



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-95-4

FACTS:

You are an elected member of the Housing Authority (Authority) of the Town of Marblehead (Town). You are currently serving a 10-year term as one of the approximately 80 corporators of the Marblehead Savings Bank (Bank). The Authority keeps a significant portion of its monies in accounts at the Bank.

Savings Banks - Historical Context

Savings banks flourished in the mid-nineteenth century; they are concentrated in the northeastern United States. The first Massachusetts savings bank was organized in 1816 and the last in 1955. Until the early 1980's, all Massachusetts savings banks were mutual, in that they were not-for-profit organizations, like most hospitals and colleges, operated solely on behalf of their depositors. Corporators of such traditional mutual savings banks are intended to represent a cross-section of a bank's depositors.

In 1982, savings banks were permitted to convert to stockholder owned institutions. St. 1982, c. 155, §29, as amended. Today, of the approximately 100 Massachusetts savings banks, approximately two-thirds are traditional mutual banks, rather than stockholder owned banks. The principal procedural, organizational, governance and managerial functions and operations of Savings Banks are set forth in G.L. c. 168 (Savings Bank Statute).^{1/}

Savings Bank Statute

A savings bank is required to have at least 25 corporators, who serve for 10-year staggered terms and must be or become depositors. At least 75% of the corporators must be citizens and residents of the Commonwealth. The principal legal responsibility of corporators is to attend annual meetings^{2/} to elect (i) their bank's trustees (from among the corporators) and (ii) their bank's president, vice president(s) and clerk^{3/}. G.L. c. 168, §§9, 9A, 10, 13, 14.

A savings bank's corporators are also authorized to amend their bank's by-laws and are among those who are required to approve certain major changes in their bank's corporate structure, *e.g.*, the merger and/or consolidation of their bank with other savings or cooperative banks, the conversion of their bank into a stockholder owned form of corporation, the formation of a mutual holding company and the dissolution of their bank. G.L. c. 167H and c. 168, §§33, 34, 34A, 34C and 34E; 209 CMR 33.00.

A savings bank's board of trustees is specifically charged with managing the business of the bank. There are required to be at least 11 trustees who meet at least quarterly. The board of trustees elects the bank's treasurer, vice treasurer and assistant treasurer and such other officers as it deems necessary. It also elects, from among the trustees, a board of investment having not less than five members who meet at least monthly. Among other responsibilities, the board of investment is specifically charged with approving the following bank activities: (i) all loans and changes in loan terms and security pledged therefor; (ii) the purchase and sale of any securities; (iii) all foreclosures and sales of foreclosed property; and (iv) interest rates for various deposit accounts. G.L. c. 168, §§10, 11, 12, 14.

Bank's By-Laws and Practice

The Bank was created in 1871 by legislative act of the General Court. St. 1871, c. 99. The Bank's by-laws (By-Laws) are consistent with provisions of the Savings Bank Statute. The By-Laws specify that the

Bank is required to have (i) from 25 to 85 corporators (Corporators); (ii) a 20-member board of trustees (Trustees); (iii) a president, 4 vice presidents and a clerk (all elected by the Corporators); (iii) a Treasurer (elected by the Trustees); and (iv) a board of investment (Board of Investment) consisting of the president and 4 trustees elected by the Trustees. In addition, the By-Laws require that there be an auditing committee, distinct from the Board of Investment, composed of at least 3 trustees and that salaried bank employees may not be Corporators.

Practically speaking and, again consistent with the Savings Bank Statute, the essential responsibility of the Bank's 80 Corporators is to attend the annual meeting to elect Corporators, Trustees and certain of the officers to fill vacant and/or term-expired positions. At such meetings, they also listen to report(s) about the affairs of the Bank. Corporators are unpaid; virtually all of the Corporators are either residents of or have businesses in the Town or both. As such, individual Corporators may, but are not required to, help the Bank to maintain an awareness of community needs and problems with Bank products, services or activities and promote the use of the Bank's products and services.

By contrast, the Trustees (who meet quarterly) are charged with exercising "general supervision of the management of the Bank," and the members of the Board of Investment (who meet weekly) are charged with exercising "general supervision and control in all matters pertaining to the interest of the Bank." The Trustees and the members of the Board of Investment are paid for each meeting they attend.

The Bank's president and vice presidents work part-time. They receive no compensation for serving as such officers. The Bank's treasurer (elected by the Board of Trustees) works full-time and receives a salary; it is the treasurer who is the day-to-day "boss" of the Bank.

QUESTION:

Does G.L. c. 268A (conflict of interest law) permit you to serve as a member of the Authority and a Corporator of the Bank?

ANSWER:

Yes, subject to the limitations discussed below.

DISCUSSION:

As a member of the Authority, you are a special municipal employee^{4/} for purposes of the conflict of interest law. G.L. c. 121B, §7.

1. Applicability of Section 19

Section 19 of the conflict of interest law, in relevant part, prohibits a municipal employee from participating in any particular matter^{5/} in which (i) he, his immediate family or his partner, (ii) a business organization in which he serves as an officer, director, trustee, partner or employee or (iii) a person or organization with whom he is negotiating or has an arrangement for prospective employment has a financial interest.

The purpose of this section (and its county and state counterparts) is to require the public employee to avoid situations in which he or certain persons or entities with whom he has a close family or business relationship have a "private stake." See Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B. U. L. Rev. 299, 353 (1965).

An employee may have a close cousin or grandparent (or friend or enemy) and be influenced by his or her interest in a particular matter; but the statute must draw a line somewhere, and the interests of such persons, who are less likely to have an identity of interest with the employee, are not attributed to him.

Id. at 356.

A similar rationale applies to business relationships addressed in this section. The statutory prohibition extends only to the specified business relationships, not to all possible business relationships. For example, the prohibition

is not triggered if a municipal employee's private business employee or consultant were to have a financial interest in a particular matter before such municipal employee.

The threshold question here is whether or not, as a Corporator, you are a "director of a business organization" within the meaning of §19 of the conflict of interest law.^{6/} If you are, then §19 applies to you in these circumstances; if you are not, then §19 does not apply.

In light of the information provided by you and by others;^{7/} our review of the Savings Bank Statute and certain associated regulations, and the By-Laws and certain practices of the Bank; our comparison of the roles and functions of Corporators and Trustees with those of stockholders and directors of business and other banking corporations; and our holdings in *EC-COI-89-15* and *89-12*, all discussed below, we take this occasion to revisit our determinations in *EC-COI-87-10* and *83-40*.^{8/} We conclude that, as a Corporator, you serve neither by title nor in substance as a director of the Bank. Accordingly, we further conclude that you will not be required by §19 to abstain from participating as an Authority member in matters in which the Bank has a financial interest.

The term "corporator" is not expressly included among those relationships, titles or positions that automatically trigger §19's abstention requirements. That, however, is not dispositive. As we have indicated in previous opinions, in determining whether §19's abstention requirements apply in a particular case, we will not necessarily be bound solely by the formal name or title given to a position; rather, we will examine the substance of the relationship or the "substance of the position." See *EC-COI-89-15* (state employee/member of private institution's board of overseers not subject to §6, state counterpart to §19); *EC-COI-89-12* (state employee/member of private hospital board of advisers not subject to §6); *80-43* (partnership relationship imputed to a group of lawyers who create a public image that they are partners).

Therefore, we will examine and compare the "substance of the positions" of the Corporators and the Trustees in the operations and management of the Bank. We will then compare those positions to those of stockholders and directors in business corporations.

The Bank's Corporators are unpaid, have no ownership interest^{9/} in the Bank and reflect various interests in the Town. They attend annual meetings to elect their fellow-Corporators and those of the Bank's Trustees and the Bank's president, vice presidents and clerk who are up for election. The Corporators are also authorized to amend the Bank's By-Laws and required to approve major changes in the Bank's structure or existence, such as mergers, conversions, consolidations and dissolutions.

By contrast, it is the Bank's 20 Trustees and, in particular, the sub-group of Trustees and president constituting the Bank's 5-member Board of Investment who manage the business of the Bank at quarterly and weekly meetings, respectively. The Trustees elect the members of the Board of Investment and the Treasurer, who is the Bank's day-to-day "boss." The Board of Investment reviews and decides upon the ongoing business decisions of the Bank relating to such matters as loan terms, interest rates, foreclosures and investments.

Most current Massachusetts business corporations are governed by the Business Corporation Law, G.L. c. 156B.

Stockholders of business corporations have ownership interests in their corporations. They attend annual meetings or vote by proxy to elect those of the directors, the treasurer and the clerk who are up for election. They are also authorized to amend the corporation's articles of organization and by-laws and required to approve major changes in the corporation's structure or existence, such as the disposition of all or substantially all of its corporation's assets, mergers, consolidations and dissolutions.

By contrast, directors manage the business of the corporation. Directors elect the president, and typically they elect officers other than the treasurer and the clerk unless the by-laws provide otherwise. Directors may delegate certain of their powers to an executive committee elected by and composed of directors.

On the basis of the foregoing analysis and comparison, it appears to us that the functions and responsibilities of the Bank's Corporators are in all material respects analogous to those of stockholders of a business corporation and, correspondingly, that the functions and responsibilities of the Bank's Trustees are analogous to those of the directors of a business corporation.^{10/} The court's finding in *Cosmopolitan Trust Co. v. Mitchell*, 242 Mass. 95

(1922) that directors of a trust company, who manage it on behalf of stockholders, are analogous to the trustees of a savings bank, who are its managing officers supports this conclusion.

The Corporators perform the same roles for the Bank as do stockholders: both choose management, have authority to amend the governing documents and are required to approve major changes in the Bank's structure and existence.^{11/} By contrast it is the Bank's Trustees, Board of Investment and/or officers (not the Corporators) who perform the functions of directors of a business corporation, to wit, managing the business and affairs of the Bank.^{12/}

In *EC-COI-89-12*, we wrote about a state employee who was also a member of a private hospital's board of advisers:

[W]e conclude that your board of advisor responsibilities are not comparable to those of a corporate officer or director. This conclusion is based on the fact that those corporate officer and director functions are already performed by other individuals, and on the Hospital's intent to establish the board of advisors as a community-based sounding board, rather than as a decision-making management board. *Id.*

We followed that opinion in *EC-COI-89-15*, involving a state employee who was also a member of a board of overseers of a private institution. We concluded that the board of overseers was primarily a community-based sounding board and did not perform the institution's "corporate officer and director functions." *Id.* at 250. The principles expressed in both opinions are equally applicable here. The Bank's Corporators are not comparable to corporate officers or directors, whose functions are already performed by other individuals, namely, the Bank's Trustees, Board of Investment and/or officers.

In sum, our conclusion is that the "substance of the position" of Corporator is not that of a director.^{13/} Accordingly, §19 does not apply to your situation. *Compare EC-COI-87-5* (under §6, the state counterpart to §19, a state employee who is also a bank director may not participate in state matters in which the bank has a financial interest).

2. Limitations on Your Activities

a. Section 17

Section 17 of the conflict of interest law, in relevant part, prohibits a municipal employee from acting as agent for anyone other than the municipality in connection with any particular matter in which the *same* municipality is a party or has a direct and substantial interest. The rationale behind this is that public employees should be loyal to their public employers, and, where their loyalty to such public employers conflicts with their loyalty to a private party or employer, their public employers' interests must win out. *See EC-COI-82-176* (involving a state employee under §4, the state counterpart to §17).

That prohibition applies less restrictively to special municipal employees. A special municipal employee may not act as agent in connection with a particular matter (i) in which he at any time participated as a municipal employee, (ii) which is or has been the subject of his official responsibility^{14/} within one year or (iii) which is pending in the municipal agency in which he serves. This last restriction applies only to special municipal employees who serve on more than 60 days^{15/} during any 365-day period.

As applied to your circumstances, you should refrain from representing the Bank's interests or acting on its behalf, formally or informally, to or before the Authority. For example, during any audit of the Authority's books, records and accounts, you should not act as the Bank's representative. *See EC-COI-87-5* (state employee who is also a bank director).

b. Section 23

Section 23 of the conflict of interest law imposes standards of conduct that are applicable to all public employees.

Section 23(b)(2) prohibits a public employee from using his official position to secure for himself or

others an unwarranted privilege of substantial value^{16/} that is not properly available to similarly situated individuals. Under the precepts of this section, you may not, for example, use your Authority title or position in a newspaper advertisement or a letter to promote the Bank to Town residents. That would or could give the impression that the Authority or the Town endorses the Bank.

Section 23(b)(3), the so-called “appearances” section, is most pertinent to your situation. It prohibits a public employee from engaging in conduct that gives a reasonable basis for the impression that any person or entity can improperly influence him or unduly enjoy his favor in the performance of his official duties. The section requires the employee to dispel any such “appearance of conflict” by making a written disclosure of the relevant facts.

Thus, even though §19 would not require you to abstain from participating in the Authority’s decisions regarding matters involving or affecting the interests of the Bank or, for that matter, the interests of the Bank’s business competitors (*e.g.*, where, in what amounts and in what types of accounts to deposit the Authority’s monies), before participating in any such matter, you will be required to file a written disclosure of all relevant facts with the Town Clerk, and we suggest that you also make a similar oral, public disclosure for inclusion in the minutes of the Authority’s meeting(s) at which such matters are reviewed, discussed, considered or voted upon.

Furthermore, if you do participate in any such matters, then under §23(b)(2), you must take care to follow ordinary and accepted procedures without deviation. In other words, if you feel that you will be so biased in favor the Bank that you will not be able to act objectively, you should abstain from participating.

DATE AUTHORIZED: April 11, 1995

^{1/}Other provisions of the General Laws govern the banking powers and functions of savings banks, cooperative banks, trust companies and other banking institutions in the Commonwealth. G.L. c. 167B through 167G.

^{2/}A quorum consists of the greater of 13 incorporators or 25% of the incorporators, but no more than 50 incorporators are necessary to constitute a quorum. A corporator may forfeit his membership by failing to attend two consecutive annual meetings. G.L. c. 268, §§9 and 9A.

^{3/}The president and at least one vice president must be trustees.

^{4/}Certain provisions of the conflict of interest law apply less restrictively to special municipal employees than to other municipal employees.

^{5/}“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).

^{6/}Because you have no ownership interest in the Bank, you have no personal financial interest within the meaning of §19. Furthermore, while we recognize that, as a Corporator, you are eligible to be elected to serve as a Trustee and that it is theoretically possible that you could be elected to serve as a Bank officer (president, vice president, treasurer or clerk), you have not been so elected and, thus, do not so serve.

^{7/}We were provided information by the General Counsel for the Massachusetts Division of Banks, legal counsel for the Bank, personnel from the Massachusetts Bankers Association and the Executive Director of the Authority. Our opinion in *EC-COI-83-40* involved a state employee who was responsible for depositing state patients’ private funds into bank accounts and who was also a corporator of a bank into which such funds were deposited. In that case, we implicitly concluded that nothing in the conflict of interest law “would prohibit outright” the state employee’s simultaneously serving in her state position and as a bank corporator, but suggested that she, nevertheless engage in specifically prescribed disclosure procedures derived from a “merger” of the disclosure procedures contained in the predecessor of §23(b)(3) (the so-called “appearance” of conflict provision) and §6 (state counterpart to §19) to address the concerns raised by her dual positions.

^{8/}In *EC-COI-87-10*, our conclusion that a particular savings bank’s corporators, in effect, performed the functions of directors was based on our determination that corporators “elect the management of the bank” and “make fundamental decisions concerning the liquidation, dissolution or merger of the Bank.” In fact, in those two respects as well as others, corporators are more like stockholders than directors. Stockholders, like corporators, elect much of the management and are involved in approving liquidations, dissolutions and mergers of their corporations. In our earlier opinion, we also noted that, upon a conversion of a savings bank into a stockholder owned corporation,

the incorporators “would be treated as directors.” In actuality, upon any such conversion, it is generally the members of the then-existing board of trustees who, pursuant to a plan of conversion approved by the Commissioner of Banks and the Corporators, among others, me the initial board of directors of the converted bank. *See* 209 CMR 33.00. Thus, after having undertaken a closer examination and analysis of the law and the facts, we here reach a different conclusion.

⁹In *Jefferson v. Cox*, 246 Mass. 495, 497 (1923), the court wrote: “There are and can be no shares of stock in a Massachusetts savings bank. Such a bank is a purely mutual institution without stock.”

¹⁰For further comparison, we note that co-operative banks (governed by G.L. c. 170), credit unions (governed by G.L. c. 171) and trust companies (governed by G.L. c. 172) have a comparable division of responsibilities between their shareholders, members or stockholders, as the case may be, on the one hand, and their directors, on the other.

¹¹Comparing the roles of incorporators and those of stockholders, we do not mean to conclude that the two positions are substantively identical, for indeed, they are not because, among other reasons, incorporators do not have an ownership interest in their savings banks whereas stockholders have ownership interests in their business corporations.

¹²If you were to be elected to serve as a Trustee or an officer of the Bank or if the Bank were to convert to a stockholder owned savings bank and you were chosen or elected to serve as a director, then from and after any such event, you would be subject to the abstention requirements of §19.

¹³ Several provisions of the Savings Bank Statute provide further support for our conclusion. First, the term “officers” is used in §13 of the Savings Bank Statute to refer in the aggregate to trustees, members of the board of investment, president, vice presidents, treasurer and clerk of savings banks. It appears that that designation is used to distinguish that group from the “operating officers,” who do not include the trustees. The fact that incorporators are not included in either group supports our conclusion.

Second, §22 of the Savings Bank Statute imposes penalties (fines and/or imprisonment) on officers, directors, trustees and employees for their knowing and wilful misconduct. It does not mention incorporators. That omission evidences the minimal role that the legislature contemplated for incorporators of savings banks.

¹⁴“Official responsibility,” 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).

We note that “[o]fficial responsibility turns on the authority to act, and not on whether that authority is exercised.” *EC-COI-89-7*. Thus, by abstaining, a public employee will not remove a particular matter from his official responsibility.

¹⁵For purposes of calculating the 60-day limit, (i) a day is not counted unless the public employee serves his agency on such day and (ii) any part of a day on which the public employee so serves will be counted as a whole day. *See EC-COI-85-49*.

¹⁶Anything valued having a value of \$50 or more is “of substantial value.” *EC-COI-93-14; Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8 (Free Passes)*.