CONFLICT OF INTEREST OPINION
EC-COI-90-15

FACTS:

You are a licensed master plumber and serve as the Plumbing Inspector for a Town (Town). As Plumbing Inspector, you are compensated on a "per inspection" basis. You also own a private plumbing company which conducts business in the Town. Most plumbing work requires a permit which may only be issued to a licensed plumber. See 248 CMR 2.04 (3)(c).

You indicate that it is common practice in the Commonwealth for plumbing inspectors who work on a per inspection basis to perform private business within their towns under c. 142, §12. Chapter 142, §12 provides:

> No inspector of plumbing or inspector of gas fitting shall inspect or approve any plumbing or gas fitting work done by himself, his employer, employee or one employed with him, but in a city or town subject to sections one to sixteen, inclusive, the said inspector of buildings, or the board of health, shall in the manner provided in the preceding section appoint an additional inspector of plumbing or gas fitting so done. Said additional inspector may act in the absence or disability of the

local inspector and his services shall receive like compensation.

This section shall not apply to any city or town establishing an annual salary for an inspector of plumbing or inspector of gas fitting, and in such city or town an inspector of plumbing or inspector of gas fitting shall not engage or work at the business of plumbing or gas fitting; provided, however such an inspector may perform the work of journeyman plumber or gas fitter outside the area over which he exercises jurisdiction as an inspector.

Chapter 142 applies to all cities and towns in the Commonwealth. G.L. c. 142, §2.

QUESTION:

Can you serve as Town Plumbing Inspector and maintain your private plumbing business in Town?

ANSWER:

Yes.

DISCUSSION:

In this opinion we are asked to consider whether G.L. c. 142, §12 supersedes the prohibitions of §17 with respect to private plumbing work by you as a local plumbing inspector. We conclude that c. 142, §12 does override G.L. c. 268A, §17.

As Plumbing Inspector, you are a municipal employee for purposes of G.L. c. 268A, the conflict of interest law. Section 17 of G.L. c. 268A primarily regulates the outside business activities of municipal employees. Under this section, a municipal employee may not receive compensation from a private party or act as agent for the party in connection with any submission, decision or other particular matter[1] in which the town or town agency is either a party or has a direct and substantial interest. The purpose of §17, prohibiting assistance to outsiders, is "the essence of conflict of interest legislation. It says, in effect, that the norm of government employment is that the regular public employee should, in the usual case, be a public employee first, last and only. For him to be also a private employee is a contradiction in terms: it suggests that he is serving two masters." **Buss, The Massachusetts Conflict of Interest Statute: An Analysis**, 45 B.U.L. Rev. 299, 322 (1965); **Town of Edgartown v. State Ethics Commission**, 391 Mass. 83, 89 (1984).

Ordinarily, §17 would prohibit you from performing plumbing work in town where the work is performed pursuant to a permit and subject to inspection by town officials because you would be receiving compensation in connection with a matter in which the town is a party and has a direct and substantial interest. The Commission has concluded in past precedent that work performed pursuant to a permit is presumptively "in relation to" the permit and of direct and substantial interest to a municipality because of the extensive municipal regulation and municipal determinations surrounding the application for a permit, decision to issue a permit, and inspection required under the permit. **EC-COI-90-13; 88-9** (part-time building inspector prohibited from performing carpentry requiring a building permit in his town); **87-31** (Chairman of Board of Health prohibited from performing septic system installations requiring a town permit).[2] Accordingly, as the owner of your company and the person who pulls permits, you would be unable to maintain your private plumbing business in town unless you qualify for a statutory exemption from §17. We conclude that the Legislature has provided such an exemption in c. 142 §12.

In the absence of any specific reference to G.L. c. 268A §17 in c. 142 §12, the Commission is obligated to construe the statute in light of its language and the presumed intent of the legislature which enacted it. **See Int'l Org. of Masters, etc. v. WoodsHole, Martha's Vineyard & Nantucket Steamship Authority**, 392 Mass. 811, 813 (1984); **Nantucket Conservation Foundation, Inc. v. Russell Management, Inc.**, 380 Mass. 212, 214 (1980). The statute provides that plumbing inspectors and gas inspectors who are not paid a salary by a municipality may perform plumbing and gas fitting work in their respective towns, provided they not inspect their own work.[3] Thus, the Legislature implicitly recognized and addressed the issue of a public employee's dual loyalties by prohibiting any such inspection. Moreover, in §12, the Legislature distinguished between salaried and non-salaried plumbing inspectors, providing that only those plumbing inspectors who are paid per inspection are permitted to perform work within their municipality. This distinction evidences a legislative intent to hold inspectors who are paid an annual salary to the highest duty of loyalty to their communities by prohibiting all work within the community, while permitting some flexibility for inspectors who are paid on a per inspection basis. The Legislature recognized an analogous distinction in G.L. c. 268A when it provided that, under certain circumstances, c. 268A will apply less restrictively to part-time or uncompensated public employees than to full-time public employees. Compare §17(a) with §17 ¶5.

Accordingly, we construe the provisions of G.L. c. 142, §12 to permit you to perform private plumbing services in the town, as long as an assistant inspector conducts all of the inspections of your work.[4]

DATE AUTHORIZED: October 10, 1990

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[1]"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).

[2]The Commission has recognized that certain facts may overcome the presumption that all work done pursuant to a permit is in relation to the permit. For example, if the work is incidental to what is required in the permit or if the permit covers an entire construction project, said work may not be "in relation to" the permit. EC-COI-90-13; 87-31. You have not overcome the presumption because plumbing work requires a separate permit and you are the only licensed plumber in your company to perform the work. EC-COI-87-31.

[3]While the statutory origin of G.L. c. 142, §12, St. 1894, c. 455, predates G.L. c. 268A, we find no express or implied intent by the Legislature to override the 1894 law in enacting G.L. c. 268A in 1962. Moreover, the Legislature had the opportunity to revisit the G.L. c. 142, §12 provisions when it rewrote much of G.L. c. 142 in 1977, but left unchanged the language pertaining to plumbing inspectors performing local plumbing work. St. 1977 c. 843 §9.

[4]Although you are exempt from the prohibitions of G.L. c. 268A §17, you remain subject to the other sections of G.L. c. 268A.