



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-99-2

FACTS:

You are an elected member of a City Council ("Council"). You are also an attorney who engages in the practice of law in the ("City") as an associate in a law firm ("Firm"). Beginning prior to your election as a Councilor and continuing through the present, one of the members of the Firm has served as special counsel ("Special Counsel") to the School Committee ("School Committee"), a position for which the Committee publicly advertised. You have been asked to assist the Special Counsel in performing legal work for the School Committee and the School Department.^{1/} Your salary as an employee of the Firm would not change as a result of your allocating time to School matters. Your salary compensates you for such legal work as it does for any work you do for the Firm and its clients, and is derived from all the Firm's revenues.

Pursuant to statute and the City's Charter,^{2/} the Council and the School Committee are separate, popularly elected municipal bodies. The independence and broad powers of the School Committee are well-established.^{3/} By statute, the School Committee has "the power to select and to terminate the superintendent, shall review and approve budgets for public education in the district, and shall establish educational goals and policies for the schools in the district consistent with the requirements of law and statewide goals and standards established by the board of education." *G. L. c. 71, § 37.* Among its other powers, the School Committee "may employ legal counsel for the general purposes of the committee and may expend money therefor from the funds appropriated by said city or town for school purposes."^{4/} *G.L. c. 71, § 37F.*

The Council is a legislative body. See *G.L. c. 43, § 3; Charter.* The relationship between the Council and School Committee is limited to the following. First, according to the Charter, "If there is a vacancy in the school committee by failure to elect or otherwise, the municipal council and school committee, sitting jointly, shall elect a suitable person to fill the vacancy until the next annual election." *Charter, § 21.*

Second, the Council appropriates^{5/} money for the School Department budget as well as for all other municipal departments. *Charter, § 11.* Pursuant to *G.L. c. 44, § 32*, which governs the general municipal budget process, the Mayor submits to the Council the annual budget, which is a statement of the amounts he recommends for proposed expenditures for the City for the next fiscal year. *G.L. c. 44, § 32 (¶1).* The Council may either approve, reduce or reject the recommended amounts with respect to all departments, including the School Department. *Id. (¶3).* However, several special statutory provisions apply to the School budget, as described below.

As a result of the enactment of the Massachusetts Education Reform Act of 1993, *St. 1993, c. 71 (Act)*, every municipality in the commonwealth "shall annually appropriate for the support of public schools in the municipality" an amount determined by a statutorily-prescribed formula and calculated by the commissioner of education, known as the district's "foundation budget."^{6/} See *G.L. c. 70, §§2 & 6; 603 CMR § 10.06.* Thus, taking into account the required foundation budget, among other things, the School Superintendent and School Committee

recommend to the Mayor a proposed School Department budget. The Mayor, in turn, proposes a School budget to the Council.^{7/} As with other proposed municipal department budgets, the Council may either approve, reduce or reject the total recommended School Department budget.^{8/} G.L. c. 44, § (¶)3. However, in contrast to the situation with other department budgets, the Council cannot increase or decrease line items within the School Department appropriation nor can it place any restrictions on those funds. Rather, it can only make non-binding monetary recommendations about increasing or decreasing line items within the total School Department appropriation. G.L. c. 71, § 34.^{9/} For example, the Council cannot decrease or increase the line item within the School budget for legal expenses.

QUESTION:

For the purposes of qualifying for the G. L. c. 268A, § 20(b) exemption, which would allow you to have an indirect financial interest in the Special Counsel's contract with the School Committee by being compensated for legal work performed for the Special Counsel, are you as a Councilor "employed by . . . an agency which regulates the activities of the contracting agency"(the School Committee), or do you have "official responsibility for any of the activities of the contracting agency"?

ANSWER:

As a Councilor, you are not "employed by . . . an agency which regulates the activities" of the School Committee, and you do not have "official responsibility for any of the activities" of the School Committee. Accordingly, you may be able to qualify for an exemption under G. L. c. 268A, § 20(b) if you can satisfy all the other exemption requirements.

DISCUSSION:

As an initial matter, we note that as a Councilor, you are a municipal employee within the meaning of the conflict of interest law.^{10/} As such, § 20 of G.L. c. 268A is relevant to your inquiry. In pertinent part, that section provides:

A municipal employee who has a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city . . . in which the city . . . is an interested party of which financial interest he has knowledge or has reason to know shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

G.L. c. 268A, § 20(a).

Section 20 serves two purposes. First, this section is intended to prevent a municipal employee from influencing the awarding of contracts by any municipal agency in a way which might be beneficial to the employee. *EC-COI-81-93; EC-COI-95-9. See also W.G. Buss, The Massachusetts Conflict of Interest Law: An Analysis*, B. U. Law Rev. 299, 368, 374 (1965).

Second, the conflict law "is concerned with the appearance of and the potential for impropriety as well as with actual improprieties." *Quinn v. State Ethics Commission*, 401 Mass. 210, 214 (1987) (holding that § 7, the state counterpart to § 20, prohibited a state employee from having an interest in his contract as a bail commissioner). Thus, in drafting this restriction, "the Legislature did not want a[n] . . . employee to use his position as a[n] . . . employee to obtain for himself a financially beneficial contract, and the Legislature did not want the . . .

employee's actions and judgment to be clouded because of an extracurricular contract." *Id.* at 221 (Liacos, J. dissenting) (emphasis added). See also *EC-COI-95-9* ("The section [7] seeks to avoid the perception and the actuality of a state employee's enjoying an 'inside track' on state contracts or employment").

Here, you would have at least an indirect financial interest in the Special Counsel's contract with the School Committee because of your compensated legal work with the Special Counsel on School matters.^{11/} See, e.g., *EC-COI-85-60* (any salary that is derived from a firm's public contract constitutes an indirect financial interest in that contract); *EC-COI-84-98* (all financial interests, no matter how insubstantial or insignificant, are covered by the prohibition except financial interests consisting of ownership of less than one percent of stock in a corporation that has a municipal contract). See also *EC-COI-95-9*; *EC-COI-93-10*.

Section 20, however, also contains certain exemptions, providing in relevant part:

This section shall not apply: . . .

(b) to a municipal employee who is not employed by the contracting agency or *an agency which regulates the activities of the contracting agency* and *who does not participate in or have official responsibility for any of the activities of the contracting agency*, if the contract is made after public notice or where applicable, through competitive bidding, and if the municipal employee files with the clerk of the city or town a statement making full disclosure of his interest and the interest of his immediate family,^{12/} . . .

G.L. c. 268A, § 20(b) (emphasis added). As one commentator has noted, this exemption "contains as its central purpose a requirement that the financial interest of the . . . employee be in a contract made by an agency in which that employee is not an important participant." Buss, *supra* p. 4, at 377. This is the only exemption from the general prohibition which might allow you, as a Councilor, to have an indirect financial interest in the Special Counsel's contract to provide legal services to the School Committee.^{13/} A municipal employee must be able to comply with each condition contained in § 20(b) in order to qualify for the exemption. See, e.g., *EC-COI-93-7*.

Here, the "contracting agency" is the School Committee. Thus, in order to qualify for the § 20(b) exemption, you must not, as a Councilor, participate in, or have official responsibility for, any activities of the School Committee *and* the Council must not regulate the activities of the School Committee.^{14/}

As an initial matter, we consider whether the joint role of the Council and the School Committee in filling a vacancy on the School Committee constitutes an activity of the School Committee within the meaning of § 20(b). "Activity" is not defined in G. L. c. 268A. Based on the well-established canon of statutory construction, statutory words are presumed, unless the contrary appears, to be used in their ordinary sense, with the meaning commonly attributed to them. *Hashimi v. Kalil*, 388 Mass. 607, 609 (1983). Thus, we look to the dictionary definition of "activity" which reads, "function or duties" or "natural or normal function or operation." *Webster's Third New International Dictionary* (1993).

We conclude that the School Committee's joint role in filling a vacancy among its membership is not an activity of the School Committee within the meaning of § 20(b) because the School Committee (as well as the Council) lacks unilateral authority to make such an appointment. Instead, the Charter expressly makes filling a vacancy the responsibility of both

bodies sitting jointly. Moreover, filling such a vacancy appears to be an unusual event rather than a “normal function” of either the School Committee or the Council.^{15/}

Participation in Any School Committee Activities

Chapter 268A defines “participate,” in pertinent part, as “participate in agency action or in a particular matter personally and substantially as a . . . municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.” *G. L. c. 268A, § 1(j)*. Thus, if you were to approve, disapprove, discuss, recommend, advise about and/or vote on any Council non-binding monetary recommendations regarding School Department line items, you would be deemed to have participated in the formulation of the School Department budget. *See Graham v. McGrail*, 370 Mass. 133, 139-140 (1976) (“[A] ‘decision’ is a ‘particular matter.’ The formulation of a budget may include a multitude of particular decisions”. . . .). You may, however, satisfy the § 20(b) “no participation” requirement simply by abstaining from all participation ^{16/}as a Councilor concerning all Council non-binding monetary recommendations about line items.^{17/}

Official Responsibility for Any Activities of the School Committee

In addition, to qualify for the § 20(b) exemption, you must not have official responsibility for any activities of the School Committee. Official responsibility turns on the authority to act, not on whether that authority is, in fact, exercised. *EC-COI-92-36*. *See also Buss, supra* p. 4, at 321-322. Thus, even if you recuse yourself from all Council participation relating to School Department line items, you could not shed your “official responsibility” for those matters if such responsibility exists.

“Official responsibility” is defined by statute as “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.”^{18/}*G.L. c. 268A, § 1(i)*. The statute does not define “operating authority” or “administrative authority.”

However, federal regulation, which has provided certain guidance in interpreting G.L. c. 268, reads, “‘Administrative’ authority as used in the [federal] definition means authority for planning, organizing and controlling matters rather than the authority to review or make decisions on ancillary aspects of a matter such as the regularity of budgeting procedures, public or community relations aspects, or equal employment opportunity considerations.” *5 CFR § 2637.202(b)(3)*. Thus, the federal regulation provides the example that a “comptroller would not have official responsibility for all programs in the agency, even though she must review the budget, and all such programs are contained in the budget.” *5 CFR § 2637.202(b)(3)*. According to the dictionary definition, ‘administrative’ “connotes or pertains to administration, especially management, as by managing or conducting, directing, or superintending, the execution, application or conduct of persons or things.” *Black’s Law Dictionary* (5th Ed.).

The issue here is whether the Council, by approving, reducing or rejecting the School Department budget and/or by making non-binding monetary recommendations, has official responsibility for any of the activities of the School Committee. We conclude that it does not for the following reasons.

First, we do not believe that simply because the Council appropriates the total School Department budget it has official responsibility for any activity of the School Committee. Rather,

as the Supreme Judicial Court has observed, appropriation of funds specified in a budget is a uniquely legislative function performed by the Council in a city government. The preparation and submission of the budget are executive acts performed by the Mayor, with input from the School Committee and Superintendent in the case of the School Department budget. *Bell v. Assessors of Cambridge*, 306 Mass. 249, 254 (1940).

Moreover, although the Council can approve, reduce or reject the total School Department budget, by doing so it “may *not limit the authority* of the school committee to determine expenditures within the total appropriation.” *G. L. c. 71, § 34* (emphasis added). Thus, the Legislature expressly has prohibited the Council from directing, managing, conducting or superintending the School Committee’s use of its budget. Additionally, by definition, non-binding monetary recommendations cannot direct or control the School Committee’s actions. Thus, for example, by making a non-binding monetary recommendation and/or approving, reducing or rejecting the total School Department budget, the Council could not direct or control the School Committee regarding whether or how to spend money on legal services. The decisions about allocations within the School budget and the programs and services those allocations fund are activities uniquely within the official responsibility of the School Committee.

Accordingly, we conclude that the Council does not have official responsibility for any activity of the School Committee within the meaning of G.L. c. 268A, § 20(b). *Compare EC-COI-84-125* (§ 20(b) deemed not available to a city councilor who wished to be appointed a reserve police officer where the city council voted on each budget line item for city departments and the city council may authorize reserve police officers to be paid); *EC-COI-86-7* (Designer Selection Board (DSB) has official responsibility for activities of the Division of Capital Planning and Operations (DCPO) because the DSB is responsible for the actual selection of designers for DCPO projects).

Regulates the Activities of the School Committee

We must also decide whether the Council “regulates the activities” of the School Committee within the meaning of § 20(b). The word “regulate” is not defined in G.L. c. 268A. We have said that “‘regulate’ means to govern or direct according to rule or bring under the control of constituted authority, to limit and prohibit, to arrange in proper order, and to control that which already exists.” *EC-COI-83-158* (from *Black’s Law Dictionary*, 5th ed. West, 1979); *EC-COI-91-9*; *EC-COI-85-80* (distinguishing “those . . . agency relationships which have an indirect, incidental effect on the contracting . . . agency’s activities from those relationships where one agency has determinative or regulatory authority over the other”).

As described above, some obvious similarities exist between the definitions of “regulates” and “official responsibility.” At the same time, we recognize that, by using the two different terms in the same section, the Legislature likely intended to mean something different by each.^{19/} We find it unnecessary, however, to reach that issue as explained below.

Section 20(b) requires not only that the employee not have “official responsibility for any of the activities of the contracting agency,” but also that he not be employed by “an agency which regulates the activities of the contracting agency.” As both a theoretical and practical matter, a municipal employee may personally lack official responsibility for any activity of the contracting agency, yet he may be employed by an agency which regulates the activities of the contracting agency. In such a case, the employee would not be eligible for the § 20(b) exemption.

In your case, your official responsibility as Councilor vis-a-vis the School Committee's activities is the same as the Council's official responsibility for the School Committee's activities. Because we have determined that the Council lacks official responsibility for any of the activities of the School Committee, it follows that the Council does not regulate the activities of the School Committee. Under no set of circumstances could we conclude that the Council directs or governs the activities of School Committee, particularly given that the Legislature has expressly stated otherwise with respect to the School Department budget allocations, and educational policy and programmatic issues. See G.L. c. 71, §§ 34 & 37.

For all the foregoing reasons, we conclude that, as a Councilor, you are not "employed by . . . an agency which regulates the activities of" the School Committee and you do not "have official responsibility for any of the activities of" the School Committee for purposes of G. L. c. 268A, § 20(b). Accordingly, if you can satisfy the remaining requirements of the § 20(b) exemption (including obtaining the approval of the City Council as required in § 20(b)(4); see language quoted in footnote 12), you will be allowed to perform and be compensated for private legal work for the Special Counsel to the School Committee.

We believe that our conclusion is consistent with the underlying purposes of § 20 and the conflict of interest law, generally. As one commentator has noted in the context of § 7 (the state counterpart to § 20), "even an indirect interest should entail an actual interest — a stake — rather than a mechanical connection."^{20/} Buss, *supra* p. 4, at 375. As we observed at the outset, the Special Counsel's contract with the School Committee and your related legal work antedated your election as a Councilor. If you satisfy the other requirements of the § 20 (b) exemption described above, we believe you will eliminate the actuality and perception of an "inside track" on prospective issues relating to the Special Counsel's contract, such as renewal and compensation.

DATE AUTHORIZED: March 10, 1999

^{1/} You report that the Special Counsel also serves as counsel to the Superintendent and the School administration. You assisted the Special Counsel in providing legal services to the School Committee and School Department prior to your election as a Councilor.

^{2/}[Deleted]

^{3/} As stated by the Supreme Judicial Court, "The policy of the Commonwealth from early times has been to establish a board elected directly by the people separate from other governing boards of the several municipalities and to place the control of the public schools within the jurisdiction of that body unhampered as to details of administration and not subject to review by any other board or tribunal as to acts performed in good faith." *Leonard v. School Committee of City of Springfield*, 241 Mass. 325, 329 (1922); see also *Davis v. School Committee of Somerville*, 307 Mass. 354 (1940).

^{4/} Additional school committee powers include receiving and expending grants or gifts for educational purposes (G.L. c.71, § 37A), entering into contracts regarding employee retirement programs (*id.* § 37B), adopting educational objectives to promote racial balance (*id.* § 37C), establishing disciplinary policies and procedures regarding the conduct of students and teachers (*id.* § 37H), and applying to the board of education for a grant for the cost of a magnet school (*id.* § 37J).

^{5/} The dictionary defines "appropriation" in the public law context to mean, "the act by which a legislative department of government designates a particular fund, or sets apart a specified portion of the public revenue or of the money in the public treasury, to be applied to some general object of governmental expenditure, or to some individual purchase or expense." *Black's Law Dictionary* (Fifth Ed.)

^{6/} This amount need not all be included in a school department's budget but also may be met by including amounts appropriated in other municipal department budgets, such as the health department.

^{7/} The Mayor is not required to recommend the budget amount the School Committee and Superintendent recommend to him. See *Superintendent of Schools of Leominster v. Mayor of Leominster*, 386 Mass. 114 (1982). However, you report that since the adoption of the Act, the Council has never been presented with a budget that exceeds the foundation budget. Rather, you state that the City has had difficulty in reaching the required appropriation.

^{8/} Statute 1987, c. 329 provides that in municipalities which accept that Act's provisions, the city council on recommendation of the school committee may by a two-thirds vote increase the total amount appropriated for the support of the schools. However, based on the records of the Secretary of State and on City municipal records, it does not appear that the City has accepted this Act. Accordingly, the Council cannot increase the School budget.

^{9/} That statute provides: "Every city . . . shall annually provide an amount of money sufficient for the support of public schools . . . , provided however, that no city . . . shall be required to provide more money for the support of public schools than is appropriated by vote of the legislative body of the city In acting on appropriations for educational costs, the city . . . appropriating body shall vote on the *total amount of the appropriations requested and shall not allocate appropriations among accounts or place any restriction on such appropriations*. The superintendent of schools . . . may address the local appropriating authority prior to any action on the school budget as recommended by the school committee . . . The city . . . *appropriating body may make nonbinding monetary recommendations to increase or decrease certain items allocating such appropriations*. The vote of the legislative body of a city or town shall establish the total appropriation for the support of the public schools, but *may not limit the authority of the school committee to determine expenditures within the total appropriation*." G.L. c. 71, § 34 (emphasis added).

^{10/} "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).

^{11/} The Ethics Commission has consistently taken a broad view of what constitutes a contract for purposes of the conflict of interest law. "The term 'contract' is not limited solely to a formal, written document setting forth the terms of two or more parties' agreement. Rather, any type of agreement or arrangement between two or more parties under which each undertakes certain obligations in consideration of the promises made by the other(s) constitutes a contract for [c. 268A] purposes." *EC-COI-85-5; EC-COI*

^{12/} If the initial exemption requirements are satisfied, § 20(b) further requires that if the contract is one for personal services:

- (1) the services will be provided outside the normal working hours of the municipal employee,
- (2) the services are not required as part of the municipal employee's regular duties, the employee is compensated for not more than five hundred hours during a calendar year,
- (3) the head of the contracting agency makes and files with the clerk of the city or town a written certification that no employee of that agency is available to perform those services as part of their regular duties, and
- (4) the city council, board of selectmen or board of aldermen approve the exemption of his interest from this section, . . .

G. L. c. 268A, § 20(b).

^{13/} Apparently to mitigate the harsh application of § 20 to selectmen and town councilors who held appointed municipal positions prior to their election, the Legislature passed what we refer to as the "selectman's exemption" and "town councilor's exemption," respectively. See G.L. c. 268A, § 20 (¶¶ 12 & 14); *St. 1982, c. 107 as amended by St. 1984, c. 459; EC-COI-93-4*; and *St. 1985, c. 252, § 3*. The Legislature, however, has not enacted an analogous exemption for city councilors or alderman in city forms of government, and we have refused to conclude that such an exemption is implied. *EC-COI-93-7*. We also note that G.L. c. 268A, § 7 (the state counterpart to § 20) contains an express exemption for members of the General Court. See G.L. c. 268A, § 7(c).

^{14/} By doing work for the Special Counsel through your salaried position at the Firm, we do not consider you to be employed by the School Committee for purposes of § 20(b). We do not offer an opinion on whether the other § 20(b) criteria can be satisfied because you have asked us to focus solely on these threshold criteria.

^{15/} Further, even if making a joint appointment to the School Committee were an activity of the School Committee, you could abstain from participation in such an activity. Additionally, we do not believe the Council would have official responsibility for or regulatory control over such an activity within the meaning of § 20(b) because it could not direct, govern, manage, superintend or control the School Committee's vote in filling the vacancy. See discussion below about "official responsibility" and "regulates."

^{16/} The Supreme Judicial Court has noted, "Ordinarily the wise course for one who is disqualified from all participation in a matter is to leave the room." *Graham v. McGrail*, 370 Mass. at 138.

^{17/} Under G.L. c. 268A, § 19, which prohibits a municipal employee from participating in a particular matter in which he or an organization by which he is employed has a financial interest, you would be prohibited from participating in non-binding monetary recommendations about School Department line items, as well as all other particular matters affecting your financial interest and/or that of the Firm. However, if those particular budget line items from which you abstain are considered separately and are approved by a qualified quorum of the Council, and those items then are included in a consolidated vote on all or part of the School budget, you may participate in the consolidated vote. See *Graham v. McGrail*, 370 Mass. at 140-141.

^{18/} This definition is based on federal law, Title 18 U.S.C. § 202(b), which has served as guidance in interpreting G. L. c. 268A because the latter statute was modeled in large part on federal law. See Buss, *supra* p. 5, at 321; *EC-COI-98-1*. Under the federal regulation which interprets Title 18 U.S.C. § 202(b), "the scope of an employee's 'official responsibility' is determined by those areas assigned by statute, regulation, . . . job description or delegation of authority." 5 CFR § 2637.202(b)(2).

^{19/} See, e.g., *St. 1982, c. 612; State Ethics Commission Bulletin, January, 1983, Vol. V, No. 1.*

^{20/} As Buss further notes:

Conflict-of-interest legislation accomplishes its purpose when it produces disinterested public employees; to the extent the statutory language permits, it should be interpreted with that objective in mind and not regardless of the effect on recruiting able public employees. Buss *supra* p. 5, at 375.