268A]; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a 'special municipal employee' unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be 'municipal employees' and shall be subject to all the provisions of [G.L. c. 268A] with respect thereto without exception." G.L. c. 268A, § 1(n).

22/ Participate is defined as "participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise." G. L. c. 268A, § 1(j).

23/ Official responsibility is defined as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action." G. L. c. 268A, § 1(i).

24/ We note that the contracting agency for a similar program in another municipality may be different. If so, full-time employees of the Tax Collector-Treasurer's Offices or those part-time positions that have not been designated as special municipal employees in those municipalities may be able to participate in an abatement program if they can otherwise comply with the requirements of § 20(b).

25/ See *EC-COI-03-02* (discussing meaning of term regulate).

26/ The § 20(b) requirement that the contract be made after public notice may be satisfied by advertisement in a newspaper of general circulation or multiple public postings in such places as the Town Hall, Senior Center and Town website. See *EC-COI-95-07; 87-24*.

27/ As Tax Collector-Treasurer, you may make the certification based on information provided by the Town's Department Heads.

28/ We note that in a municipality with a population of less than 3,500, a full-time appointed municipal employee may participate in an abatement program using the "small town exemption" in § 20. The small town exemption provides that in municipalities having a population of less than 3,500, a municipal employee may hold more than one appointed position with the town provided that the board of selectmen approves the exemption. This exemption does not apply, however, if a municipal employee holds an elected position and one or more appointed positions.

29/ A Town resident who is not a Town employee and does not have a financial interest in another contract with the Town does not need an exemption under § 20 of G.L. c. 268A in order to participate in the Abatement Program. However, if he wants to take on another municipal employee position or contract with the Town while participating in the Abatement Program, he will need to comply with § 20.

30/ G.L. c. 268A, § 1(g). The term municipal employee does not include elected members of a town meeting and members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. *Id.*

31/ *Id.* § 1(n).

32/ *Scaccia v. State Ethics Commission*, 431 Mass. 351, 359 (2000) quoting *Selectmen of Avon v. Linder*, 352 Mass. 581, 583 (1967).

33/ G.L. c. 59, § 5K.

34/ See G.L. c. 268A, §§ 2, 3, 8, 17, 18, 19, 20, 21A and 23. Anyone interested in participating in the Abatement Program may seek further advice from Town Counsel or the Commission as to the application of these other provisions of the conflict of interest law.

35/ See, e.g., G.L. c. 268A, § 17.