Commonwealth of Massachusetts
State Ethics Commission

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CONFLICT OF INTEREST OPINION
EC-COI-99-7

FACTS[1]:

X and Y are principals of a Massachusetts general partnership. There are no other professional employees on the partnership's regular payroll except X and Y.

The ABC Contract

In June 1996, ABC, a state agency, entered into a five-year contract with a company ("Company"), of which the partnership is a member, for the provision of certain professional services ("ABC Agreement").

Services under the ABC Agreement are to be provided pursuant to an annual business plan approved by ABC and in accordance with certain guidelines devised jointly by the Company and certain ABC personnel. ABC retains control over all policy making decisions regarding the subject of the ABC Agreement and has an oversight and approval role with respect to the Company's performance. The Company has no authority to bind ABC without its specific permission.

Pursuant to the ABC Agreement, the Company shall ensure that certain named individuals, including X and Y, each remain active in the operation and management of the Company and its performance under the ABC Agreement.

At the time the ABC Agreement was executed it was anticipated and agreed to between X and Y and the Company that during the first six months of the ABC Agreement, X and Y's services would require 2.5 days per week. Later efforts were anticipated to require 1 day per week. During the first six months of the ABC Agreement, X and Y have, in fact, each worked approximately 2-3 days per week on matters covered by the ABC Agreement. Thereafter, they have each devoted one day per week to these efforts. During the past 365 days, X and Y's duties for ABC have required less than one day per week, therefore resulting in each of them working on the Company business for less than 60 days in that time period.

According to X and Y, it was understood prior to the execution of the ABC Agreement that they would not sign the Agreement if they were to be considered special state employees. To that end, apparently, the ABC Agreement provides that no member of the Company or its personnel shall, by virtue of the Agreement, be a "special state employee" as defined under applicable Massachusetts law.

On the other hand, under another section of the ABC Agreement, the Company agrees that it has read and is fully aware of the provisions and requirements of G.L. c. 268A as one of at least five statutes applicable to the ABC Agreement and the Company's performance thereunder.

The Project

In July 1998, X and Y entered into an agreement with a private corporation ("Corporation") to provide compensated services to the Corporation in connection with a certain development ("Project"). In furtherance of certain of the Project's objectives, X, on behalf of the Project development team, proposed a certain mutually beneficial agreement between ABC and the Corporation to which ABC has agreed in principle, subject to the fulfillment of certain contingencies.

According to its agency counsel, it is ABC's position that the Project and X and Y's involvement therein is outside the ABC Agreement and is not a subject of X and Y's official responsibility under that contract.[2/]

X states that he has occasionally provided professional services for ABC in the past.

Based on the foregoing, X and Y have asked the following questions.

QUESTIONS:

1. Are X and Y state employees under G.L. c. 268A, § 1(q), by virtue of the ABC Agreement?

2. If so, does G.L. c. 268A, § 4, prohibit them from receiving compensation from or acting as the Corporation's agent with respect to the Project?

ANSWERS:

1. Yes.

2. No, because X and Y did not participate in the Project as state employees; it is not the subject of their official responsibility; and they served on less than 60 days in the relevant period of 365 consecutive days.

DISCUSSION:

We first address whether X and Y are state employees by virtue of the contract between the Company and ABC. In doing so, we look to the expansive definition of "state employee" contained in G.L. c. 268A.

State employee, for purposes of the conflict law, is defined as "a person performing services for or holding an office, position, employment, or membership in a state 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, including members of the general court and executive council." G.L. c. 268A, § 1(q). ABC is a state agency for purposes of the conflict law. G.L. c. 268A, § 1(p).[3/]

Generally speaking, the state employee definition is broad enough to include anyone doing work for the state, including so-called "independent contractors." See Buss, The Massachusetts Conflict of Interest Law: An Analysis, 45 B.U. Law Rev. 299, 312 (1965) ("there is virtually no room" for an argument that the Massachusetts law does not reach independent contractors; such argument "is precluded because the definition encompasses a person

'performing services for' an agency, by 'contract of hire or engagement,' even when that person is serving on an 'intermittent' or 'consultant' basis."); Braucher, Conflict of Interest in Massachusetts in Perspectives of Law, Essays for Austin Wakeman Scott 8, 10 (1964) ("the reference to 'consultant' suggests that some persons who contract to supply services may be included even though for other purposes they would be classified as independ-ent contractors rather than employees. That suggestion is strengthened by a reference to 'contract of hire or engagement' as an alternative to election or appointment."). Relying on the plain language, we have previously opined that the definition applies to consultants who provide services on an intermittent basis, whether or not they receive compensation. *See, e.g., EC-COI-87-8* (principal of consulting group providing real estate development services to a city is a municipal employee for purposes of the conflict law)**.**

Our conclusion is supported by the legislative history of the definition of "state employee." Briefly stated, prior to enacting G.L. c. 268A in 1962, the Legislature passed a comparatively short statute that essentially established a code of ethics for public employees. That statute, c. 610 of the Acts of 1961, defined "officer or employee" for purposes of that law as "a person performing services for, or holding an office, position or employment in an agency (including independent consultants who receive compensation for such services)." In reaching this definition, the Legislature declined to adopt the definition of "state employee" contained in S. 492 proposed by then Governor Volpe. The Volpe bill would have specifically exempted from the definition of state employee "employees of privately-owned corporations or business performing work for or on behalf of the commonwealth pursuant to the provisions of a contract awarded in accordance with law."

The Legislature recognized that the 1961 statute was inadequate and so ordered the creation of a Special Commission on the Code of Ethics which was charged with proposing a more comprehensive piece of legislation. In 1962, the Legislature enacted c. 779 of the Acts of 1962 which defined "state employee" as "a person performing services for or holding an office, position, employment, or membership in a state 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, including members of the general court and executive council, but excluding members of the judiciary, but not excluding any other officers and employees of the judicial department." The definition contained in the 1962 legislation was developed by the Special Commission whose report is indicative of its thought process. There the Special Commission expressed its intent to have enacted a comprehensive definition that "applies to all levels of government in the Commonwealth including the state, counties, municipalities, authorities, boards and commissions. It includes public officials in every capacity at all of these levels, whether elected, appointed or engaged, whether paid or unpaid, whether full-time or part-time." Report of the Special Commission on Code of Ethics, 1962 House Doc. No. 3650, p. 19 (hereafter "1962 House Doc. No. 3650"). Taken together, the legislative history confirms a legislative intent to include within the conflict law's scope virtually anyone who performs services for the government, including employees or principals of privately-owned businesses.

X and Y, however, contend that they are not covered by G.L. c. 268A, §1(q) because of that section's use of the word "person" which they argue is not intended to cover entities or their personnel. We disagree. By definition in G.L. c. 4, § 7, Twenty-third, the word "person" for purposes of construing the General Laws "include[s] corporations, societies, associations and partnerships." For the reasons set forth above, it is clear that "person" in § 1(q) is intended to be broad enough to include the employees of corporations or other entities performing services under a contract of hire or engagement with the Commonwealth. Indeed, a 1977 amendment to

§ 1(q) confirms that the personnel of a corporation under contract to the Commonwealth are state employees (or special state employees) unless specifically exempted.[4]

Notwithstanding the broad statutory definition in G.L. c. 268A, § 1(q), this Commission has recognized that there are situations where the connection between an individual and the state agency is "too remote" to warrant state employee status. "In recognition of this principle, the Commission has previously held that a contract between a state or municipal agency and a corporation does not generally operate to bring employees of the corporation within a definition of public employee." *EC-COI-87-8* (citing example of a secretary who performs typing services for a corporation under contract to a state agency).

Instead, this Commission has established certain factors to determine when an employee of a private business entity should be deemed a state employee. These factors are:

1. whether the individual's services are expressly or impliedly contracted for;

2. the type and size of the business entity;

3. the degree of specialized knowledge or expertise required of the service. For example, an individual who performs highly specialized services for a corporation which contracts with a public agency to provide those services may be deemed to be performing services directly to that agency;

4. the extent to which the individual personally performs services under the contract, or controls and directs the terms of the contract or the services provided thereunder; and

5. the extent to which the person has performed similar services to the public entity in the past. *EC-COI-89-35.*

No one factor is dispositive; rather the Commission will employ a balancing test of all of the factors as applied to the circumstances. Under the circumstances presented here, we conclude that X and Y, by virtue of the contract between the Company and ABC, are each state employees for purposes of G.L. c. 268A.

Important to our analysis is the fact that X's and Y's services are expressly called for in the ABC Agreement. Specifically, the ABC Agreement requires that X and Y each remain active in the Company's operation and management and in the performance of its obligations under the Agreement.

Second, X and Y are principals of a small general partnership which, significantly, has no professional staff on its regular payroll except for X and Y. It is expected that the partnership's services under the ABC Agreement will be provided by these two principals.

Third, the services provided under the ABC Agreement are not clerical or ministerial. Rather, the services, including feasibility analysis, market studies and appraisal and valuation reports, are "professional, highly specialized and call for discretion and judgment." *EC-COI-87-8.*

Fourth, given the partnership's size, the Company's structure and governance, and the intent of the parties as expressed in the ABC Agreement, it is clear that X and Y perform their contract services personally and play an active role in the delivery of the Company's contract

services generally. While X and Y do have some discretion in carrying out these functions, their discretion is not absolute. ABC has the right to approve critical aspects of their performance through an annual business plan, certain general guidelines, and other points of supervision.

Finally, X states that he has occasionally provided professional services for ABC in the past. Thus, based on our analysis of each of the relevant factors, we conclude that X and Y are state employees under G.L. c. 268A.

Nonetheless, X and Y, relying on the ABC Agreement which states that no member of the Company or its personnel shall be a "special state employee," argue that they are not covered by the law. Again, we disagree.

In essence, X and Y contend that they and ABC have bargained to waive their coverage under G.L. c. 268A and, with it, the protections afforded by the statute. However, "[t]here never has been at any time in Massachusetts an absolute right in its inhabitants to make all such contracts as they pleased." *Opinion of the Justices,* 109 Mass. 589, 592 (1895). To the contrary, the Legislature retains power to enact statutes for the common good and, in so doing, limits the extent to which contracts may be drafted to operate at variance with that intent. *See United States v. Atlantic Mut. Ins. Co.,* 343 U.S. 236, 245 (1952) (*quoted in Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc.,* 422 Mass. 318, 321 (1996)) ("[t]he Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.")

Massachusetts courts have held that "where laws are enacted on grounds of general policy their uniform application for the protection of all citizens alike is desirable, and an agreement to waive those provisions is generally declared invalid, but where they are designed solely for the protection of rights of private property, a party who may be affected can consent to a course of action, which if taken against his will, would not be valid." *Washington National Bank v. Williams,* 188 Mass. 103, 107 (1905). This rule applies even where the party purporting to waive the statutory protection is a government agency or official. *White Construction Co., Inc. v. Commonwealth,* 11 Mass. App. Ct. 640, 647 (1981) (state contract that limited architect's liability held unenforceable; "It is not within the power of the [Commonwealth's] Director of Building Construction to nullify the statutory requirements. Officers of govern-mental agencies have authority to bind their governmental bodies only to the extent conferred by the controlling statute.")

Clearly, the Legislature has stated that there shall be a comprehensive conflict of interest law that extends the entire span of governmental service. Its purpose is "[to] strike at corruption in public office, inequality of treatment of citizens and the use of public office for private gain." 1962 House Doc. No. 3650, p. 18. In general, the conflict of interest law is designed to restrain government employees from engaging in conduct which might be inimical to the best interest of the general public. *Id.* at 21 ("the people are entitled to know that no substantial conflict between private interests and official duties exists in those who serve them.")

Moreover, we have examined ABC's enabling statute. We are not aware of any statute which gives ABC power to alter the definition of state employee contained in G.L. c. 268A, §1(q). The conflict of interest law itself does not confer such power. Therefore, based on guiding principles of contract law, we conclude that ABC may not by contract declare that The Company, its members or its personnel shall not be subject to the conflict of interest law.

Our conclusion that X and Y are state employees not only is consistent with applicable law, it also is the only sensible conclusion reading the ABC Agreement in its entirety. Specifically, we are mindful that the ABC Agreement enumerates G.L. c. 268A as one of the laws applicable to the Agreement and X and Y's performance thereunder. There is no point in requiring X and Y to read and presumably understand the requirements of the state's conflict of interest law if neither they nor any of the Company's personnel is subject to that law. In other words, to give the contract the meaning urged by X and Y is to render the ABC Agreement self-defeating in this important respect. This we will not do. Accordingly, we conclude that X and Y are state employees by virtue of ABC Agreement.

Applying the Conflict of Interest Law

We next turn to applying the conflict of interest law to X and Y, in particular with respect to the Project. Before doing so, however, we note that X and Y qualify for special state employee status pursuant to G.L. c. 268A, §1(o)(2)(a).[5] We assume that, in light of this opinion, they will file the disclosure called for in that section. Thus, for the balance of this opinion, we will assume that X and Y are "special state employees."[6]

Section 4

Section 4(a) of G.L. c. 268A prohibits a state employee from directly or indirectly receiving or requesting compensation from anyone other than the commonwealth or a state agency, in relation to any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest. Section 4(c) prohibits a state employee from acting as agent or attorney for anyone other than the commonwealth or a state agency for prosecuting any claim against the commonwealth or a state agency, or as agent or attorney for anyone in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest. The section is aimed at divided loyalty, as well as influence peddling. *See Commonwealth v. Cola,* 18 Mass. App. Ct. 598, 610 (1984); *Edgartown v. State Ethics Commission,* 391 Mass. 83, 89 (1984) (construing G.L. c. 268A, §17, the municipal counterpart to § 4).

A special state employee is subject to the prohibitions of § 4(a) and (c) only in relation to a particular matter (1) in which he has at any time participated[7] as a state employee, or (2) which is or within one year has been a subject of his official responsibility, or (3) which is pending in the state agency in which he is serving. Clause (c) only applies to a special state employee who serves as such for more than sixty days during any period of three hundred and sixty-five consecutive days.

Our analysis under the "participation" prong is simple. That is, there are no facts to indicate that X or Y participated as special state employees in any aspect of the Project.

We also readily conclude that the Project is not and within the last year has not been the subject of their official responsibility. "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." G.L. c. 268A, § 1(i). In applying this definition, we have recently said that we will rely, at least in part, on the regulation that interprets the federal law on which this definition is modeled, Title 18 U.S.C. § 202(b). *EC-COI-99-2.* Under that regulation, "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)*.

Here, X and Y's authority derives solely from the ABC Agreement which in effect contains their job description. ABC, through its counsel, asserts that the Project does not fall within the ABC Agreement's scope. Based on this assertion, we conclude that the Project is not and within one year has not been the subject of X's or Y's official responsibility.

A more difficult question is presented when we ask whether X and Y are prohibited from receiving compensation or acting as The Corporation's agent in the Project because the Project is a matter pending in the state agency in which they are serving. We begin our analysis by examining the origin of the 60-day standard.

The Massachusetts conflict of interest law is the product of extensive study and proposals by the Special Commission. See 1962 House Doc. No. 3650. In drafting the legislation the commission modeled much of the statute on the Federal conflict of interest provisions proposed by H.R. 8140, 87th Cong., 1st Sess. (1961). That Congress was faced with two problems — an existing array of inconsistent, overlapping and incomplete provisions, and a statutory scheme that created unnecessary obstacles to recruiting qualified people for government service. Of the latter problem, the drafters of the House Committee on the Judiciary report accompanying H.R. 8140 wrote:

> But if the statutes often leave important areas unregulated, they also often serve as a possible bar to securing important personal services for the Government through excessive regulation when little or no ethical problem really exists. Fundamentally, this is because the statutes fail to take into account the role, primarily in the executive branch of our Government of the part-time or intermittent adviser whose counsel has become essential, but who cannot afford to be deprived of private benefits, or reasonably requested to deprive themselves, in the way now required by these laws. Such problems are encountered when the Government seeks the assistance of a highly skilled technician, be he scientist, accountant, lawyer, or economist.
>
> In general, these difficulties stem from the fact that even occasional consultants are regarded as "officers or employees" of the Government, whether or not compensated. As such, they are within the prohibitions applicable to regular full-time employees.

House Committee on the Judiciary, Bribery, Graft, and Conflicts of Interest, H.R. Rep. 748, 87th Cong., 1st Sess., pp. 4-5 (July 20, 1961).[8/]

To correct this "intolerable situation," H.R. 8140 pro-posed creating a class of "special government employees" to whom the conflict of interest law would apply less restrictively. *Id.* at 14.

Not surprisingly, the Massachusetts Special Commission on Code of Ethics reached a similar conclusion and struck a similar balance. On the one hand, the definition of "state employee" would be broad and would apply basic ethical standards to consultants who work on a part-time or intermittent basis. On the other hand, the proposed legislation would define "special employees" as "those who serve without compensation or those whose condition of employment permits some personal and private activities on the part of the state employee." 1962 House Doc. No. 3650, pp. 12-13. The Special Commission noted that, without the

classification, it would be "impossible for the Commonwealth to have the service of specialists or other capable people for specific assignments in departments or agencies." *Id.*

In short, both Congress and the Massachusetts legislature elected to single out for more relaxed treatment under the conflict law those individuals who serve government on a limited basis. Yet, Congress "recognize[d] that an intermittent or temporary consultant or adviser may attain a considerable degree of influence in an agency he serves and that [the restriction concerning matters pending in the agency in which he serves] is a reasonable one in principle." 1962 U.S. Code Cong. and Adm. News, p. 3858. Thus, Congress proposed the 60-day standard that was ultimately adopted by the Massachusetts Legislature as well.

Based on this legislative history, we conclude that the 60-day provision should be read to achieve two basic objectives: (1) to encourage government service by qualified professionals; and (2) to impose the greater statutory restrictions only where there is real potential for divided loyalty and influence peddling. With these principles in mind, we turn to applying the 60-day stand- ard to the government services of X and Y.

As a general rule in calculating the 60-day limit, we have counted only those days on which services are actually performed. *EC-COI-90-12.* A special state employee who works only part of a day is considered to have served for a complete day. *EC-COI-98-6.* Moreover, we have applied the 60-day standard over a "'floating' period [of 365 consecutive days] (that is, looking to both prior and subsequent service) as opposed to a fixed, prospective only period of 365 days." *EC-COI-91-5.* We have said that it is the employee's responsibility to keep accurate records of their service. *EC-COI-90-16*.

Here, the ABC Agreement commenced in June 1996. During the first six months of the ABC Agreement, X and Y worked 2-3 days per week. Since that time, they have each worked one day per week. Thus, based on their own records, during the first consecutive 365-day period of the ABC Agreement, X and Y each served on between 78 and 104 days, with the majority of that service (between 52-78 days) coming in the first six months of the ABC Agreement.

X and Y agreed to provide compensated services on the Project in July 1998. Applying a "floating" period of 365 consecutive days, we calculate that in the 365-day period surrounding the X and Y's deal to provide compensated services the Corporation, X and Y served under the ABC Agreement on no more than 60 days. They in fact each served on only 52 days in that period. Moreover, assuming that they continue to provide services at the rate contemplated by their agreement with the Company, they, for the balance of the ABC Agreement's five-year term, will never serve more than 52 days in a consecutive 365-day period.

A special state employee shall be subject to G.L. c. 268A, § 4 in relation to a particular matter pending in the state agency in which he is serving only where he "serves on no more than sixty days during *any* period of three hundred and sixty-five consecutive days." (emphasis supplied). Here, it could be argued that X and Y are subject to the more restrictive conflict provision because they served more than 60 days during the *first* consecutive 365-day period of the ABC Agreement. Thus, it could be argued, § 4 applies in the more restrictive fashion for the balance of the ABC Agreement's five-year term.

On the other hand, it could be argued, as do X and Y, that the statutory language requires an examination of the given 365-day period closest to the event that would otherwise trigger § 4 — here, the agreement to provide services to The Corporation. Under this reading,

the more restrictive provision is not applicable because in that given period of 365 consecutive days, the 60-day limit was not reached or exceeded.

The Commission has not dealt squarely with the argument X and Y now raise. However, in *EC-COI-85-49*, the Commission considered § 17 as applied to a special municipal employee/partner in a law firm under contract to a municipal agency. The legal services called for in the contract included "investigation, negotiation and possible litigation" in connection with a parcel of land owned by the agency. While not stated explicitly in the facts, the contract at issue in *85-49* clearly had the potential to run for more than 365 days. With regard to the 60-day limit, the Commission wrote:

> If you were to provide services under the contract for more than sixty days, you could not be retained by or represent other clients in connection with any matters before [the municipal agency] during the *duration* of your municipal employment because such matters would be considered to be pending in the agency in which you are serving. (emphasis supplied)

In other words, *EC-COI-85-49* could be read to decide that once the 60-day limit is reached, the restriction relating to matters pending in the employee's state agency would apply for the duration of the contract that creates state employee status. However, we decline to so read this opinion for two reasons. First, where we are not convinced that the 1985 Commission squarely confronted the issue raised by X and Y, we decline to speculate on what that Commission would have opined. Second, we conclude that, in any event, such an interpretation is inconsistent with the legislative policy behind the 60-day limit.

We are aware of our obligation to construe statutory exemptions narrowly. *See Department of Environmental Quality Engineering v. Town of Hingham,* 15 Mass. App. Ct. 409, 412 (1983). We also are obliged to construe the 60-day provision according to its plain meaning. *Int'l Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority,* 392 Mass. 811, 813 (1984); *O'Brien v. Director of DES,* 393 Mass. 482, 487-88 (1984). We may resort to the legislative history only where the language used is ambiguous. *Treasurer & Receiver Gen. v. John Hancock Mut. Life Ins. Co.,* 388 Mass. 410, 423 (1983)

We conclude that the 60-day provision is ambiguous. This ambiguity derives from the use of the word "any" which is a general word. It can mean "every," "all," "one" of any number, "either," or even "each" depending on the context. *See* Webster's Third New International Dictionary. Here the context does little to illuminate the appropriate construction. Relying solely on the plain language, "any period of [365] consecutive days" could mean any "one" such period, or it could require an examination of "each" given period of 365 days. Thus, we look to the statute's legislative history as a further aid in construction.

We conclude that an interpretation which requires an examination of the given period of 365 consecutive days surrounding the activity that triggers § 4 best comports with the legislature's intent. Of paramount importance to the legislature was its desire to craft a statute that would not needlessly interfere with ability to attract "trained and expert personnel" which it described as "one of [government's] most pressing problems. 1962 House Doc. No. 3650, p. 18. Interpreting the 60-day provision, once triggered, to apply for the duration of a multi-year contract even where in later years actual service under the contract has fallen below the 60-day limit, does little to prevent actual divided loyalty or influence peddling. To the contrary, such an interpretation could well apply the more restrictive conflict provisions even when the employee's

ability to exploit his position for private gain is at its lowest ebb. Such an interpretation also would greatly harm the Commonwealth's ability to attract and retain qualified, part-time professionals. Indeed, it was this potential negative consequence that was central to the Special Commission's decision to adopt the 60-day requirement. *Id.* at p. 13 ("Here again, the decision was made that a person with highly specialized or technical knowledge might be forced to refrain from undertaking a specific assignment for a state agency if it meant that he would be unable to deal with that agency in any other matter during the period of his employment or for a period thereafter.")

Our decision to reject the more restrictive construction also is consistent with the interpretation given to the counterpart federal language in 18 U.S.C., §§ 203 and 205 as originally enacted. In interpreting the 60-day limit, the federal Office of Government Ethics said:

> The 60-day standard affecting a special Government employee's private activities before his agency is a standard of actual . . . service . . . Thus, although once having been in effect, the statutory bar may be lifted later by reason of an intervening period of nonservice. In other words, as a matter of law the bar may fluctuate in its effect during the course of a special Government employee's relationship with his agency.

5 CFR § 735 Appendix C (2)(f) (November 9, 1965) (Revised July 1969) *Conflicts of Interest Statutes and Their Effects on Special Government Employees (Including Guidelines for Obtaining and Utilizing the Services of Special Government Employees).*

Based on the foregoing, we conclude that the appropriate 365-day period to examine is the one immediately surrounding X's and Y's July 1998 involvement in the Project. X and Y did not perform services on more than 60 days during that period. Therefore, we conclude that they are not prohibited by § 4 from receiving compensation or acting as the Corporation's agent with regard to the Project.

DATE AUTHORIZED: November 17, 1999

[1/]Except where indicated, this opinion is based on facts and documents supplied by X and Y through their counsel. We have not undertaken an independent investigation of the facts. As with any opinion, this opinion is valid only to the extent that the facts provided are accurate and complete.

[2/]Footnotes 2 and 3 have been deleted pursuant to G.L. c. 268B, § 3(g).

[3/]"State agency", any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department, and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town.

[4/]St. 1977, c. 245, approved June 1, 1977, amended § 1(q) by adding the following:

> No construction contractor nor any of their personnel shall be deemed to be a state employee or special state employee under the provisions of paragraph (o) or this paragraph as a result of participation in the engineering and environmental analysis for major construction projects either as a consultant or part of a consultant group for the commonwealth. Such contractors or personnel may be awarded construction contracts by the commonwealth and may continue with outstanding construction contracts with the commonwealth during the period of such participation; provided, that no such contractor or personnel shall directly or indirectly bid on or be awarded a contract for any construction project if they have participated in the engineering or environmental analysis thereof.

[5] "Special state employee", a state employee:

…

(2) who is not an elected official and

(a) occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment." G.L. c. 268A, § 1(o)(2)(a)

[6] We note that §1(o)(2)(a) requires disclosure "prior to" com-mencement of the private employment. We allow X and Y to make their disclosure "late" solely because of their and ABC's apparent mutual mistake concerning their status under the law.

[7] "Participate," 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).

[8] *See also* 1962 U.S. Code Cong. and Adm. News, p. 3855:

At this date it is no longer open to question that many, if not most, of the departments and agencies find it necessary for the optimum performance of their tasks to make use of the skill, talent, and experience of leaders in the sciences, business, and the professions whose regular work is conducted in private spheres. Today's Government requires the part-time services of thousands of such persons to deal with problems of increasing complexity and scope. It can scarcely be questioned that a satisfactory means must be found of facilitating the employment of these individuals by the departments and agencies, as needed, without relaxing basic ethical standards or permitting actual conflicts of interest.