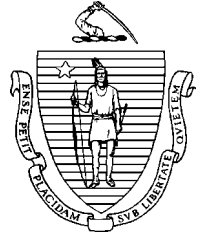




Commonwealth of Massachusetts State Ethics Commission

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



CONFLICT OF INTEREST OPINION EC-COI-97-1

FACTS:

An individual who works as a private security guard for a shopping mall in Methuen (“City”) would like to serve as an intermittent or reserve police officer for the City. The City’s Chief of Police has nominated this individual for appointment as an intermittent police officer by the Mayor.^{1/} Methuen, like many municipalities in the Commonwealth, augments its regular police force through the use of reserve and intermittent police officers.

Pursuant to G.L. c. 147, 11, a city may establish a reserve police force. The mayor, chief of police or city marshal may assign the members of the reserve police force to duty whenever, and for such length of time, as they may deem necessary. *G.L. c. 147, §13*. When members of the reserve force are on duty, they “shall have all the powers and duties of members of the regular police force.” *Id.*^{2/}

Methuen also has a permanent intermittent police force, which was established by special act. *St. 1945, c. 201, §1.*^{3/} Intermittent police officers may be called to duty when the City or the Chief of Police determine that their service is required. *Id.* Any member of the intermittent police force called into service also “shall have all of the powers, duties and rights” of a regular police officer. *Id.*

Both reserve and intermittent officers must complete the same course of study prior to exercising police powers. *G.L. c. 41, §96B*. A major difference between reserve and intermittent police in Methuen is that an individual can be appointed an intermittent police officer without having to complete a civil service examination.^{4/} For purposes of our opinion, we shall refer to both reserve and intermittent police officers as “Intermittent Officers”.^{5/}

According to the Chief of Police, Intermittent Officers are most often called into service to perform municipal detail work^{6/} on a part-time basis when regular police are not available. Detail work is assigned only on a daily basis. Accordingly, an Intermittent Officer is not assigned to a municipal detail for more than one day at a time. The Chief of Police has informed us that, contrary to the requirement for full-time regular police officers, the Police Department does not consider Intermittent Officers to be “on duty” at all times nor does it authorize or require them to take reasonable action to preserve the peace or protect life and property when they are not on duty.^{7/}

As the Chief of Police has explained, Intermittent Officers need other employment because of the part-time nature of their police work for the City. He further noted that most of those who wish to become full-time regular police begin their careers by becoming Intermittent Officers. The Department believes that private security guard work, for example, provides background that benefits future police work.

QUESTION:

Does G.L. c. 268A, §23(b)(1) prohibit a part-time Intermittent Officer from also working privately as a security guard within Methuen?

ANSWER:

Section 23(b)(1) of G.L. c. 268A will not prohibit a part-time Intermittent Officer from working privately as a security guard within the City, as long as he or she does so when not on active police duty. An Intermittent Officer’s private work will, however, be subject to the restrictions of §’17, 19 and 23 of the conflict of interest

law noted below.

DISCUSSION:

Intermittent Officers are “municipal employees”^{8/} for purposes of the conflict of interest law. As such, they are subject to §23(b)(1), which prohibits a municipal employee from accepting “other employment involving compensation of substantial value,^{9/} the responsibilities of which are inherently incompatible with the responsibilities of his public office.”

Section 23(b)1)

In *EC-COI-94-8*, we concluded that §23(b)(1) prohibited the Town (“Town”) of Falmouth’s full-time regular police officers from providing private security services in the Town, but outside of the Town’s established detail system, because the Falmouth Police Department Manual required police to be “on duty” at all times, not only during their regular duty shifts. In Falmouth, regular police officers are required to take reasonable police action when necessary, even during their off-duty hours. Therefore, an officer performing private security services in Town “would be forced to choose between his public position obligations and the wishes of his private employer,” thus creating the inherent incompatibility §23(b)(1) prohibits. We found that in such circumstances, the police officer’s private employment as a security guard violates §23(b)(1). *See also EC-COI-94-3* (employment as home inspector potentially inconsistent with statutory obligations as building inspector); *91-14* (current member of the General Court may not conduct seminars regarding obtaining advantages before or otherwise lobbying the Legislature).

By contrast, Intermittent Officers in Methuen are not “on duty” at all times. When not on active duty, they have neither the authority nor the obligation to act as police officers. Therefore, the quandary we described in *EC-COI-94-8* would not arise for an Intermittent Officer in Methuen not on active duty because he or she would not be forced to choose between his or her public obligations and his or her duties as a private security guard at a facility located in the City. Thus, we conclude that §23(b)(1) does not preclude a part-time Intermittent Officer in Methuen from also working as a private security guard in the City when off duty.^{10/} Nonetheless, a Intermittent Officer must be aware that other sections of the conflict law, which we note briefly below, will restrict his or her private activities.^{11/}

Other Sections of G.L. c. 268A

In particular, §17(a) and (c) prohibit a municipal employee, such as an Intermittent Officer, from directly or indirectly receiving compensation^{12/} from, or acting as agent^{13/} for, anyone other than the City, in connection with or relation to a particular matter^{14/} in which the City is a party or has a direct and substantial interest.

For example, §17 generally would prohibit an Intermittent Officer working as a private security guard at a shopping mall from being privately compensated or acting as his private employer’s agent in connection with a criminal incident that occurred at the mall and to which the City’s police responded. *See e.g., EC-COI-89-30* (a Police Chief, who did not have twenty-four hour per day official duties and responsibilities, could not undertake or be paid privately to oversee an internal investigation of a crime at his private employer’s facility which inevitably would involve his police department). An Intermittent Officer could not later submit claims or reports or give interviews on behalf of the shopping mall in connection with a Police Department’s subsequent investigation leading to an arrest or charge.^{15/} *See also EC-COI-88-7 and EC-COI-93-5*. If the Intermittent Officer cannot practically arrange his or her private work to accommodate these restrictions, the Officer would have to discontinue such work in order to serve as an Intermittent Officer.^{16/}

Additionally, §19 would prohibit an Intermittent Officer from participating as such in particular matters in which his private employer had a reasonably foreseeable financial interest. *See e.g., EC-COI-93-20*. For example, he could not participate as an Officer in a claim, charge or arrest that could affect his private employer’s financial interests, such as a charge that could impose a monetary penalty. If circumstances arise in which he would like to participate, he must obtain the following exemption in advance of his participation.

Under §19(b)(1), he must advise his appointing authority in writing about the nature and circumstances of the particular matter and make full disclosure of the financial interest. He must then receive a written determination

made by his appointing authority that the financial interest is not so substantial as to be deemed likely to affect the integrity of his services to the City.

We also note that, under §23(b)(2), an Intermittent Officer may not use his official position to secure for himself or others unwarranted privileges or exemptions of substantial value that are not properly available to similarly-situated individuals. *EC-COI-93-17; 92-38*. For example, he could not use his position as an Intermittent Officer to elicit favorable treatment from the Police Department on behalf of the shopping mall. *See also EC-COI-92-7* (discusses restrictions over a public employee's business relationship with persons or entities within his regulatory jurisdiction).

Under §23(b)(3), an Intermittent Officer may not engage in any conduct that 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 Officer must make a written disclosure of all the facts and circumstances to his appointing authority in advance of participating in the matter. *EC-COI-91-3; 89-19; Commission Fact Sheet, Avoiding "Appearances" of Conflicts of Interests, Standards of Conduct (Section 23)*. For example, if an Intermittent Officer had once worked for a private company and the Chief of Police assigned him to work on a matter involving that company, it might be reasonable to conclude that the Officer could be biased in his official work relating to that former employer. In such circumstances, §23(b)(3) would require him to file a written disclosure with his appointing authority about his private relationship with that employer.

Finally, §23(c) will prohibit an Intermittent Officer 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, *G.L. c. 4, §7*. *See e.g. EC-COI-91-1*.

DATE AUTHORIZED: March 12, 1997

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

^{1/} This request for advice under G. L. c. 268A comes from the Chief of Police on behalf of the individual.

^{2/} In municipalities, such as Methuen, that have accepted civil service law, an individual must complete a civil service examination, among other requirements, prior to being eligible for appointment as a reserve police officer. *G.L. c. 31, §59*. *See also G.L. c. 31, §'58, 61A*.

^{3/} According to the Chief of Police, the special act was intended to address the shortage of police personnel in the City caused by World War II.

^{4/} Although reserve police officers and permanent intermittent police officers may have once had a different status for purposes of civil service law, *see Op. Att'y. Gen., Pub. Doc. No. 12 at 90, (June 24, 1941)*, G. L. c. 31, §60, inserted by St. 1978, c. 393, §11, appears to treat them the same for purposes of appointment to the regular police force. *See also G. L. c. 31, §34; c. 32, §4(2)(b); c. 32, §85H; c. 41, §96B* (other examples that treat reserve and intermittent police the same) and *Costa v. Board of Selectmen of Billerica*, 377 Mass. 853, 854 (1979) (permanent intermittent police officers are "officers with tenured status but working only on such days as they might be called."). Nothing in our opinion, however, turns on what differences, if any, may exist between the two types of police officers for purposes of civil service laws.

^{5/} The total number of Intermittent Officers in Methuen varies from time to time because of promotion to regular, full-time status or simple attrition. Additionally, there are normal delays in filling the Intermittent Officer ranks. For example, the Chief of Police has noted that when Intermittent Officers are promoted to the full-time police force, their replacements, in the case of reserve officers, must come from the civil service list. The Chief also has noted that individuals he selects as potential intermittent police officers must be approved by the Mayor. The City is authorized to have up to seventeen reserve police officers, *G. L. c. 147, §12*, and up to twelve intermittent police officers. *St. 1945, c. 201, §1*.

^{6/} *See Commission Advisory No. 10, Chiefs of Police Doing Privately Paid Details* (describes municipal detail work which includes, among other things, traffic control at construction sites, crowd control and security work).

^{7/} Based upon the language in both G. L. c. 147, §13 that gives reserve and intermittent officers police powers "when on duty," and St. 1945, c. 201, §1, which gives intermittent officers police powers when "called into service," the City's attorney is of the opinion that Intermittent Officers possess police authority only upon assignment to active duty. Therefore, the Police Department has had a policy that Intermittent Officers may not exercise police powers when not on duty. By contrast, the Chief has noted that Departmental policy

requires regular full-time police to be “on duty” at all times to preserve the public peace and protect life and property.

^{8/} “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, . . . G.L. c. 268A, §1(g).

^{9/} Anything valued at \$50 or more is “of substantial value”. *EC-COI-93-14*.

^{10/} We would, however, reach the same conclusion as we did in *EC-COI-94-8* if the Department established a policy, consistent with G. L. c. 147, §13 and St. 1945, c. 201, §1, that *required* Intermittent Officers to exercise police responsibilities when not on active duty, i.e., making them “on duty” at all times. Similarly, §23(b)(1) would prohibit an Intermittent Officer called to full-time active duty, for example, to fill in for a regular police officer on leave, from continuing to be employed as a private security guard in the City during such duty, if such an Officer were required to be on duty at all times.

^{11/} Based upon the limited facts presented to us, our advice about these other sections of c. 268A must necessarily be general in nature.

^{12/} “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).

^{13/} We have 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 is 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).

^{14/} “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).

^{15/} We recognize, however, that as a practical matter, if the Intermittent Officer were working his private security shift when a criminal incident occurred at the mall, he should be allowed to answer the police’s questions at the scene (as would any witness), without being required to forfeit his private pay for the remainder of his shift. Once such preliminary questioning had concluded, however, §17 would not allow him to continue to work with the police on behalf of the mall or be paid by his private employer in connection with an ongoing police investigation. He may, however, give “testimony under oath or [make] statements required to be made under penalty for perjury or contempt” in connection with the incident. *G. L. c. 268A, §17*.

^{16/} Alternatively, if Intermittent Officers were classified as special municipal employees, *G. L. c. 268A, §1(n)*, §17 could, in certain circumstances, impose fewer restrictions on their private activities. A special municipal employee is subject to §17(a) and (c) “only in relation to a particular matter (a) in which he has at any time participated as a municipal employee, or (b) which is or within one year has been the subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special municipal employee who serves no more than sixty days during any period of three hundred and sixty-five consecutive days.” See *e.g., EC-COI-91-5 and 85-49* (cases discuss calculation of the 60 day period). For example, it would be likely that an Intermittent Officer who performed municipal detail work would neither have participated in nor had official responsibility over a police investigation of a crime involving his private employer, the shopping mall. Therefore, in such circumstances, if an Intermittent Officer were classified as a *special municipal employee*, §17(a) and (c) would not restrict him in his actions on behalf of the shopping mall in connection with a criminal incident as long as he did not serve as an Intermittent Officer more than sixty days during any three hundred and sixty-five day period.