



Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-371-9500, fax: 617-723-5851



CONFLICT OF INTEREST OPINION EC-COI-95-6

FACTS:

Pursuant to state law, certain state employees conduct tests of persons who are applying for a certain state license. The tests are generally conducted on Monday through Friday. These state employees receive no additional compensation beyond their “straight time” salary for these tests.

There is currently a backlog of tests. Additionally, a number of private schools have requested that the state agency conduct tests on Saturday mornings because of the great convenience to their customers and themselves.^{1/} You state that the assignment of additional state employees during the week could handle any backlog, but the convenience of Saturday testing will always remain a significant issue. The supervisor of the state employees would like the state employees to conduct Saturday tests on “straight time,” however, the current union contract prohibits Saturday work at “straight time” and requires overtime compensation at a rate of time and one-half.^{2/} Neither the state agency that conducts the test, nor the state agency that issues the licenses, has the funds to pay for such overtime.

Recently, at the request of several private schools, approximately twenty state employees have been conducting tests on Saturday mornings. Each state employee has been assigned a specific work period. The schools have paid the time and one-half hourly rate by depositing it into an existing state agency funds designated for this purpose. Each state employee is compensated with a Commonwealth of Massachusetts check drawn from that account (less appropriate payroll deductions). Each state employee conducts about twelve (12) tests in the four (4) hour period. The school may not select or request the specific state employee that will be assigned on a particular Saturday. These state employees are assigned by their agency from a list of personnel.

In general, pursuant to an article in the contract between the state employees’ union and the Commonwealth, such work periods “shall be in accordance with the terms of a certain agency memorandum (Memorandum).” Under the Memorandum, state employees may perform work “involving the construction and/or maintenance or repair of state highways and/or properties owned by the Massachusetts Port and Turnpike Authorities” or “of any type approved by the Executive Officer, or his designee.” Such work may be performed on days off; on holiday days off; during vacations; on any day on which the state employee starts days off, holiday day off, or vacation; “and at such other times as may be established by agreement and announced by the [state agency].” The Memorandum further provides that “[a]ll work will be distributed to members fairly and equitably [from lists established in accordance with a procedure set forth in the Memorandum] as to number of work periods, type, hours and compensation thereof, and averaged on a continuing monthly basis.”

The method by which the school finances the additional costs associated with a this work is not standard. One method is for the school to surcharge each student being tested nine dollars, which is paid directly to the school. This additional cost is not paid by persons taking tests given by the state employees during Monday to Friday.

You and the administrative head of the state agency^{3/} have approved Saturday testing period “as a short term measure,” provided that such testing periods are consistent with the requirements of the Massachusetts conflict of interest law.^{4/} As a long term remedy, the state agency’s managers are negotiating with their employees’ union to find a way to assign state employees to Saturday tests and to pay for such service on “straight time”.

QUESTION:

Does G.L. c. 268A permit state employees to be paid for working at private schools which may or may not charge their students a surcharge in connection with that work?

ANSWER:

No, unless legal authority for such work is established through statute or regulation.

DISCUSSION:

Except as “otherwise provided by law for the proper discharge of official duties,” §4 of the conflict law prohibits a state employee from being compensated, directly or indirectly, by anyone other than the Commonwealth in relation to any particular matter^{5/} in which the Commonwealth or a state agency is a party or has a direct and substantial interest. The rationale behind §4 “is that public employee should be loyal to the state and, where their loyalty to the state conflicts with their loyalty to a private party or employer, the state’s interest must win out.” *EC-COI-82-176*.

In deciding the current question, we need not decide the extent to which the proposed work periods, in general, are or are not in relation to particular matters. Rather, it is enough that state licensure of an individual or entity, as we have previously found, is a particular matter of direct and substantial interest to the Commonwealth. See, e.g., *EC-COI-82-105* (description omitted); *80-95* (state has direct and substantial interest in decision to grant a cable television license); see also *EC-COI-79-6* (liquor licensing is a matter of direct and substantial interest to the municipality). Thus, unless such compensation is “otherwise provided by law for the proper discharge of official duties,” §4 prohibits a state employee’s receipt of compensation from a private school (i.e., a non-state party) in connection with a state agency-sponsored test. Compare *EC-COI-82-176* (state employee, for private compensation, may teach at school because his compensation is not in relation to the test). That is, because there is the potential that a state employee might feel beholden to the private school that pays him at the expense of the state’s interest in licensing only qualified persons, express statutory authority for the private payment is required.

Our examination of the facts reveals that nothing in General Laws or the state agency’s enabling act authorizes these work periods. Instead, such work hours are governed by the collective bargaining agreement and a specific agency memorandum. Although the agency’s administrative head is authorized to make all necessary rules and regulations for the performance of the duties of the state’s employees, including rules and regulations relating to compensation of affected state employees [citation omitted], these provisions do not, of themselves, amount to statutory authority for work periods in connection with particular matters of direct and substantial interest to the Commonwealth. See, e.g., *EC-COI-92-4 n. 9* (the statute or regulation must specifically authorize receipt of compensation from the non-state party); see also *EC-COI-89-5*. Thus, the privately paid work in question violate §4 of the conflict law.

In *EC-COI-92-4*, we recognized that the “as provided by law” language in §4 can be met by “a regulation duly promulgated by a government agency authorized to do so.” We also note that, at the municipal level, there exists statutory authority for payment for work similar to that at issue here. [citation omitted]

We think that enactment of a statute or promulgation of a regulation pursuant to the General Laws, similar to the statute governing municipal affairs, would satisfy the §4 requirement. However, because such authorization is presently lacking, a state employee’s receipt of compensation from a private school in relation to a state agency-sponsored test violates §4.

DATE AUTHORIZED: May 10, 1995

^{5/}Each location of each private school must be licensed to operate by the Commonwealth pursuant to statute. Such licenses must be renewed annually.

^{2/} (statutory reference omitted)

^{3/} (footnote omitted)

^{4/} Saturday examinations have been suspended pending the outcome of this opinion.

^{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).