Commonwealth of Massachusetts
State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851

CONFLICT OF INTEREST OPINION
EC-COI-99-4

FACTS:

You serve as Town Counsel to the Town of Swansea ("Town"). The Town has a three-person Board of Selectmen ("Board"). One of the Board's responsibilities is to approve payroll warrants for all departments. You write on behalf and with the permission of one of the Board members who has an immediate family member employed by the Swansea School Department ("School Department").

You describe the process of payroll payment in Swansea as follows. On a weekly basis, each Town department head reviews his or her department's payroll forms, including time sheets and vouchers (collectively, "Payroll Forms") and, if everything is accurate and complete, swears to and signs the Payroll Form for the preceding week. Department heads[1/] forward their signed weekly Payroll Forms to the Selectmen's Office. There, the Town Administrator[2/] reviews the signed Payroll Forms, and if accurate and complete, countersigns them. The signed Payroll Forms are then forwarded to the Town Treasurer who draws a warrant upon the Treasury for payment of the payroll. The warrant generally is broken down by departments. Upon approval of the warrant by the Selectmen, the Treasurer pays payroll from the Treasury.[3/]

QUESTION:

1. Under the reasoning of *EC-COI-98-5,* does § 19 prohibit a Selectman from approving or disapproving a payroll warrant for the School Department in which his immediate family member is employed?

2. If the answer to the preceding question is yes, would the rule of necessity allow the Selectman to approve or disapprove a payroll warrant for the School Department if one of the other two Selectmen is absent and a quorum of the Board is necessary to approve payroll warrants within the time period required by statute?

ANSWER:

1. Yes, § 19 prohibits the Selectman from approving or disapproving a School Department payroll warrant because such approval or disapproval constitutes participation in a particular matter in which the Selectman's immediate family member has a financial interest.

2. Yes, so long as the Selectman follows the procedures for invoking the rule of necessity discussed herein, the rule would allow him to approve or disapprove a School Department payroll warrant under circumstances where a statute requires the Town to pay Town employees weekly (or on another prescribed basis); another Selectman is absent; and, due to the disqualification of the Selectman under § 19, the Board cannot obtain a quorum to act before it is statutorily required to do so.

DISCUSSION:

Approval\Disapproval of School Department Payroll Warrants

The Selectmen are municipal employees within the meaning of the conflict of interest law. G.L. c. 268A, § 1(g). As such, section 19 is relevant to your inquiry.

General Laws c. 268A, §19 (a) provides, in relevant part, that "a municipal employee who participates as such an employee in a particular matter[4/] in which to his knowledge he, his immediate family[5/] or partner, a business organization in which he is serving as an officer, director, trustee, partner or employee . . . has a financial interest, shall be punished . . ."

It is clear that payment of the School Department payroll is a particular matter within the meaning of G.L. c. 268A and that the Selectman's immediate family member employed by the Department has a financial interest in that particular matter. The remaining question is whether, by approving or disapproving the School Department payroll warrant, the Selectman "participates" in that particular matter within the meaning of the statute. The conflict law defines "participate" as "participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise." G.L. c. 268A, §1(j) (emphasis added).

In *EC-COI-98-5*, the Commission opined that *§ 19(a)* prohibits an elected member of a local school committee from approving payment schedules for payment to a nonprofit corporation vendor to the schools, where the school committee member sits on the board of directors of the nonprofit corporation. In determining whether School Committee members "participate" in the particular matter of the payment of an item on the schedule of bills payable, the Commission looked to the statutory scheme underlying the payment of town monies. General Laws c. 41, § 56, which is included in sections governing town accountants, provides in relevant part:

> The selectmen and all boards, committees, heads of departments and officers authorized to expend money shall approve and transmit to the town accountant as often as once each month all bills, drafts, orders and pay rolls chargeable to the respective appropriations of which they have the expenditure. Such approval shall be given only after an examination to determine that the charges are correct and that the goods, materials or services charged for were ordered and that such goods and materials were delivered and that the services were actually rendered to or for the town . . . The town accountant shall examine all such bills, drafts, orders and pay rolls, and, if found correct and approved as herein provided, shall draw a warrant upon the treasury for the payment of the same, and the treasurer shall pay no money except upon such warrant approved by the selectmen . . .The town accountant may disallow and refuse to approve for payment, in whole or in part any claim as fraudulent, unlawful or excessive, and in such case he shall file with the town treasurer a written statement of the reasons for such refusal. The treasurer shall not pay any claim or bill so disallowed by the town accountant . . .

(Emphasis added).

Section 52 of G.L. c. 41, which is included in sections governing town auditors, is also relevant to your inquiry:

> All accounts rendered to or kept in the departments of any city shall be subject to the inspection of the city auditor or officer having similar duties, and in towns shall be subject to

> the inspection of the selectmen. The auditor or officer having similar duties, or the selectmen, may require any person presenting for settlement an account or claim against the city or town to make oath before him or them, in such form as he or they may prescribe, as to the accuracy of such account or claim.[6] . . . The auditor or officer having similar duties in cities, and the selectmen in towns shall approve the payment of all bills or pay rolls of all departments before they are paid by the treasurer, and may disallow and refuse to approve for payment, in whole or in part, any claim as fraudulent, unlawful or excessive; and in that case the auditor or officer having similar duties, or the selectmen, shall file with the city or town treasurer a written statement of the reasons for the refusal; and the treasurer shall not pay any claim or bill so disallowed. This section shall not abridge the powers conferred on town accountants by sections fifty-five to sixty-one, inclusive.

As is evident from the foregoing, the powers of the selectmen under § 52 are similar to the powers of the town accountant under § 56. The Supreme Judicial Court observed, "[T]he Legislature has empowered the town accountant and the board of selectmen to disallow claims against the municipality which appear to be unlawful." *Treasurer of Rowley v. Town of Rowley, et al.,* 393 Mass. 1, 6 (1984). The Court further explained:

> The [1913] Joint Special Committee on Municipal Finance, in recommending that "some official in every city and town of the State should be given the statutory authority to investigate every item of every bill if necessary, and to refuse to sanction payment of a bill if such course seems to him to be necessary," noted that in towns which have a town accountant, that official "has the legal right . . . to ascertain whether or not the charges made . . . are irregular." House Doc. No. 1803, *supra* at 63. To ensure that at least some official has the right to challenge the lawfulness of a claim for payment, the committee suggested that the board of selectmen also be given that right. *Id.*

Id. at 6-7.

The Legislature's intent appears to be to ensure that the Board has authority to disallow fraudulent, unlawful or excessive claims.[7] The Selectmen's authority to approve the payroll warrants before they are paid implies a corresponding authority to disapprove warrants, at least based on fraud, unlawfulness or excessiveness. *See, e.g., Town of Rowley,* 393 Mass. at 3; *accord* A. Cella, *Massachusetts Practice: Municipal Law* § 113 (1971) ("In certain respects the selectmen are watchdogs of the town treasury. They must approve the payment of all bills or payroll before they are paid by the town treasurer.") .

You argue that the Selectmen's role regarding warrants is "predominantly ministerial," especially given that a payroll claim may only be disallowed if it is "fraudulent, unlawful or excessive" and "a written statement of the reasons for refusal" is provided. We disagree for the following reasons.

Based on the dictionary definition, a "ministerial act" is "[o]ne which a person or board performs under a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to or the exercise of his or their own judgment upon the propriety of the act being done." *Black's Law Dictionary* (6th Ed. 1990) (emphasis added). If the Selectmen disapprove a warrant as fraudulent, unlawful or excessive, there can be no question that they are exercising judgment and discretion which the Legislature vested in them because it deemed such judgment to be important to the integrity of the municipal finance process. Similarly, even if the Selectmen approve a payroll warrant, there can be no question that prior to doing so, they must exercise their judgment to determine whether the claim is fraudulent,

unlawful or excessive. As the Commission noted in *EC-COI-98-5* with respect to the School Committee's power to approve and disapprove bills, "[s]uch power, whether exercised or not, implies discretion and judgment," and removes the approval of payroll claims and warrants from the realm of the ministerial. Similarly, we conclude here that the Selectmen's approval or disapproval of payroll claims and warrants, even after the department head has approved such claims, is not ministerial and constitutes "participation" within the meaning of G.L. c. 268A.[8/]

We earlier determined that the School Committee's immediate family member has a financial interest in the particular matter of payment of the School Department payroll. Thus, under G.L. c. 268A, § 19, the Selectman cannot approve or disapprove the School Department payroll warrant unless he is authorized to do so by means of another statute or other legal authority, such as the rule of necessity.[9/]

Rule of Necessity

As the Commission stated in *EC-COI-93-13*:

> The rule of necessity was established by courts to allow public officials to participate in official decisions from which they are otherwise disqualified by their bias, prejudice or interest when no other official or agency is available to make that decision. *See Moran v. School Committee of Littleton*, 317 Mass. 591, 594 (1945); *Graham v. McGrail*, 370 Mass. 133, 138 (1976) (suggesting that the rule would apply in proper circumstances where public officials could not participate due to GL. c. 268A); *see also Georgetown v. Essex County Retirement Board*, 29 Mass. App. Ct. 272 (1990).

The Commission historically has stressed the narrow circumstances in which the rule of necessity may properly be invoked in conflict situations under G.L. c. 268A. *See, e.g., EC-COI-92-24; 82-10; 80-100.* In general, only where a municipal body cannot obtain the quorum necessary to take action because of disqualification based on conflicts of interest under G.L. c. 268A may the rule provide a mechanism by which all members may act notwithstanding any conflicts of interest. *EC-COI-93-13.* In short, the rule of necessity is a tool of last resort. *EC-COI-92-24.*

In *EC-COI-93-13*, the Commission considered a situation in which a board of selectmen was required by statute to act on a licensing matter within a certain period of time, one of the three board positions was vacant because of the death of a selectmen, a special election to fill the vacancy could not be held due to statutory requirements until after the time required to act on the licensing matter, and one of the two remaining selectmen was disqualified from participating in the licensing matter under G.L. c. 268A, § 19. Under those narrow circumstances, the Commission concluded that "the rule of necessity should apply where statutory time restrictions require the Board to act, where a vacancy on the Board cannot be filled in time to meet those restrictions and where, as a result, the Board cannot obtain a quorum due to the disqualification of one or more of its members." *Cf. EC-COI-93-3* (rule [of necessity] could be applied in a situation where, because of conflicts of interest and the type of matter being considered (requiring a super-majority for an affirmative vote), the body could never approve (or act affirmatively with regard to) the matter). The Commission in *EC-COI-93-13* specifically reserved the question of "the appropriateness of invoking the rule of necessity where the board is required by law to act on a matter within a limited time period and where one of its members is unable to participate for reasons other than vacancy before the expiration of the period in which the board must act." *EC-COI-93-13* n. 4.

Town employees generally must be paid on a weekly (or other prescribed) basis, so long as certain statutory requirements are satisfied.[10] *See* G.L. c. 148, § 149; A. Cella, *Massachusetts Practice: Municipal Law* § 213 (1971). Thus, the situation you present requires the Commission to address whether the rule of necessity can be invoked where the Selectman is disqualified from approving School Department payroll warrants due to a conflict of interest under § 19(a), a second Selectman is absent due to illness, business, vacation or other reason, and the result is that a quorum of the Selectmen is unavailable to approve the weekly warrant for the School Department payroll. Similar to the situation in *EC-COI-93-13,* if the Selectmen fail to obtain a quorum to approve payroll warrants and, consequently, the Treasurer cannot make payment within the time frame required by statute, the Town would violate state law.

The statutes do not appear to provide for any substitutes for or alternatives to the selectmen's approving warrants where a selectman is disqualified due to a conflict of interest or absent. Section 56 of G.L. c. 41 provides, "If there is a failure to elect or a vacancy in the office of selectmen, the remaining selectman or selectmen, together with the town clerk, may approve such warrant." Based on a plain meaning reading, the statute does not authorize the town clerk or anyone else to approve a warrant in the event of an absence on the Board for a reason other than failure to elect or vacancy. In this regard, we note the familiar principle of statutory construction, "the expression of one thing is an implied exclusion of other things omitted from the statute." *Glorioso v. Retirement Board of Wellesley*, *401 Mass. 648, 650 (1988).* Had the Legislature intended to provide for the situation where a Selectman could not approve a warrant due to absence for a reason other than failure to elect or vacancy, it could have done so. *Cf. EC-COI-94-5* (G.L. c. 150E, § 1 provides that the "employer" for collective bargaining purposes is the "chief executive officer" or a designated representative); *EC-COI-83-114* (G.L.c. 43, § 27 provides that where mayor has an interest in a municipal contract and would otherwise be required to sign the contract, city clerk may sign).

Thus, neither state law nor any other authority of which we are aware[11] provides for substitutes or alternative arrangements when a quorum of selectmen is unavailable to timely approve warrants for reasons other than failure to elect or vacancy in the office. We are, nonetheless, mindful of the need to give the conflict of interest law a workable meaning. *See Graham v. McGrail*, 370 Mass. 133, 140 (1976); *EC-COI-83-114*. Accordingly, we conclude that where a statute requires the Selectmen to approve payroll warrants on a weekly (or other prescribed) basis, where one Selectman is absent, and where the Board cannot otherwise obtain a quorum due to the disqualification of the Selectman whose immediate family member works for the School Department, the rule of necessity can be invoked on behalf of the disqualified Selectman. We strongly suggest, however, that the rule be used only upon prior written advice from town or city counsel since improper use of the rule could result in a violation of § 19.[12] *See EC-COI-93-3* n. 11; *92-24*. The rule should be used sparingly, as a last resort only.[13]

Date Authorized: April 22, 1999

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

[1] The School Committee ultimately reviews and approves the School Department Payroll Forms and forwards them to the Town Treasurer.

[2] Swansea does not have a Town Accountant; it does have a part-time Town Auditor.

[3/] A similar process is followed for payment of Town bills other than payroll.

[4/] "Particular matter" is defined as "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."

[5/]"Immediate family," the employee and his spouse, and their parents, children, brothers and sisters. G.L. c. 268A, §1(e).

[6/]Under G.L. c. 41, § 41, prior to payment of any salary to a town employee, the payroll for such salary must be sworn to by the head of the department or other person designated in accordance with that section.

[7/]This is especially important in towns such as Swansea which does not have a Town Accountant.

[8/] We deem irrelevant the fact you note that the Selectmen play no role in setting School Department salaries. You have not identified and we have failed to locate any authority to suggest that the requirements of G.L. c. 41, §§ 52 and 56 do not apply to School Department payroll notwithstanding the autonomy of School Committees in many other respects. *See, e.g., G.L. c. 71, § 34*. The reasons for auditors, selectmen and accountants to review and approve all payroll warrants for fraud, lawfulness and excessiveness apply equally to the School Department payroll. Finally, the issue is not, as you suggest, whether the Selectmen have discretion to disallow lawful payroll claims but rather whether they must exercise discretion in determining whether payroll claims are lawful.

[9/]The exemption available to appointed officials and employees under G.L. c. 268A, § 19(b)(1) is not available to selectmen because they are elected. *EC-COI-83-114* n. 4. If it is possible to segregate the School Department warrant from the other department warrants, the Selectman disqualified as to participation in the School Department warrant may approve or disappove the balance of the department warrants.

[10/]We do not have information about and, therefore, do not comment on whether and how collective bargaining agreements may affect statutory requirements.

[11/]You have informed us that no relevant charter provisions exist in Swansea.

[12/] As we noted in *EC-COI-92-24*, it is advisable for municipal counsel to establish advance guidelines describing the circumstances under which the rule should be invoked. Use of the rule should be noted in the minutes of the meeting at which it is invoked and, in order to satisfy the requirements of § 23(b)(3), the otherwise disqualified Selectman should, if possible, make an advance written disclosure, to be filed with the Town Clerk, of the relevant facts that created the conflict of interest and necessitated use of the rule in order to obtain a quorum. *See EC-COI-93-3*. If such an advance written disclosure is not possible, the Selectman should include a § 23(b)(3) disclosure in the minutes of the meeting. In addition, § 23(b)(2) is relevant, providing that no public employee may use or attempt to use his official position to secure unwarranted privileges or exemptions of substantial value for himself or others. Therefore, if the disqualified Selectman participates in reviewing School Department warrants based on the rule of necessity, he must apply objective criteria to those as well as all other department warrants.

[12/] For example, in the event of a short-term absence of a Selectman, if the Board can reasonably reschedule a meeting to allow that Selectman to participate in approving warrants within the statutory time period or can make arrangements for that Selectman to approve warrants at a different time, outside the meeting but within the statutory time period, then such arrangements should be made to avoid the need to invoke the rule of necessity on behalf of the disqualified Selectman.