



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-94-5

FACTS:

You are an attorney seeking an opinion on behalf of a Mayor of a City. The spouse of the Mayor is a firefighter employed by the City's Fire Department, and is a member of the City Firefighters Union ("Union"). The Mayor is the sole collective bargaining authority for the City, pursuant to G.L. c. 150E, and therefore has the responsibility to participate in contract negotiations and other decisions in which the Mayor's spouse has a financial interest. The Mayor is also the City's "appointing authority" for purposes of the civil service law, G.L. c. 31, which is incorporated by reference in the collective bargaining agreement between the City and the Union ("Agreement").

The Mayor's spouse is the subject of a grievance filed by the Union, in which the Union alleges that the *prior* Mayor's appointment of the Mayor's spouse to the position of Lieutenant violated the Agreement. Under the Agreement, grievances that are not resolved at Step I, before the Chief of the Fire Department, or at Step II, before the City's Director of Personnel, shall be submitted to arbitration or, where appropriate, to the Massachusetts Civil Service Commission. You state that the grievance has now progressed past Step II and that, as appointing authority, the Mayor may be called upon to participate in decisions relative to the disposition of the grievance. This matter is currently being handled by the City's labor counsel.

The only provision of the City Charter which deals with substitution for the Mayor is §4.10, thereof, entitled "Temporary Absence of the Mayor". That section provides:

- (a) Acting Mayor - Whenever by reason of illness or absence from the city, the mayor shall be unable to perform the duties of his office for a period of three successive working days, or more, the president of the city council shall become the acting mayor.
- (b) Powers of Acting Mayor - The acting mayor shall have all of the powers of the mayor except that he shall not make any permanent appointment nor removal to or from any office unless the disability of the mayor shall have continued for sixty days or more, nor shall he approve or disapprove any measure passed by the city council unless the time within which the mayor must act would expire before the return of the mayor. During any period in which the council president is serving as acting mayor he shall not be eligible to vote on any measure as a member of the city council.

QUESTION:

May the Mayor participate in the negotiation of the collective bargaining agreement between the City and the Union, even though the Mayor's spouse has a financial interest in that contract?

ANSWER:

No. However, the Mayor may invoke the rule of necessity to select a "designated representative" to carry out this function.

DISCUSSION:

The Mayor is a municipal employee^{1/} for purposes of the conflict of interest law. Section 19 of G.L.c. 268A prohibits the Mayor's official participation^{2/} in any contract, decision or other "particular matter"^{3/} in which the

Mayor or the Mayor's immediate family⁴ member has a financial interest. Section 19 encompasses financial interests of any size, whether positive or negative, but the financial interest must be direct and immediate or reasonably foreseeable. See *EC-COI-92-18*; *89-19*; *86-26*. Consequently, §19 would normally prohibit the Mayor's participation in those matters affecting the spouse's direct or reasonably foreseeable financial interest. For example, §19 would prohibit the Mayor from participating in any discussions or votes concerning the collective bargaining agreement between the spouse's union and the City. Other matters affecting the spouse's financial interest include grievances or disciplinary matters affecting the spouse, health benefits affecting all firefighters, matters affecting seniority rights which will impact upon the spouse, or matters involving lay-offs or retirement which affect the spouse. *EC-COI-92-21*; see also, *Commission Advisory No. 11 (Nepotism)*; *EC-COI-90-1*; *In re DeOliveira*, 1989 SEC 430. Section 19 also prohibits the Mayor from delegating to another those functions which §19 bars the Mayor from performing. See *Commission Advisory No. 11 (Nepotism)*, footnote 8. Thus, we must consider whether applicable statutes or the City Charter provide a substitute official to perform these duties in place of the Mayor.

Mayor Acting As "Employer" Under G.L. c. 150E

Under G.L. c. 150E, §1, the "employer" for purposes of collective bargaining is the city itself, acting through its "chief executive officer" or a designated representative. In *Labor Relations Commission v. Natick*, 369 Mass. 431, 438-441 (1976), the Court held that a city has but one chief executive officer, and that it is that official who must make a "designation of a bargaining representative" to act in his place. Here, however, the chief executive officer is the Mayor, who is prohibited by §19 from designating a bargaining representative to negotiate the firefighter's contract in the Mayor's stead. Thus, Chapter 150E does not provide for a substitute in this case.

The City Charter also does not make any provision for another official to act where the Mayor is disqualified by conflict of interest. Rather, by its terms, the provision calling for an acting mayor is operative only in the case of the Mayor's illness or absence from the City.

Likewise inapplicable here are G.L. c. 43, §26, which provides that the president of the city council shall perform the duties of mayor "[i]f the mayor is absent or unable from any cause temporarily to perform his duties", and G.L. c. 39, §5, which provides that the president of the board of aldermen, "upon the death, resignation, absence of the mayor, or his inability to perform the duties of his office", shall perform the duties of mayor. It is well settled that these statutes are applicable "only in matters not admitting of delay." *Dimick v. Barry*, 211 Mass. 165, 166-167 (1912). At a minimum, therefore, there must be a "necessity so importunate that it cannot be resisted with reason." *Id.* (examples cited by the court include "impending disaster, threatened disorder, public pestilence, devastation by flood or fire", or matters where time is of the essence, such as in the case of an impending election); see also 5 Op. Att'y Gen. 537, 538 (1920) (statute providing for an acting mayor in matters "not admitting of delay" is "merely a designation of an employee to discharge the duties of the office in the case of emergency"; there must be "an exigency requiring action by the acting mayor"). There is no evidence of exigent circumstances in the present case.⁵ Finally, these statutes provide that the acting mayor shall have the power to perform *all* of the duties of the office, not merely those which the mayor is disqualified to perform by reason of conflict, as would be the case if these statutes were applied here. See, *Ryan, supra*. Thus, lacking a substitute official to perform these particular duties of the Mayor, we must consider whether this is an appropriate case to invoke the rule of necessity.

As we recognized in *EC-COI-93-13*, "[t]he rule of necessity was established by the courts to allow public officials to participate in official decisions from which they are otherwise disqualified by their bias, prejudice or interest when no other official or agency is available to make that decision." See *Moran v. School Committee of Littleton*, 317 Mass. 591, 594 (1945); *Graham v. McGrail*, 370 Mass. 133, 138 (1976) (suggesting that the rule would apply in proper circumstances where public officials could not participate due to G.L. c. 268A). The facts of this case are analogous to those presented in *Mayor of Everett v. Superior Court*, 324 Mass. 144 (1949). In that case, license commissioners challenged the mayor's order removing them from office, citing certain personal remarks of the mayor said to indicate his bias or prejudice against them. The lower court found that the mayor was indeed biased and overturned the mayor's order. The Supreme Judicial Court, however, noted that the legislature conferred upon the mayor the power to remove the city's license commissioners, and that it made no provision that any other officer could act in case the mayor was disqualified by reason of bias or prejudice. As a result, that court, citing *Moran*, held that the mayor could invoke the rule of necessity to participate in the removal of the license commissioners. See also *Graham, supra* (recognizing *Mayor of*

Everett as a case in which the rule of necessity has been applied).

Here, similarly, the legislature has conferred upon the Mayor the sole power to act as the city's bargaining representative with regard to the firefighter's contract. Since neither G.L. c. 150E, the City Charter, nor any other statute provides that another official may act if the Mayor is disqualified by conflict of interest, the rule of necessity may be invoked in this case. However, we believe that the rule of necessity ought to be invoked solely to permit the Mayor to select another as the Mayor's "designated representative". G.L. c. 150E, §1. In this way, the City may carry out its obligation to bargain collectively with the Union "free of suspicion or suggestion of action motivated in part by private interest." *Albano v. Selectmen of South Hadley*, 341 Mass. 494, 496 (1960).^{6/}

DATE AUTHORIZED: May 10, 1994

^{1/} "Municipal employee", 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).

^{2/} "Official participation includes ... action to approve, disapprove, recommend or decide a particular matter, for example, by voting on it or through discussion of it." *EC-COI-87-25*.

^{3/} "Particular matter", any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

^{4/} "Immediate family", the employee and his spouse, and their parents, children, brothers and sisters. G.L. c. 268A, §1(e).

^{5/} Moreover, G.L. c. 39, §5 is applicable only where the city charter does not provide otherwise. *Ryan v. Boston*, 204 Mass. 456, 459 (1910). In this case, the City Charter does contain a provision which expressly addresses the mayor's absence or inability to perform the duties of her office. Thus, G.L. c. 39, §5 appears to be inapplicable here in any event.

^{6/} You also ask us to consider whether the rule of necessity would apply to actions of the Mayor as the City's "appointing authority", under G.L. c. 31, with regard to the pending grievance. However, you are unable to tell us what role the Mayor may play in the matter. This Commission renders opinions "only when presented with specific questions relating to potential conflict situations which exist or are imminent. It does not rule on abstract, hypothetical questions." *EC-COI-79-56*. Since we lack specific facts concerning actions the Mayor may be called upon to take as appointing authority, any answer we may give as to whether invocation of the rule is required so that "an important public decision would [not] be frustrated", *EC-COI-93-3*, would be completely hypothetical. Thus, we decline to decide this question at this time. You may contact this Commission for further advice when you have specific facts.