

**CONFLICT OF INTEREST OPINION  
EC-COI-90-18\***

**FACTS:**

You are a member of the Mental Health Advisory Council (Council), which is established pursuant to G.L. c. 19, §11. The Council is a fifteen member body appointed by the secretary of human services, with the approval of the governor. Eight of its members are affiliated with community mental health boards, and of the remaining seven members one is a professional in the field of children's mental health and at least four are appointed to represent one of the following professions and groups: state level medical, psychological, nursing, educational, social work, occupational therapy, or bar associations, associations for mental health, industrial and labor groups and the clergy.

The Council is directed by G.L. c. 19, §11 to:

(a) advise the Commissioner of the Department of Mental Health (DMH) on policy, program development, and priorities of need in the commonwealth for comprehensive programs in mental health;

(b) participate with DMH in holding a regular series of public hearings throughout the commonwealth to obtain the views of the area boards and other citizens concerning the programs of the department and the needs of the people for mental health services;

(c) review the annual plans and the proposed annual budget of the DMH and make recommendations to the commissioner in regard thereto;

(d) hold at least three meetings per year and convene special meetings at the call of the chairman of the council, a majority of the council, or the commissioner.

**QUESTION:**

Are you covered by the state conflict of interest law as a Council member and, if so, what limitations

does the law place on your having, as a Council member, a financial interest in a contract made by DMH?

ANSWER:

You are subject to the restrictions discussed below.

#### DISCUSSION:

##### 1. Jurisdiction

Initially, it is well-established that DMH is a "state agency" within the meaning of G.L. c. 268A, §1(p).<sup>1/</sup> See, G.L. c. 19, §1. The definition of state agency also includes any department of state government and all councils thereof and thereunder, and any instrumentality within such department. We conclude that the Council is a state agency of DMH for the purposes of G.L. c. 268A.

The Council is a state agency since it possesses many of the qualities which are common to state agencies. The Commission has recognized the following four factors as significant: (1) how the agency was created; (2) the purpose the entity serves; (3) whether the entity receives or uses public funds; and (4) the degree of government control exercised over the entity. The Council qualifies as a state agency since it was created by statute; it is a permanent, as opposed to an ad hoc, temporary committee; it performs a governmental function by reviewing and making recommendations concerning the DMH budget, by advising the DMH Commissioner on policy, program development and priorities for mental health program; its members are entitled to reimbursement from the commonwealth for all expenses incurred the performance of their duties, and its members are all appointed by a state official.<sup>2/</sup>

The Council is similar to other state advisory committees which the Commission has found to be state agencies under G.L. c. 268A. See, EC-COI-87-17; 86-4; 82-157; compare EC-COI-86-5. For the purposes of G.L. c. 268A, §1(p), the Council is not comparable to an independent state agency such as the MBTA or other state authorities but rather appears to be a council or instrumentality which serves DMH. It is established to serve in an advisory capacity to DMH in establishing mental health policy and program priorities as well as in making recommendations to DMH regarding its proposed annual budget. Notwithstanding the fact that the appointment of council members is made by the secretary of human services, rather than DMH, the primary focus of the services provided by the Council

is to assist and advise DMH.<sup>3/</sup> Thus, the Council appears to be either a council of (and under DMH or an instrumentality within DMH, G.L. c. 268A, §1(p), and its members are, accordingly, state employees of DMH. G.L. c. 268A, §1(q).<sup>4/</sup>

##### 2. Application of G.L. c. 268A, §7

The consequence of your status as a state employee of DMH is that you will be subject to the restrictions of G.L. c. 268A, §7, which prohibits you from having a financial interest in a contract made by a state agency. In light of your unpaid status on the Council, you are a special state employee under G.L. c. 268A, §1(o), and therefore, you will be eligible for certain exemptions from the prohibition of §7.

While you serve on the Council, you will not be eligible for an exemption available to special state employees under §7(d)<sup>5/</sup> with respect to your financial interest in any contract made by DMH. To qualify for a §7(d) exemption, a special state employee may not participate in or have official responsibility for any activity of the contracting agency. In your case, your financial interest in a contract made by DMH will qualify under §7(d) only if, in your Council position, you neither participate in nor have official responsibility for any activity of DMH. We conclude that by (1) reviewing the annual plans and proposed annual budget of DMH and making recommendations to the DMH Commissioner regarding those matters; (2) advising the DMH Commissioner on policy, program development and priorities for mental health programs; and (3) participating with DMH in conducting public hearings to obtain DMH area board and citizen input into DMH programs and services, you participate as a Council member in activities of DMH. See, EC-COI-86-7; 85-80. Accordingly, you do not qualify for an exemption under §7(d) with respect to your financial interest in a DMH contract. Your financial interest would be permissible, however, if you received a gubernatorial exemption under §7(e)<sup>6/</sup> or if your services for DMH qualified under an exemption designed for services to mental health institutions or clients.<sup>7/</sup>

DATE AUTHORIZED: December 12, 1990

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

<sup>1/</sup>"State Agency", any department of 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. G.L. c. 268A, §1(p).

2/The fact that the Council may have had its origin in a federal statute does not detract from the Council's status as a state agency. See, EC-COI-83-30; EC-COI-84-55.

3/Jurisdiction has consistently been based on the destination of the services which a state employee provides rather than on the identity of the appointing official of the employee. Otherwise, jurisdiction under G.L. c. 268A would result in anomalies such as judges being considered employees of the governor and executive branch.

4/Even if, for the sake of argument, we were to conclude that the Council is a separate state agency, independent of DMH, the conclusion which we reach in applying G.L. c. 268A, §7 would be unchanged. For the purposes of §7(d), the key issue is not the identity of the agency with which a special state employee is associated, but rather whether the special state employee participates in or has official responsibility for any activity of the contracting agency. It follows that if DMH is the contracting agency, a special state employee does not qualify for a §7(d) exemption if the employee participates in or has official responsibility for any activity of DMH while serving as a special state employee.

5/Section 7(d) states that the prohibition of §7 does not apply

to a special state employee who does not participate in or have official responsibility for any of the activities of the contracting agency and who files with the state ethics commission a statement making full disclosure of his interest and the interest of his immediate family in the contract ...

6/Section 7(e) exempts from §7:

... a special state employee who files with the state ethics commission a statement making full disclosure of his interest and the interests of his immediate family in the contract, if the governor with the advice and consent of the executive council exempts him.

7/The final paragraph of §7 provides as follows:

This section shall not prohibit a state employee from being employed on a part-time basis by a facility operated or designed for mental health care, public health, correctional facility or any other facility principally funded by the state which provides similar services and which operates on an uninterrupted and continuous basis; provided that such employee does not participate in, or have official responsibility for, the financial management of such facility, that he is compensated for such part-time employment for not more than four hours in any day in which he is otherwise compensated by the commonwealth, and at a rate which does not exceed that of a state employee classified in step one of job group XX of the general salary schedule contained in section forty-six of chapter thirty, and that the head of the facility makes and files with the state ethics commission a written certification that there is a critical need for the services of the employee. Such employee may be compensated for such services, notwithstanding the provisions of section twenty-one of chapter thirty.