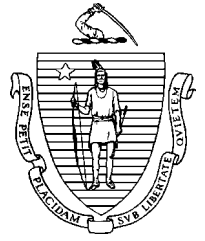




Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-96-2

FACTS:

A Town Board of Assessors is made up of five elected, uncompensated members. Certain members of the Board are licensed real estate appraisers.

QUESTION:

Does the conflict of interest law allow a Board member, who is also a licensed real estate appraiser, to be paid to perform appraisals of properties located in Town?

ANSWER:

Yes, subject to the limitations set forth below.

DISCUSSION:

Board members are municipal employees under the conflict of interest law.^{1/} The following provisions of c. 268A are relevant to the question.

Section 17

Section 17(a) prohibits municipal employees from receiving compensation^{2/} from anyone, other than their municipality, in connection with a particular matter^{3/} in which the municipality is a party or has a direct and substantial interest. In addition, §17(c) prohibits municipal employees from acting as agents^{4/} for anyone other than the municipality in any claim against the municipality or for anyone in connection with any particular matter in which the municipality has a direct and substantial interest. This section is based on the principle that “one cannot serve two masters.” A member of the Board who is also a private appraiser would be restricted from participating or receiving compensation in certain particular matters.

For example, such a member would not be allowed, under §17(a), to be paid by a private party to prepare materials such as affidavits or valuation forms that would be submitted to the Board. One could not be paid to perform an appraisal for the express purpose of seeking an abatement. If one were to perform such types of work for no pay, one would still not be able to act as an agent for a private party before any Town boards or officials. Signing or submitting forms on behalf of a private party or appearing personally before Town officials would constitute acting as an agent. Representing any private party in any matter relating to a property assessment such as a challenge to the assessment or an abatement application would be prohibited.

Additionally, if the Town were interested in leasing or purchasing properties, it is conceivable that value as established by an appraisal would be of direct and substantial interest to the Town. A Board member could not be paid by or represent a private party in connection with such an appraisal.^{5/} Similarly, a Board member could not conduct an appraisal for a private party in an eminent domain proceeding by the Town or in connection with a tax taking or sale.

Section 17 would not, however, prohibit a Board member from performing appraisals conducted only for private parties and not related to any official action by the Town. For example, §17 would not bar a Board

member from conducting an appraisal in connection with private financing.

Section 19

In pertinent part, §19 provides that a municipal employee may not participate in any particular matter in which he, an immediate family member^{6/} or partner, a business organization in which he is an officer, director, trustee, partner, or employee has a financial interest. The definition of participation includes not only voting but also formal and informal lobbying of colleagues, reviewing and discussing, giving advice and making recommendations on particular matters. *EC-COI-92-90*. The financial interest may be of any size and may be either positive or negative so long as it is direct and immediate *or* reasonably foreseeable. *EC-COI-92-24; 84-96; 84-98*. For example, a Board member could not participate in Board matters concerning his own property or property of his immediate family.^{7/}

Section 23

Certain provisions of §23, which specifies standards of conduct that apply to all public officials, are pertinent. Under §23(b)(2), a public employee may not use his official position to secure unwarranted privileges or exemptions of substantial value^{8/} for himself or others. Section 23(b)(3) prohibits a public employee from engaging in any conduct which gives a reasonable basis for the impression that any person or entity can improperly influence or unduly enjoy his favor in the performance of his duties, or that he is likely to act or fail to act as a result of kinship, rank, or position of any person. To dispel such an impression, the public employee must make a written public disclosure in advance of participating in the matter of all the facts and circumstances. *EC-COI-91-3; 89-19*. An elected official must file such a disclosure with the municipal clerk. In addition, if an appearance of a conflict of interest arises in a public meeting, officials are advised to make a verbal disclosure to be included in the meeting minutes. *Commission Fact Sheet, Avoiding "Appearances" of Conflicts of Interests, Standards of Conduct (Section 23)*.

Finally, §23(c) prohibits a public employee from engaging in any business or professional activity that will require him to disclose confidential information which he has gained by reason of his official position or authority and from improperly disclosing material or data which is exempt from the definition of a public record.^{9/} *EC-COI-91-1*.

Under §23(b)(2), a Board member may not use his title as an Assessor, municipal time or resources to promote or benefit private interests. Although final assessments are a matter of public record, one could not use, for example, computer data bases or programs not available to the public to get information for a private appraisal business.

We acknowledge that appraisals are performed for purposes not related to the Board's responsibilities or other municipal matters. For example, private parties secure appraisals for financings, sales, or marketing efforts. Neither the Board member nor the private party may have contemplated that the appraisal would be used in connection with a municipal matter. However, such an event may occur. If such an appraisal were to be submitted to the Board at a later time in connection with a particular matter, §23(b)(2) requires the Board member who performed the appraisal to apply objective criteria to that matter. *EC-COI-89-23*. In addition, as described below regarding §23(b)(3), the Board member must also make a public disclosure of all the facts and circumstances regarding his work on the appraisal in order to dispel the appearance of a conflict of interest. See also *EC-COI-89-29*. If the Board member cannot be objective about the matter because of his prior private work on the appraisal, he must abstain from participating in that particular matter before the Board.^{10/}

Issues under §23(b)(3) often arise because of one's relationships with non-immediate family members which do not involve financial interests under §19. If a former private appraisal client of a Board member were to bring a matter before the Board, not involving the Board member's private appraisal, that Board member must fully disclose his history with the client in order to dispel an appearance of bias or influence prior to participating in the matter. Similarly, again when §19 or §17 issues are not involved, if a Board member assisted a party in completing an abatement application for no pay, that Board member must disclose his prior relationship. See also *EC-COI-89-16*.^{11/}

DATE AUTHORIZED: March 27, 1996

^{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).

Although a non-paid municipal position may qualify to be designated for “special municipal” employee status, our records do not indicate that the Board of Assessor positions have been so designated. The definition of a special municipal employee is a municipal employee

who is not a mayor, a member of the board of aldermen, a member of the 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 this chapter; 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 this chapter with respect thereto without exception. G.L. c. 268A, §1(n).

Certain provisions of the conflict law apply somewhat less restrictively to special municipal employees. If the Town were to designate the Board positions as “special municipal” employees, you should seek further advice from the Commission.

^{2/} “Compensation,” any money, thing of value or economic benefit conferred on or received by any person in return for service rendered or to be rendered by himself or another. G.L. c. 268A, §1(a).

^{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/} The State Ethics Commission has concluded that “the distinguishing factor of acting as agent within the meaning of the conflict law is §acting on behalf of” some person or entity, a factor present in acting as spokesperson, negotiating, signing documents and submitting applications.” *In re Sullivan*, 1987 SEC 312, 314-315; See also *In re Reynolds*, 1989 SEC 423, 427; *Commonwealth v. Newman*, 32 Mass. App. Ct. 148, 150 (1992).

^{5/} If the Town were to retain a Board member for pay to perform an appraisal for the Town’s benefit, then that Board member could have an issue under §20 of the conflict law. Section 20 generally prohibits municipal employees from having an interest in another contract with the same municipality. This prohibition, however, contains several exemptions and qualifications. If such an issue arises, you should seek further guidance from the Commission.

^{6/} “Immediate family,” the employee and his spouse, and their parents, children, brothers and sisters. G.L. c. 268A, §1(e).

^{7/} Note that the exemption under §19(b)(1) is not available to elected officials. *EC-COI-90-1*.

^{8/} “Substantial value” is \$50 or more. *EC-COI-93-14*.

^{9/} G. L. c. 4, §7.

^{10/} There may be circumstances in which a private appraisal performed by a Board member is called into question by the Board. Other Board members might criticize the integrity of that Board member’s private work. For example, a recently performed private appraisal might have a valuation that is less than the Board’s assessment. We have concluded that in certain circumstances a public official would have a reasonably foreseeable financial interest in an official decision because of the effect of that decision on the official’s private reputation. In *EC-COI-82-105* and *82-176*, the Commission held that driving schools have financial interests in decisions by the Registry of Motor Vehicles (“RMV”) to grant licenses to applicants from their driving schools because of the effect such decisions have on the reputation and success of the schools. Therefore, the Commission held that RMV inspectors who also worked privately for driving schools would have to comply with §6, the state counterpart to §19, and not act as RMV inspectors in connection with license applications by students from the driving schools at which they teach.

Even in circumstances not implicating §17, if a Board member’s appraisal were to be used by a *former* client in connection with Board matters, §19 might be implicated because of the effect of the Board’s decisions on his private reputation as an appraiser. If such a circumstance were to occur, the Board member should seek further guidance from the Ethics Commission prior to participating in the Board matters.

¹¹ Note that §23(e) expressly permits a head of a municipal agency to establish and enforce additional standards of conduct. We have said that the Commission, absent special circumstances, will defer to an agency code of conduct governing conflicts of interest that is more restrictive than c. 268A and consistent with its principles. *EC-COI-93-23*.