

# STATE ETHICS COMMISSION

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Advisory Opinions

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Enforcement Actions

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*for Calendar Year 2005*

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**Included in this publication are:**

**State Ethics Commission Formal Advisory Opinions issued in 2005**

Cite Conflict of Interest Formal Advisory Opinions as follows:

*EC-COI-05-(number).*

**State Ethics Commission Advisories issued in 2005**

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*EC-ADV-05-(number).*

**State Ethics Commission Decisions and Orders, Disposition  
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*In the Matter of John Doe, 2005 SEC (page number).*

# State Ethics Commission

## Advisory Opinions

2005

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## **Summaries of Advisory Opinions Calendar Year 2005**

**EC-COI-05-1** - Section 17(a) of G.L. c. 268A prohibits a municipal employee from receiving private compensation to perform preparation and maintenance tasks required by a municipal permit in which the municipality is a party and in which the municipality has a direct and substantial interest, unless the compensation is authorized by a municipal by-law or other law.

**EC-COI-05-2** - The Commission concluded that the School Building Authority is subject to the conflict of interest law based on express language in St. 2004, c. 208, which created the Authority and which specifies that the Authority's operations "shall be subject to G. L. c. 268A." In addition, the Commission concluded that the School Building Advisory Board is subject to G. L. c. 268A because the Board was created by statute; it will have formal procedures and work product; it was the clear intent of the Legislature to have the Authority's operations subject to c. 268A; and the Board develops governmental policy.

**EC-COI-05-3** - G.L. c. 268A, § 5(e) does not prohibit a former state employee from engaging in paid public advocacy intended to influence public opinion on a matter before the person's former governmental body provided that he does not do so on the grounds of that body. G.L. c. 268A, § 5(e) will, however, prohibit a former state employee from both directly lobbying his former governmental body and from engaging for compensation in lobbying that body through strategic legislative agent activities "behind the scenes." Additionally, before engaging in permissible forms of public advocacy, a former state employee must ensure he complies with the requirements of G.L. c. 268A, §§ 5(a), 5(b) and 23(c).

**CONFLICT OF INTEREST OPINION  
EC-COI-05-1**

**QUESTION**

May a full-time municipal employee be privately compensated to prepare lines for municipal athletic fields, and perform other maintenance functions, when the municipal permits issued to private parties for the use of the fields require the private parties to have certain line-painting and maintenance functions performed?

**ANSWER**

No. Section 17(a) of G.L. c. 268A prohibits a municipal employee from receiving private compensation to perform preparation and maintenance tasks required by a municipal permit in which the municipality is a party and in which the municipality has a direct and substantial interest, unless the compensation is authorized by a municipal by-law or other law.

**FACTS**

You are a full-time employee of the Town.

On your own time, using your own equipment, you would like to earn money providing various services to private organizations that use Town grounds and playing fields. For example, you would apply lines to an athletic field, rake baseball diamonds, set up tables, chairs, tents and public address systems, pick up trash and clean up the fields following the events.

Whenever a private organization wishes to use a Town field, the organization must comply with conditions under a permit from the Town's Park and Recreation Commission. To schedule the use of a field, an organization must apply to the Park and Recreation Commission. The Town discontinued the past practice of lining athletic fields for community groups and does not provide materials for painting lines or marking diamonds. Due to budget cuts, the Town discontinued providing materials but "will layout fields and paint lines at the beginning of each season, only once. From that time on, any marking will be the individual groups [sic] responsibility."

However, the Town must approve all field linings and "organizations are not permitted to do any type of maintenance on fields without permission from the Parks Division and the Park and Recreation Commission."

The type of paint product must be approved, in advance, by the Parks Superintendent. According to the Town's Director of Public Works, the type of paint must be an approved field-marking paint, which does not damage grass. The Manual states that a community group may hire a private company or individual to do the lining

that had been previously approved by the Superintendent. "The company or individual must provide proof of insurance to the community group, with a copy provided to the Town . . . . The community group liaison must remain in contact with the private company or individual and with the [Parks] Superintendent to insure collaboration between the mowing and lining schedule."

In order to obtain a permit, the organization must also comply with an Agreement, entered into by the organization and the Park and Recreation Commission. The Agreement reiterates the above-described requirements and imposes several conditions such as removing equipment, clothing and trash from the field at the end of the event. Extra work related to repairing an organization's unauthorized maintenance work is billed to the organization. The Park and Recreation Commission imposes charges on groups using fields. The Town requires all groups that use fields to provide proof of insurance by submitting a certificate of insurance to the Director of Park and Recreation.

According to the Town, it devotes a substantial amount of money each year just to do the initial line painting. The School system uses the same fields, so, along with the use by numerous private groups, the fields receive significant wear and tear. The Town has devoted substantial financial resources to field improvements over the last ten years, according to the Director of Park and Recreation.

Previously, the Park and Recreation Commission had a policy that allowed users to request maintenance services through the Superintendent. If the users chose to use Town services, the cost of overtime would be paid by the user into the Park and Recreation's Gift Fund. Alternatively, the policy provided that Town staff may do work for an organization, on their own off-time, but may not use Town supplies, vehicles or equipment.

Based on that policy, you decided to provide services to private organizations, using your own equipment and your own time. You state that the Town initially allowed you to perform services for the organizations. Some time later, you were informed that you could not work for the organizations but, you report, were told that the Town would defer to a decision by the State Ethics Commission regarding your ability to perform these services. You received informal advice from the Commission's Legal Division, advising you that G. L. c. 268A, § 17 prohibited your conduct, and have asked the full Commission to review the informal advice.

The Town's rules now state, "A community group may not hire a Town Public Works employee to do maintenance, including lining, on his/her own time. This practice has been allowed in the past, but in accordance with The Commonwealth of Massachusetts State Ethics

law, it must be discontinued.”<sup>11/</sup>

## DISCUSSION

As a full-time Town employee, you are a municipal employee<sup>2/</sup> subject to the conflict of interest law. Section 17(a) of G.L. c. 268A prohibits a municipal employee from receiving compensation<sup>3/</sup> from anyone other than the Town “in relation to any particular matter”<sup>4/</sup> in which the Town is a party or in which it has a “direct and substantial interest.”<sup>5/</sup>

As the Commission and the courts have often advised, § 17 is intended to prohibit misconduct arising from divided loyalty *and* influence peddling.<sup>6/</sup> “The Legislature was entitled to [preclude] all potential conflicts before they become a reality and before damage, even unwittingly, has been done. The Legislature may have recognized that it is not always easy to tell when an actual conflict has arisen. These ‘section[s] of the statute [reflect] the old maxim that “a man cannot serve two masters.” [They seek] to preclude circumstances *leading to* a conflict of loyalties by a public employee.”<sup>7/</sup>

“The citizens of the Commonwealth reasonably expect public officials to act for the common good, rather than solely to benefit a special interest or to advance their own aims or fortunes.”<sup>8/</sup> Outside employment can raise these issues if the outside “activity might be construed to be an official act” of the municipality or if “it involves services closely related to official duties.”<sup>9/</sup> “Accordingly, there are concerns that a municipal employee may not only favor a private interest over his municipality’s interest in a particular matter but also be in a position to exert influence [over his municipality] on behalf of his private client”<sup>10/</sup> or for his private interests, such as business opportunities, regardless of the financial magnitude of those interests.<sup>11/</sup>

The permit the Park and Recreation Commission issues to allow the use of a field, and the Agreement, are particular matters in which the Town is a party. In addition, these particular matters are also of direct and substantial interest to the Town because they involve municipal action and govern the use of municipal property.<sup>12/</sup> As described above, the Town has created an extensive and detailed set of rules governing the use of its athletic fields.<sup>13/</sup> The Town devotes significant municipal resources to establishing the correct location of the lines, the use of proper materials, and the overall maintenance of the field and associated facilities.

Next, we consider whether your receipt of compensation from a private organization to perform services required by the permit and/or the Agreement would be “in relation to” those particular matters. In many circumstances, one’s private compensation is so closely associated with the relevant particular matter that there

can be no debate about whether the private compensation is “in relation to” or “in connection with” the particular matter. For example, if one is being paid to prepare plans for submission to a municipal official for review and approval before construction can begin, one’s compensation is in relation to the decision to approve the plans.<sup>14/</sup> Similarly, if one is being compensated to obtain a building permit, one’s compensation is “in relation to” the permit or if one is being paid to be the primary party to implement an approved plan or the terms and conditions of a permit.<sup>15/</sup>

We acknowledge that, as a result of work being performed pursuant to a municipal permit, there may be opportunities for private compensation that do not violate the conflict of interest law. In *EC-COI-88-9*, for example, the Commission observed:

[A] municipal employee, who is one of many privately paid employees or independent contractors on a major construction project, and who has no responsibility for dealing with the town on any matter, might not be considered to be privately compensated ‘in relation to’ the permit which allows the construction. Furthermore, certain permits which authorize a major construction project (e.g., a zoning municipal reuse permit to convert a school building into [a condominium]) will not necessarily render all work done on the project, e.g., interior painting, ‘in relation to’ the permit.<sup>16/</sup>

Here, you are not being compensated to *obtain* the permit on behalf of a private party using an athletic field. Also you may be able to perform your work, on behalf of a private party, in a way that avoids your having to interact with the Town officials who grant and monitor compliance with the field use permits.

However, you are being privately compensated to implement the terms and conditions of the permit. You are being compensated to apply Town-approved paint in Town-approved places. Thus, the relationship between your compensation and your actions to meet Town requirements is not attenuated like that of a worker doing interior painting on a private home, the application of which is not subject to municipal review and approval. In addition, for example, if the field is not cleaned up according to the permit, the private user will likely turn to you to ensure that the field is restored. The Town has devoted significant resources to maintaining public property that is used often by many parties and, to address risks to the Town, required private parties to have insurance.

The Town’s interests in ensuring that its public resources are appropriately maintained, and that the health and safety of people using Town fields are ensured, are both direct and substantial.<sup>17/</sup> Your compensation for your work is directly connected to the particular matters because, by your work, you are ensuring that the

organization meets its obligations to the Town pursuant to the Field Use Permit.

Accordingly, we conclude that G.L. c. 268A, § 17(a) will prohibit you from being paid by any private party to apply lines to athletic fields and perform any functions required under a Permit.<sup>18/</sup>

We note that there are ways that will enable you to comply with § 17. If your work were performed through your contract with the Town as part of your Town wages, as described in the Manual concerning overtime, you would be *directly* compensated by the Town, rather than by a private organization, in relation to the relevant particular matters. Alternatively, to allow you and other DPW employees to directly receive private compensation, a Town by-law would have to be enacted.<sup>19/</sup> In either case, these are arrangements that the Town will have to approve.

Finally, we note that § 23(e) of G.L. c. 268A, allows the Town “to establish and enforce additional standards of conduct.”<sup>20/</sup> Thus, as the Manual indicates, if the Town has decided to prohibit a municipal employee from engaging in the type of outside employment you have described, regardless of whether § 17 bars your conduct in these circumstances, then you must abide by the Town’s additional restrictions.

**DATE AUTHORIZED:** February 3, 2005

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<sup>1/</sup> Manual, Section on “Overtime By DPW Staff.”

<sup>2/</sup> “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).

<sup>3/</sup> “Compensation, any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another.” G.L. c. 268A, § 1(a).

<sup>4/</sup> “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 . . . .” G.L. c. 268A, § 1(k). Section 17(c) uses the phrase “in connection with” rather than “in relation to.” For the purposes of our analysis here, we do not believe that these two phrases have legally distinguishable meanings or applications.

<sup>5/</sup> Section 17(c) prohibits a municipal employee from acting (with or without compensation) as agent or attorney for anyone other than his municipality in connection with any particular matter in which his municipality is a party or in which it has a direct and substantial interest.

<sup>6/</sup> *EC-COI-99-7*.

<sup>7/</sup> *Edgartown v. State Ethics Commission*, 391 Mass. 83, 89 (1984) (emphasis added in *Edgartown*) (quoting *Commonwealth v. Canon*

373 Mass. 494, 504 (1977), cert. denied, 435 U. S. 933 (1978) (Liacos, J., dissenting on other grounds).

<sup>8/</sup> *Final Report, Special Commission on Ethics*, June 12, 1995, Preamble (as authorized by St. 1994, c. 43, § 49 and St. 1995, c. 2).

<sup>9/</sup> Conflict of Interest and Federal Service, The Association of the Bar of the City of New York Special Committee on the Federal Conflict of Interest Laws (1960), p. 84.

<sup>10/</sup> *EC-COI-03-2*.

<sup>11/</sup> The preamble to G.L. c. 268A states, “A public official of a free government is entrusted with the welfare, prosperity, security and safety of the people he serves. In return for this trust, the people are entitled to know that no substantial conflict between private interests and official duties exists in those who serve them.” (emphasis added).

<sup>12/</sup> *Commonwealth v. Canon*, 373 Mass. 494, 498 (1977).

<sup>13/</sup> See e.g., *EC-COI-88-9*; *PEL 99-2*; *PEL 98-1*.

<sup>14/</sup> See e.g., *EC-COI-87-31*; *PEL 98-1*; *PEL 99-2*.

<sup>15/</sup> See e.g., *EC-COI-03-2*; *EC-COI-99-6*; *EC-COI-88-9*; *EC-COI-87-31*.

<sup>16/</sup> *EC-COI-88-9*, quoting *EC-COI-87-31*. See also *EC-COI-93-5* (regarding § 4, the state level counterpart to § 17, the Commission concluded that certain duties of a pharmacist were not in connection with his employer’s state operating permit because he was not the principal pharmacist and he did not have dealings directly with the state licensing board or other state agencies); and *EC-COI-90-13* (some positions within a wastewater treatment plant, such as internal plant security, maintenance of plant grounds, or mechanical equipment repairs, may not be in relation to the DEP permit regarding plant compliance).

<sup>17/</sup> See e.g., *EC-COI-98-7* (the Commonwealth will have a direct and substantial interest in the particular matter under § 4 (the state level counterpart to § 17) if the particular matter affects the Commonwealth’s legal rights or liabilities, pecuniary interests, property interests, or the Commonwealth may have a stake in the particular matter due to a significant interest that may not be financial or proprietary but may involve the devotion of substantial resources of the Commonwealth).

<sup>18/</sup> You are also prohibited from acting as agent, with or *without* receiving private compensation, for private parties in connection with particular matters of direct and substantial interest to the Town or in which the Town is a party.

<sup>19/</sup> See e.g., *EC-COI-92-10*.

<sup>20/</sup> *EC-COI-96-1*.

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## CONFLICT OF INTEREST OPINION EC-COI-05-2

### QUESTION

Are members and employees of the School Building Authority and members of the School Building Advisory Board created pursuant to St. 2004, c. 208 (Act) subject to the conflict of interest law, G.L. c. 268A?

### ANSWER

Yes. Our conclusion that the Authority is subject to the conflict of interest law is based on express language in the Act which specifies that the School Building Authority's operations "shall be subject to G. L. c. 268A." In addition, as discussed in detail below, we conclude that the School Building Advisory Board is subject to G. L. c. 268A because the Board was created by statute; will have formal procedures and work product, the clear intent of the Legislature to have the Authority's operations subject to c. 268A; and the Board's role in developing governmental policy.

### FACTS

The Massachusetts Municipal Association (MMA) has designated you as its appointee to the new School Building Advisory Board (Board), described in detail below. You are the Deputy Town Administrator for the Town of Brookline.

#### *School Building Authority*

Pursuant to the Act, the Commonwealth created the "Massachusetts School Building Authority" (Authority) as a "public instrumentality" to serve as "an independent public authority not subject to the supervision and control of any other executive office, department, commission, board, bureau, agency or political subdivision of the commonwealth except as specifically provided in any general or special law. The exercise of the authority of the powers conferred . . . shall be considered to be the performance of an essential public function."<sup>1/</sup>

The Authority consists of the State Treasurer (who serves as chairperson), the Secretary of Administration and Finance, the Commissioner of Education, and four (4) additional members appointed by the State Treasurer. Two of these additional members "shall have practical experience in educational facilities planning, school building construction, or architecture and school design." The two other members "shall be persons in the field of education with demonstrated knowledge of Massachusetts curriculum frameworks and other relevant federal and state educational standards."<sup>2/</sup>

Members of the Authority serve without pay. The

chairperson of the Authority must report, at least annually, to the Governor and the Legislature, "to assist the executive and legislative branches in coordinating educational, community development and fiscal policies of the commonwealth."<sup>3/</sup> The chairperson of the Authority appoints an executive director, who supervises the administrative affairs and general management and operations of the Authority.<sup>4/</sup>

The Act specifies that "the operations of the authority shall be subject to chapter 268A and chapter 268B and all other operational or administrative standards or requirements to the same extent as the office of the state treasurer."<sup>5/</sup>

The Authority must "do all things necessary or convenient to carry out the purposes" of G.L. c. 70B, as amended by the Act. Chapter 70B of the General Laws is the "School Building Assistance Program," established as the "largest capital grant program operated by the Commonwealth" to assist municipalities in meeting the cost of constructing school facilities.<sup>6/</sup> The Authority's powers include: collecting and maintaining data on all public schools facilities in the Commonwealth; performing or commissioning a needs survey to ascertain capital construction, reconstruction, maintenance and other capital needs; developing a long term capital plan; adopting and amending bylaws and rules, regulations and procedures for conducting business of the trust<sup>7/</sup> as the Authority shall deem necessary to carry out c. 70B; establishing and maintaining reserves; disbursing amounts due to municipalities and school districts; investing funds of the trust; obtaining insurance; suing and being sued and prosecuting and defending actions relating to the trust; engaging accounting, management, legal, financial, consulting and other professional services necessary to the operations of the trust.<sup>8/</sup>

The Authority must "complete final audits on all projects on the list . . . for which a final audit had not been completed as of the effective date" of the Act and must "adjust payments in accordance with the result of those audits."<sup>9/</sup> The Authority must provide financial assistance under the Act for the "projects on the list . . . and not yet approved by the board of education prior to the effective date" of the Act. However, the Authority "may deviate from the order [on the list] if it determines that it is necessary to do so in order to comply with federal income tax laws or regulations related to the tax exemption of indebtedness incurred by the authority or to provide grants to municipalities or districts whose short-term borrowing would otherwise terminate prior to the award of a grant."<sup>10/</sup>

The Authority must file a progress report, and a final report no later than April 1, 2005, "along with any regulatory and legislative proposals necessary to carry its recommendations into effect," with the Secretary of

Administration and Finance, the House and Senate Clerks, the chairpersons of the House and Senate Committees on Ways and Means, and the House and Senate chairs of the Joint Committee on Education, Arts and Humanities.<sup>11/</sup> In turn, the Secretary of Administration and Finance shall submit a report on recommended changes to G.L. c. 70B, § 10, no later than May 1, 2005, with proposed legislation, to the Clerks of the House and Senate, the House and Senate Committees on Ways and Means, and the Joint Committee on Education, Arts and Humanities.

The Authority shall propose draft regulations, after holding no fewer than five public hearings, and submit draft regulations to the Legislature's Joint Committee on Education, Arts and Humanities for its review and comment. The Authority shall promulgate regulations by July 1, 2006.<sup>12/</sup>

### *School Building Advisory Board*

In addition, the Act created, as part of the Authority, the "school building advisory board" (Board) made up of the following: "the state auditor or his designee, the inspector general or his designee, and the executive director of the authority, who shall serve as the secretary to the advisory board and shall be a nonvoting member of the board, and 15 members to represent the following nongovernmental organizations, to be appointed by those organizations." The MMA, which designated you, is one of the "non-governmental" organizations specified in the Act.<sup>13/</sup>

"The [Board] shall assist the authority in the development of general policy regarding school building construction, renovation, reconstruction, maintenance and facility space, preservation of open space and minimization of loss of open space, thoughtful community development, cost management and shall provide technical advice and input to the authority."<sup>14/</sup>

The Board is to provide input to the Authority about a wide variety of matters. For example, the Board will consult with the Authority in the review of existing regulations, cost and size standards, the appropriate formula for facilities grants, the best means to encourage energy-efficient schools, the advisability of allowing municipalities and school districts to establish funds for building maintenance, and the advisability of further changes to G.L. c. 70B in accordance with construction reform.

In addition, the Authority and the Board will consider the feasibility of requiring prototype designs for schools, the feasibility of allowing public-private partnerships to construct schools, the feasibility of the use of lease-purchase in providing educational space, and the best means to assist in meeting the building needs of charter schools and educational collaboratives. Further,

both the Authority and the Board will consider the feasibility of requiring future school buildings to be constructed to facilitate early education and care programs, full day kindergarten, proper tutorial space, and services beyond instructional services that may be best provided to students in a school setting. Finally they will consider uses that extend beyond the typical school day, recreational and other purposes for community uses, the introduction of wireless technology in the classroom, and the feasibility of providing financial incentives to communities that have adopted zoning policies or other initiatives that encourage increased affordable housing production.<sup>15/</sup>

"Notwithstanding any general or special law to the contrary, the [Authority], with the advice of the [Board], shall conduct a comprehensive analysis of the needs of municipal and regional school districts for projects eligible for reimbursement under chapter 70B of the General Laws beginning July 1, 2007."<sup>16/</sup> Although the Authority decides pending applications, it is your understanding that the Board will review and comment on pending applications and ongoing approved projects.

In consulting with the Authority about the above subjects, the Board will review and be able to provide written comments to the Authority. It is our understanding that the Board will not be tasked with drafting regulations. However, the Board, as part of its consulting function, will review and provide written comments to regulations the Authority drafts. The Board must meet at least every quarter. It is our understanding that the meetings shall be public, contain formal agendas, and minutes will be kept.

### **DISCUSSION**

The issues are whether members and employees of the Authority and/or members of the Board are subject to G. L. c. 268A.

#### *The Authority*

The Act states, "The operations of the authority shall be subject to chapter 268A . . . and all other operational or administrative standards or requirements to the same extent as the office of the state treasurer," which evidences a clear legislative intent to apply the conflict of interest law to the Authority's members and employees. In addition, the Act specifies that the Authority is a "public instrumentality" and performs "an essential public function." State officials control the Authority and it expends state funds. Considering these attributes, we conclude that the Authority is a "state agency"<sup>17/</sup> for purposes of the conflict of interest law.

#### *The Board*

With respect to the Board, we also conclude that

it is a “state agency” as that is defined in the conflict of interest law. In determining whether an advisory board is a state agency, or otherwise a governmental agency, subject to G. L. c. 268A, the Commission has applied a multi-factored analysis. The analysis considers the following factors:

- (1) the impetus for creation of the committee (e.g. by statute, rule, regulation or otherwise);
- (2) the degree of formality associated with the committee and procedures;
- (3) whether committee members will perform functions or tasks ordinarily expected of state employees, or will they be expected to represent outside private viewpoints; and
- (4) the formality of the committee’s work product, if any.

Although advisory committees created by law are generally considered to be public agencies, such a factor, alone, is not dispositive.<sup>18/</sup> We consider all of these factors.<sup>19/</sup>

Here, the Board was created pursuant to the Act. It was not created as a temporary body to meet for a single purpose. When “a committee is a permanent and mandatory component to the implementation of a state statute,”<sup>20/</sup> the Commission has considered that fact to be an important factor in determining state agency status.

As Sections 16, 54, and 56 of the Act make clear, the Board will provide substantive input to the Authority. The Board will provide written comments to the Authority about draft regulations, and a wide variety of policies and considerations the Authority must review in developing school facilities. There will be formal meetings, at least on a quarterly basis. Meeting minutes will be kept, and meetings will be open to the public. Votes will be taken, with the executive director of the Authority operating as secretary to the Board and as a nonvoting member of the Board. The Act requires the Authority to accomplish tasks by certain dates, in consultation with the Board. Considering these facts, we conclude that the Board will not be functioning on an informal basis.

Although the Act obviously is intended to have representatives from a variety of interested parties serve on the Board, such as representatives from construction, engineering, architectural, and taxpayer groups, the Act is not set up to allow only for outside private viewpoints, on an ad hoc, informal basis.<sup>21/</sup> The Board “shall assist . . . in the development of general policy regarding school building construction, renovation, reconstruction, maintenance and facility space,” among other functions. In addition to the state auditor or his designee, the inspector

general or his designee, and the executive director of the Authority, many of the representatives from “non-governmental organizations,” as noted above, are governmental employees. These include the Massachusetts Municipal Association, Massachusetts Association of School Committees, Massachusetts Mayors Association, Massachusetts Association of School Superintendents, Massachusetts Association of Regional Schools, Massachusetts Teachers Association, and Massachusetts Federation of Teachers. Thus, many of the individuals on the Board are serving because they are already governmental officials and are serving to represent various governmental interests.

Finally, the Authority must consult with the Board about a comprehensive set of regulations and laws that relate to most (if not all) aspects of constructing public schools. As a result, the Board will provide written comments about those regulations and laws. The Authority, “with the advice of the” Board, “shall conduct a comprehensive analysis of the needs of municipal and regional school districts for projects eligible for reimbursement” under G. L. c. 70B. These facts suggest that the Board also will be producing, in addition to its written comments, formal work products.

Considering these facts, including that the Act states, “the operations of the [A]uthority shall be subject to chapter 268A,” we conclude that the Board is a state agency for purposes of the conflict of interest law.<sup>22/</sup> Accordingly, because Authority members and Board members are not compensated, they are “special state employees”<sup>23/</sup> for purposes of the conflict of interest law.

**DATE AUTHORIZED:** April 7, 2005

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<sup>1/</sup> St. 2004, c. 208, § 2.

<sup>2/</sup> Id.

<sup>3/</sup> Id.

<sup>4/</sup> Act, § 15.

<sup>5/</sup> Id.

<sup>6/</sup> G.L. c. 70B, § 1.

<sup>7/</sup> The “trust” is the Massachusetts School Modernization and Reconstruction Trust, as established by G. L. c. 10, § 35BB. The trust was created to hold receipts from certain sales taxes. The funds in the trust are to be use “exclusively for the purposes of the authority.” G.L. c. 10, § 35BB(c), as inserted by St. 2004, c. 210, § 1.

<sup>8/</sup> No later than June 30th each year, the Authority must submit a report to the Governor, the House and Senate Committees on Ways and Means, the Joint Committee on Education, Arts and Humanities, the Joint Committee on Natural Resources, the House and Senate Committees on Long-Term Debt and Capital Expenditures, and the

Joint Committee on Local Affairs. This report will analyze the anticipated financial needs for school facilities projects that qualify for assistance and include a listing of each school building within the state, together with a description of its size, capacity, age and state of maintenance. Also, the report shall describe whether the school building is likely to require construction, enlargement, reconstruction, rehabilitation or improvement due to such factors as deterioration, lack of adequate facilities to meet educational standards and anticipated increases in school-age population. Act, § 41.

<sup>9/</sup> Act, § 48.

<sup>10/</sup> Act, § 50.

<sup>11/</sup> Id.

<sup>12/</sup> Act, § 55.

<sup>13/</sup> Act, § 16. The non-governmental organizations are: The Massachusetts Municipal Association; the Massachusetts Association of School Committees; the Massachusetts Mayors Association; the Massachusetts Association of School Superintendents; the Massachusetts Association of Regional Schools; the Massachusetts Building Trades Council; the Massachusetts chapter of the Associated Builders and Contractors, the Massachusetts Alliance of Small Contractors, the American Council of Engineering Companies of Massachusetts, the Associated Subcontractors of Massachusetts, the American Institute of Architects-Massachusetts; the Massachusetts Smart Growth Alliance; the Massachusetts Taxpayers Foundation; Associated General Contractors of Massachusetts and acting jointly, the Massachusetts Teachers Association and Massachusetts Federation of Teachers.

<sup>14/</sup> Id.

<sup>15/</sup> Act, § 54.

<sup>16/</sup> Act, § 56.

<sup>17/</sup> “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, but not an agency of a county, city or town.” G.L. c. 268A, § 1(p).

<sup>18/</sup> EC-COI-86-4.

<sup>19/</sup> EC-COI-93-22.

<sup>20/</sup> EC-COI-93-22; EC-COI-87-17.

<sup>21/</sup> Compare EC-COI-93-22 (Council members served at pleasure of the Governor and Council not required to remain in existence for any definitive period, Council not created by statute, rule, or regulation, and Council member principally serve to provide Governor with outside viewpoints was considered to be ad hoc).

<sup>22/</sup> We found nothing in the Act that expressly or impliedly exempts Board members from any sections of G.L. c. 268A. To the extent that the application of certain sections in the conflict of interest law, such as §§ 4, 5, 6, 7 or 23, may restrict the Board from accomplishing its statutory mandate, the Legislature should address those concerns.

<sup>23/</sup> G.L. c. 268A, § 1(o)(1).

## CONFLICT OF INTEREST OPINION EC-COI-05-3

### QUESTION

As a former state employee affiliated with the General Court, what restrictions do you face under G.L. c. 268A, § 5(e) in acting as a legislative agent before the General Court?

### ANSWER

General Law c. 268A, § 5(e) does not prohibit you from engaging in public advocacy activities for compensation, as discussed below, provided that you do not do so on the grounds of your former governmental body. G.L. c. 268A, § 5(e) will, however, prohibit you from both directly lobbying your former governmental body and from engaging in lobbying that body through strategic legislative agent activities, as discussed below. Additionally, before engaging in permissible forms of public advocacy, you must ensure you comply with the requirements of G.L. c. 268A, §§ 5(a), 5(b) and 23(c).

### FACTS

You recently resigned from your position with the General Court to take a position with a private organization with legislative interests in Massachusetts. You are interested in engaging in a number of activities that are ultimately designed to influence legislation that may be before the General Court. For example, you wish to engage in what we will refer to as public advocacy, such as speaking at rallies or public meetings related to legislation, encouraging the public to contact Massachusetts legislators to express views on pending legislation, attending press conferences on proposed legislation, and encouraging the public to engage in letter-writing campaigns to the General Court. Additionally, you wish to engage in what we will refer to as strategic lobbying. Strategic lobbying may include developing strategies for your organization and other groups to use in opposing or supporting relevant legislation, assisting activists in planning which legislators to contact, drafting letters to be signed under a third party’s signature, strategizing with your employer or a client on which legislative districts they should target, obtaining information on legislation from your private organization’s legislative agent, and discussing your private organization’s position on legislation with that legislative agent. You do not wish to engage in direct lobbying, which includes you directly calling, contacting, writing or interacting with members or employees of the General Court.

### DISCUSSION

When you left your position at the General Court, you became a former state employee for purposes of

G.L. c. 268A, the conflict of interest statute. Sections 5 and 23(c) of G.L. c. 268A apply to your activities as a former state employee. In particular, G.L. c. 268A, § 5 contains a one year prohibition on former state employees acting as a legislative agent. It provides:

“[A] former state employee or elected official, including a former member of the general court, who acts as legislative agent, as defined in section thirty-nine of chapter three, for anyone other than the commonwealth or a state agency before the governmental body with which he has been associated, within one year after he leaves that body . . . 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, § 5(e) and § 5(f).

In turn, G.L. c. 3, § 39 defines a “legislative agent” as follows:

“[A] person who for compensation or reward does any act to promote, oppose or influence legislation, or to promote, oppose or influence the governor’s approval or veto thereof. The term ‘legislative agent’ shall include a person who, as part of his regular and usual business or professional activities and not simply incidental thereto, attempts to promote, oppose or influence legislation, or the governor’s approval or veto thereof, whether or not any compensation in addition to the salary for such activities is received for such services; provided, however, that for purposes of this definition a person shall be presumed to engage in activity covered by this definition in a manner that is simply incidental to his regular and usual business or professional activities if he engages in any activity or activities covered by this definition for not more than fifty hours during any reporting period or receives less than five thousand dollars during any reporting period for any activity or activities covered by this definition.”

We first recognize that there are federal and state constitutional rights related to an individual’s right to petition government<sup>4/</sup> and advocate a position with government that a former state employee does not forego simply by virtue of that status. Such activities are appropriate and necessary parts of the democratic process. G.L. c. 268A, § 5(e) does not prohibit a person from engaging in these activities; rather, it restricts a former state employee from receiving compensation for performing such outside activities before the governmental body with which that person served.

The conflict of interest law was “enacted as part of ‘comprehensive legislation ... [to] strike at corruption

in public office, inequality of treatment of citizens and the use of public office for private gain.”<sup>2/</sup> The conflict of interest statute is prophylactic in nature, where the Legislature’s objective “was as much to prevent giving the appearance of conflict as to suppress all tendency to wrongdoing.”<sup>3/</sup>

More specifically, G. L. c. 268A, § 5(e) was enacted in 1978 as part of an effort to strengthen the public’s confidence in its officials.<sup>4/</sup> The purpose of the § 5(e) restriction is to ensure that the democratic process is not skewed to give a former state employee an undue advantage in his or her legislative agent activities. As the Commission has previously noted, “[t]he purpose of G.L. c. 268A, § 5(e) [i]s to establish a one-year cooling off period for former state employees who might otherwise be in a position to take undue lobbying advantage of former associates whose loyalties they acquired as state employees.”<sup>5/</sup>

In short, the critical policy interest that § 5(e) guards against is allowing a former state employee, for compensation, to trade upon loyalty and contacts that he or she has gained by virtue of his or her official position. Among the ways that a person might take undue lobbying advantage of a former associate is by personally appealing to a former colleague’s loyalty, drawing on private loyalty through a lobbying associate when the former colleague is aware of that association, and advising or directing a client, another employee of your organization, or a lobbying associate, through use of insider or special knowledge of people or processes.

Implicit within your request, are two separate questions: 1) whether the activities you describe constitute acting as a “legislative agent,” as defined in G.L. c. 3, § 39, and 2) whether these actions are “before the governmental body” with which you were associated so that they fall into the one year prohibition established in G.L. c. 268A, § 5(e).

We first address the question of what activities, for purposes of G.L. c. 268A, constitute the acts of a legislative agent. In doing so, we focus on the first portion of the definition of “legislative agent” in G.L. c. 3, § 39: “A person who for compensation or reward does any act to promote, oppose or influence legislation, or to promote, oppose or influence the governor’s approval or veto thereof.”

We begin our analysis by examining the plain language of the statute. When interpreting a statute, we do so according to the intent of the legislature ascertained from all its words construed by ordinary and approved usage of language, considered in connection with the cause of its enactment, mischief or imperfection to be remedied and the main object to be accomplished.<sup>6/</sup> When the words are clear and, when assigned their ordinary

meaning, yield a workable and logical result, we interpret the statute without resort to extrinsic aids, such as legislative history.<sup>7/</sup>

“Any” has been defined, in relevant part, as “one or more indiscriminately of whatever kind,” or “any thing or things: any part, quantity, or number.”<sup>8/</sup> “The word any is generally used in the sense of ‘all’ or ‘every’ and its meaning is most comprehensive.”<sup>9/</sup> To “act” commonly means “to produce a desired effect: perform the function for which designed or employed” or “to exert power or influence.”<sup>10/</sup>

We conclude that the language is clear and unambiguous. Based upon the plain meaning of the statute, *all actions* undertaken with the purpose of promoting, opposing or influencing legislation or the governor’s approval or veto thereof are the types of activities in which a legislative agent engages. Thus, provided that a person engages in such acts “for compensation or reward,” that person will be acting as a legislative agent for purposes of G.L. c. 268A when they engage in any of the activities mentioned above, whether that activity is labeled as public advocacy, strategic lobbying, or direct lobbying.<sup>11/</sup>

We next turn to the question of what it means to act as a legislative agent “before the governmental body” with which you were associated, as prohibited by G.L. c. 268A, § 5(e). Absent a specific precedent on the meaning of a word or phrase in a statute, we are guided by accepted principles of construction, including the principle of relating the words in question to the associated words and phrases in the statutory context.<sup>12/</sup>

The phrase “before the governmental body” modifies the phrase “acts as legislative agent.” The word “before” commonly means “in the presence of” or “in sight or notice of” or “face to face with.”<sup>13/</sup> Although the term “governmental body”<sup>14/</sup> is defined neither in G.L. c. 268A, § 5(e) nor in the definition provisions of G.L. c. 268A, § 1, the Commission has previously concluded that the General Court intended that the definition in G.L. c. 268B, § 1(h) apply to § 5(e).<sup>15/</sup>

Guided by the prophylactic purpose of the statute as well as the language and purpose of § 5(e), we conclude that the statute prohibits you from both directly lobbying your former governmental body by direct contact or communication, and also from indirectly lobbying that body through a member or individual who is closely connected to your private organization whom you have advised, directed, or strategized with to influence legislation. Such persons could include a client, another employee of your organization, or a lobbying associate. In the latter case, where your legislative agent activity comes before your former governmental body, even if through another person within or closely connected with

your private organization, we conclude that you would in fact be acting as a legislative agent before that body, contrary to § 5(e). You would be engaging in “behind the scenes” legislative agent activity that you could not otherwise engage in personally before your former governmental body. Further, in each instance, you would be using private knowledge of past personal associations within your former governmental body to benefit your current employer or client.

Thus, G.L. c. 268A, § 5(e) prohibits you from engaging in direct lobbying activity, including directly communicating with or contacting a member or employee of the General Court, whether in person, by telephone, or in writing. Additionally, we conclude that authorizing a third party to use your name in connection with legislative agent acts constitutes acting as legislative agent before your former governmental body. Furthermore, we conclude that personally introducing an employee of your private organization or a citizen activist to a member of the General Court is also impermissible under G.L. c. 268A, § 5(e).<sup>16/</sup>

Furthermore, G.L. c. 268A, § 5(e) prohibits you from receiving compensation to engage in “strategic lobbying” where you direct, advise, or strategize with a member or other closely connected individual within your private organization, such as a client, another employee of your organization, or a lobbying associate, who will in turn take the information you provide and lobby members or employees of your former governmental body. In these circumstances, your legislative agent activities are, even if through these other parties, before your former governmental body. Additionally, such activities violate the policy purpose of the statute by placing you in a position to take undue lobbying advantage of a former colleague’s loyalty. If you, for example, strategize with another employee in your organization on who or how to lobby, draft letters that will go to specific legislators, or otherwise have direct input or a degree of control into the message or over the messenger, circumstances are ripe for you to take advantage of insider information or special knowledge gained by virtue of your former position and otherwise appeal to a former colleague’s loyalty. In these circumstances, your inside knowledge may give you unequal access in the halls of government, permitting you to use your former public office for private gain and causing public confidence to be eroded in the decision-making process.<sup>17/</sup>

We conclude, however, that § 5(e) does not prohibit you from engaging in paid, public advocacy activities intended to influence legislation, provided that you do not do so on the grounds of your former governmental body, as discussed below. You may permissibly engage in public advocacy provided that it is intended to influence public opinion on a piece of legislation rather than directly influence the General Court.

Grassroots public advocacy that involves public education or shaping public opinion is fundamentally distinct from a situation where you advise, direct, or strategize with a client, employee, or inner circle of associates who in turn carry out your legislative strategy before the General Court.

If, for example, you hold a press conference about pending legislation that is broadcast by television and a member or employee of the General Court later sees it, we do not consider this to be a legislative agent activity that is “before” your former governmental body. Such an activity would not violate either the language or the purpose of G.L. c. 268A, § 5(e) in that it would not put you in a position to take undue advantage of former colleagues or put you in a position to use insider information.

Additionally, we conclude that the statutory language as well as the underlying purpose of G.L. c. 286A, § 5(e) do not prohibit you from engaging in other “grassroots,” public advocacy activities, including encouraging the public to contact Massachusetts legislators to express views on pending legislation and to engage in letter-writing campaigns to the General Court, provided you do not advise the public on specific strategy, such as which legislators to contact, or what to say or do when a person contacts a legislator. When you engage in “grassroots” public advocacy, your efforts are targeted to influence public opinion on an issue rather than specifically targeting the legislature. We conclude that such activities are not “before” your former governmental body and that, further, your opportunity for capitalizing on personal relationships is sufficiently removed. Prior to engaging in any of these activities, however, you must ensure that you comply with the requirements of G.L. c. 268A, §§ 5(a),<sup>18/</sup> 5(b),<sup>19/</sup> and 23(c).<sup>20/</sup>

We are persuaded, however, that engaging in any direct, indirect, and/or grassroots advocacy for compensation on the grounds of your former governmental body, during the one year after you leave that body, constitutes impermissibly appearing before that body. If, for example, you were invited to give a speech to an activist group in the Great Hall of Flags, we conclude it can be properly said that you are doing so “before” the General Court, as that activity can fairly be said to be “in sight or notice” of the General Court. Furthermore, giving a speech or leading a rally on the State House steps can similarly be considered to be “before” the General Court. Thus, for one year after you leave state employment, G.L. c. 268A, § 5(e) also will prohibit you from being compensated to engage in these types of activities on the grounds of your former governmental body. In these instances, engaging in legislative agent activities so near the heart of where your former governmental body does business, or in a place so integrally related to its work and over which it exerts control, may properly be deemed

“before” that body.

In sum, G.L. c. 268A, § 5(e) does not prohibit you from engaging in public advocacy activity, including speaking about legislation to members of the public through press conferences or speeches, and encouraging the public to engage in letter-writing campaigns, provided that you do not do so on the grounds of your former governmental body. Rather, G.L. c. 268A, § 5(e) prohibits you, for compensation and for a period of one year after you leave your position with the Legislature, from directly lobbying your former governmental body, whether in person, in writing, or by telephone, and from “strategically” lobbying where you direct, advise, or strategize with a client, another employee, or individual who is closely connected to your private organization on how to influence your former governmental body.

**DATE AUTHORIZED:** July 25, 2005

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<sup>1/</sup> See, e.g., McDonald v. Smith, 472 U.S. 479, 482 (1985) (“The First Amendment guarantees ‘the right of the people . . . to petition the Government for a redress of grievances.’ The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression.”); Mine Workers v. Illinois Bar Association, 389 U.S. 217, 222 (1967) (The right to petition is “among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and purpose, with the other First Amendment rights of free speech and free press.”); Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939); United States v. Cruikshank, 92 U.S. 542 (1875).

<sup>2/</sup> McMann v. State Ethics Commission, 32 Mass. App. Ct. 421, 427 (1992) (citations omitted).

<sup>3/</sup> Scaccia v. State Ethics Commission, 431 Mass. 351, 359, quoting Selectmen of Avon v. Linder, 352 Mass. 581, 583 (1967). See Edgartown v. State Ethics Commission, 391 Mass. 83, 89 (1984) (The Legislature’s concern about conflict between private interests and public duties may reasonably have motivated it to prohibit involvements that might present *potential* for such conflicts.)

<sup>4/</sup> See 1978 House Doc. No. 5151; St. 1978, c. 210.

<sup>5/</sup> See *EC-COI-84-146*; *EC-COI-85-52*.

<sup>6/</sup> See Brockton Educ. Ass’n v. School Committee of Brockton, 47 Mass. App. Ct. 36, 39 (1999) (citations omitted).

<sup>7/</sup> Foss v. Commonwealth, 437 Mass. 584, 586 (2002) (citations omitted).

<sup>8/</sup> Webster’s Third New International Dictionary (1993).

<sup>9/</sup> See, e.g., Hollum, Jr. v. Contributory Retirement Appeal Board, 53 Mass. App. Ct. 220, 223 (2001) (citations omitted); Boston Towing and Transportation Co. v. Commissioner of Revenue, 52 Mass. App. Ct. 803, 807 (2001) (“any” refers to entire class).

<sup>10/</sup> Webster’s Third New International Dictionary (1993).

## COMMISSION ADVISORY 05-01

### THE STANDARDS OF CONDUCT (Section 23)

This Advisory explains the provisions of the Standards of Conduct contained in Section 23 of G.L. c. 268A, the conflict of interest law. The Standards of Conduct provide a general code of ethics for all public employees when faced with the overlap of private interests and official responsibilities. Conflict of interest law violations under Section 23 may be created when a public employee's personal interests or relationships overlap with his or her public obligations and may result in penalties of up to \$2,000 per violation. The term "public employee" includes both elected and appointed state, county and municipal employees, whether paid or unpaid. Unpaid volunteer board members as well as, in some instances, consultants and contractors are considered public employees for purposes of the conflict of interest law.

#### **I. UNWARRANTED PRIVILEGES** (G.L. c. 268A, § 23(b)(2))

Public employees are prohibited from, knowingly or with reason to know, using or attempting to use their official positions to secure for themselves or others unwarranted privileges of substantial value that are not properly available to similarly situated individuals. "Substantial value" has been set at \$50 or more by the courts and the Ethics Commission. In some instances, "substantial value" may not be readily ascertainable, such as when a public employee uses his or her position to get preferential treatment, to secure a special benefit or to retaliate against someone. In such cases, the Ethics Commission will view the totality of the circumstances to determine whether the substantial value threshold has been met. "Similarly situated individuals" can mean, in various situations, other people, businesses or entities in the city, town, state or county who are not necessarily public employees.

Using public equipment and resources for personal business is using an official position to obtain an unwarranted privilege of substantial value not properly available to others. Thus, the use of public resources valued at \$50 or more for personal, private or political purposes violates the conflict of interest law. In addition, public employees may not use the "inherently coercive authority" of their position to seek anything of substantial value.

Example: A manager may not use official time, his staff or the supplies or equipment available to him in his office in order to write books.

Example: An elected official may not invoke his position to seek preferential treatment from police

<sup>11/</sup> Our analysis is limited to the interpretation of the term "legislative agent" within the context of G.L. c. 268A, § 5(e). We offer no opinion on whether you are required, under G.L. c. 3, § 39, to register as a legislative agent. Whether a person is required to register as a legislative agent falls under the jurisdiction of the Secretary of the Commonwealth. For purposes of this opinion, we also do not need to address whether G.L. c. 268A, § 5(e) applies to those individuals whose paid advocacy is incidental to his or her regular and usual business or professional activities.

<sup>12/</sup> Building Com'r of Franklin v. Dispatch Communications of New England, Inc., 48 Mass. App. Ct. 709, 717-18 (2000).

<sup>13/</sup> *Webster's Third New International Dictionary* (1993).

<sup>14/</sup> G.L. c. 268B, § 1(h) defines "governmental body" as follows: "any state or county agency, authority, board, bureau, commission, council, department, division, or other entity, including the general court and the courts of the commonwealth."

<sup>15/</sup> See EC-COI-84-146.

<sup>16/</sup> In the Commission's view, such conduct is merely a slightly attenuated method of appearing before your former governmental body.

<sup>17/</sup> See *Association of the Bar of the City of New York Special Committee on the Federal Conflict of Interest Laws, Conflict of Interest and Federal Service*, 1960, pp. 6-7, discussing the five policy objectives to be addressed in any conflict of interest legislation: government efficiency; equal treatment of equal claims; public confidence; preventing the use of public office for private gain; and preserving the integrity of government policy-making institutions.

<sup>18/</sup> Section 5(a) prohibits you from receiving compensation from or acting as agent or attorney for anyone, other than the Commonwealth, in connection with a particular matter in which the Commonwealth is a party or has a direct and substantial interest and in which you previously participated as a state employee. For example, if as a former state employee you participated in drafting or discussing special legislation, you are thereafter permanently restricted from being compensated or acting as agent or attorney for anyone other than the Commonwealth in connection with that legislation.

<sup>19/</sup> Section 5(b) prohibits you, as a former state employee, within one year of leaving state service, from appearing personally before any court or agency of the Commonwealth as agent or attorney for anyone other than the Commonwealth in connection with any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest and which was under your official responsibility as a state employee at any time within a period of two years prior to termination of your employment. Thus, if a piece of special legislation fell within your official responsibility any time during the last two years of your service but you did not participate in discussing or otherwise participating in that legislation, you are nevertheless prohibited from *appearing personally* before any court or agency of the Commonwealth as agent or attorney for anyone other than the Commonwealth in connection with that particular matter for a one year period.

<sup>20/</sup> Section 23(c) prohibits a current or former public employee from accepting other employment or engaging in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority, and from improperly disclosing such confidential materials or using such information to further his private interests. See EC-COI-83-154; EC-COI-84-9.



officers during a traffic stop.

Example: A public employee may not generally solicit donations for a private or charitable organization from individuals with whom he conducts official business.

## II. “APPEARANCES” OF CONFLICTS (G.L. c. 268A, § 23(b)(3))

Public employees must avoid conduct that creates a reasonable impression that any person may improperly influence them or unduly enjoy their official favor, or that they are likely to act (or fail to act) because of kinship, rank, position or undue influence of any party or person. A reasonable impression of favoritism or bias may arise when a public employee, knowingly or with reason to know, acts on matters affecting the financial interest of a friend, a business associate or a relative other than an immediate family member or a non-financial interest of an immediate family member.<sup>17</sup>

The conflict of interest law allows public employees to act on matters, even if it creates the appearance of a conflict, if they openly admit all the facts surrounding the appearance of bias prior to any official action. Specifically, the conflict of interest law states that if a reasonable person having knowledge of the relevant circumstances would conclude that a public employee could be improperly influenced, the public employee can dispel this impression of favoritism by disclosing all the facts that would lead to such a conclusion. For example, it may be necessary for a public employee to disclose a personal relationship with someone appearing before his or her board.

Appointed employees must make such disclosures in writing to their appointing authority (the person or board who appointed them to their job). This disclosure must be kept available for public inspection. An elected employee’s public disclosure must be made in writing and filed with the city or town clerk. These public disclosures must be made prior to any official participation or action. In addition, the Commission advises public employees to make an oral disclosure for inclusion in the meeting minutes. Occasionally, an appearance of a conflict of interest arises for the first time during a public meeting. In that case, a public employee should make an oral disclosure at the meeting and file a written disclosure as soon as possible thereafter. Alternatively, instead of filing a written disclosure under Section 23(b)(3), a public employee may simply abstain from participating, i.e. debating, voting or otherwise being involved, in a matter that creates an appearance of a conflict.

Once a public disclosure has been made, the public employee may participate in the matter notwithstanding the “appearance” of a conflict. When public employees

do act on matters affecting individuals with whom they have a private relationship, they must act objectively and be careful not to use their official position to secure any unwarranted privilege or benefit for that person.

Example: An elected planning board member participates in the planning board’s consideration of a subdivision plan submitted by a contractor who previously built the planning board member’s house. Her participation in the planning board’s consideration would create a reasonable basis for the impression that the contractor could unduly enjoy the planning board member’s favor in the performance of her official duties. To dispel this appearance of bias, the planning board member must disclose in writing her private relationship with the contractor and file the disclosure with the town clerk before participating. She may then participate in the board’s consideration of subdivision plan, including voting on the plan.

Example: The longtime friend of the head of a state agency applies for a job in the agency. If the agency head gets involved in the hiring process, it may appear to a reasonable person that he would be biased in favor of his friend. To dispel the appearance of favoritism, the agency head must disclose his private relationship with the job applicant in writing to his appointing official. The appointing official may then determine whether further steps should be taken to avoid the appearance of a conflict (e.g., instruct the agency head not to participate in the hiring and delegate the matter to another employee).

## III. DEALINGS WITH SUBORDINATES (G.L. c. 268A, § 23(b)(2))

The inherently exploitable nature of the relationship between superior and subordinate requires formal safeguards to protect against even accidental or unintended coercion or undue pressure by the superior. Section 23 of the conflict of interest law prohibits both actual exertion of undue influence and also the appearance of acting in anything but a completely objective manner. Therefore, persons in supervisory positions may not ask their subordinates to work for them in a private capacity or to contribute to any private interest or organization. In such situations, the subordinate employee may feel coerced even if there is no such intent on the part of the supervisor, and it would be impossible to avoid the “appearance” of impropriety in such situations. The limitations of Section 23 also apply to a public employee dealing with vendors and other individuals that the employee regulates.

Example: A public employee is doing substantial renovations on his home, and he knows that his

administrative assistant and his brother do roofing work on the side. The public employee may not ask his assistant to re-shingle the roof, even if he is willing to pay a fair market wage for the work. If, however, the solicitation is made by the subordinate, either directly or through advertisement, rather than the superior, private employment of the subordinate by the superior may be permissible if the proper public disclosures are made to the superior's appointing official. Individuals considering such arrangements should contact the Ethics Commission's Legal Division for specific advice.

#### IV. INHERENTLY INCOMPATIBLE ACTIVITIES

(G.L. c. 268A, § 23(b)(1))

A public employee is prohibited from, knowingly or with reason to know, accepting other employment involving compensation of substantial value (\$50 or more), the responsibilities of which are inherently incompatible with the responsibilities of his or her public office. For example, a public employee who is acting as a mediator would violate the conflict of interest law by working privately for a union when he was simultaneously involved in mediating a labor dispute with the same union.

#### V. USE OF CONFIDENTIAL INFORMATION

(G.L. c. 268A, § 23(c))

No current **or former** officer or employee of a state, county or municipal agency may, knowingly or with reason to know:

- accept employment or engage in any business or professional activity that will require disclosure of confidential information the employee has gained by reason of his or her position or authority; nor
- improperly disclose material or data that are not considered public records, when an employee acquired such information in the course of his or her official duties; nor
- use such confidential information to further his or her personal interests.

Example: A former employee of the town personnel office sets up her own employment placement service and uses confidential information from the town's personnel records to prepare a client list for use in her private business. This violates Section 23 because she would be using confidential information acquired in the course of her official duties to further her personal interests, and also because she would be using her official position to secure for herself an unwarranted privilege not properly available to similarly situated individuals (i.e., other

placement services).

\* \* \*

For more information about the state conflict of interest and financial disclosure laws (G.L. c. 268A & c. 268B), including the subjects discussed in this Advisory, please contact:

State Ethics Commission ([www.mass.gov/ethics](http://www.mass.gov/ethics))  
One Ashburton Place, Room 619  
Boston, MA 02108  
(617) 371-9500

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**REVISED:** January 28, 1991  
**REVISED:** December 31, 1992  
**REVISED:** February 3, 2005 [as an Advisory]

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<sup>1/</sup> The conflict of interest law (in Sections 6, 11 and 19) expressly prohibits public employees from acting on any matter that affects the financial interest of themselves, their immediate family members or businesses for which they serve as an employee, partner, officer, director or trustee. "Immediate family" is defined in the law as the employee and his or her spouse and each of their parents, children, brothers and sisters. The public disclosure process is not available for elected public employees when faced with matters affecting these groups – the officials must abstain from participating in the matter. Public employees who are appointed or hired to their jobs should contact the Ethics Commission or consult its "Advisory No. 86-02: Nepotism" before taking any action on such matters.

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#### COMMISSION ADVISORY NO. 05-02

##### VOTING ON MATTERS AFFECTING ABUTTING OR NEARBY PROPERTY

The conflict of interest law is intended to ensure that public employees act in the best interests of the citizens they represent, and do not pursue their own self-interests or other private interests. The law prohibits a public employee from participating, by voting, discussing, delegating or otherwise acting, in any matter that affects:

- his or her own financial interests or those of a business partner;
- the financial interests of his or her immediate family members (i.e., the employee's spouse; and the parents, siblings and children of either the employee or the employee's spouse);

- the financial interests of a private or “after-hours” employer, or anyone with whom the employee is negotiating or has an arrangement for prospective employment; or
- any organization, either charitable or for-profit, in which the employee is serving as an officer, director, partner or trustee.

The term “public employee” includes both elected and appointed state, county and municipal employees, whether paid or unpaid, full-time or part-time. An unpaid volunteer board member as well as, in some instances, a consultant who is a contractor are considered public employees for purposes of the conflict of interest law.

### I. PARTICIPATION IN A PARTICULAR MATTER

The conflict of interest law defines participation as participating in agency action or in a particular matter personally and substantially through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. Thus, a public employee participates not only when he makes a final decision or vote on a matter, but also when he discusses the merits of a matter with a colleague or makes a “non-binding” recommendation. A particular matter is any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination or finding.<sup>17</sup>

### II. DETERMINING PROHIBITED FINANCIAL INTERESTS

The restrictions of the conflict of interest law apply regardless of the size of the financial interest. They apply in any instance when the private financial interests are directly and immediately affected, or when it is reasonably foreseeable that the financial interests *would* be affected. Also, the conflict of interest law prohibits *any* type of official action in such matters, regardless of whether the proposed action would positively *or* negatively affect the private financial interests.

Example: An elected board of health member owns property abutting a proposed landfill. If the landfill is approved, it will negatively affect the value of the board of health member’s property value. Despite the fact that it will negatively affect his property value, the board of health member is in favor of the landfill. He may not participate in the discussion and vote of the landfill. (As discussed below, an appointed board member may participate if he discloses and receive from his appointing authority an exemption that would allow him to participate.)

### III. ABUTTING OR NEARBY PROPERTY MAY AFFECT A PUBLIC OFFICIAL’S FINANCIAL INTEREST

Under the conflict of interest law, a property owner is *presumed* to have a financial interest in matters affecting abutting and nearby property. Thus, unless she can clearly demonstrate that she does *not* have a financial interest, a public employee should not take any action in her official capacity on matters affecting property that is near or directly abuts:

- her own property;
- property owned by a business partner;
- property owned by any immediate family members;
- property owned by a private employer, or prospective employer; or
- property owned by any organization in which the public employee is an officer, director, partner or trustee.

Otherwise, she risks violating the conflict of interest law.

The following factors are considered to determine whether, in a particular situation, a person or organization has a financial interest in an abutting or nearby property. A financial interest is *presumed* whenever:

- her property directly abuts (i.e., it shares any part of a property line); or
- her property is directly opposite a street, public way or private way, or she is an abutter to an abutter within 300 feet of the property line; or
- she, because of an act or failure to act by the board or commission, may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public; or
- the matter would otherwise alter her property value, rights, or use. For example, a property owner is presumed to have a financial interest in zoning changes, variances, nearby subdivision or development approvals, and roadway, sewerage or safety improvements.

Example: An appointed state employee is reviewing an environmental impact report for a large development. The development abuts property owned by his parents. The state employee must notify his appointing authority, i.e., the individual or board responsible for appointing

the public employee to his position, and the State Ethics Commission of the conflict and may not participate in the matter unless he follows the exemption process discussed below.

Example: An elected planning board member is also a business owner. A residential subdivision application is filed with the planning board for property abutting her business. She must not participate in the subdivision application review and approval process.

#### **IV. REBUTTING THE PRESUMPTION THAT A FINANCIAL INTEREST EXISTS**

As discussed above, the Commission presumed that a property owner has a financial interest in matters affecting abutting and nearby property unless he can clearly demonstrate that he does *not* have such a financial interest. If a public official, in good faith, believes that no such financial interest, positive or negative, exists, he can rebut or refute that presumption by getting an independent real estate appraisal that concludes that the matter affecting the abutting or nearby property will not affect the financial interest of the public official. Such an appraisal should be a bona fide appraisal that includes such things as the credentials of the appraiser, sufficient detail about the property and the appraisal and a description of the basis of the opinion.

#### **V. ABSTAINING WHEN A CONFLICT OF INTEREST OCCURS**

Not only must a public employee abstain from voting when he has a conflict of interest, he may not participate in any official discussion of the matter. Ordinarily, the best course of action is simply to leave the room during the deliberation and vote of the board.

Example: A selectman who discusses the environmental and traffic impacts of a license application for a business located next to his property but abstains from the final vote will nevertheless have participated through his discussing the license application.

While a municipal employee and members of boards and commissions at both the state and municipal level are not required to disclose the reason for their abstention, an appointed state or county employee who would normally be required to participate in a particular matter as part of his job *must* disclose, in writing, to his state appointing official and the State Ethics Commission *even if* he wishes to abstain. The appointing official then determines if such an abstention should occur by following the exemption process discussed below. This disclosure is required even if the appointed state or county employee abstains.

## **VI. EXEMPTIONS**

Statutory exemptions can, in certain instances, allow a public employee to take actions that would otherwise be prohibited.

### ***State and County Employees***

One exemption is available to all *appointed* state and county employees. This exemption is *not* available to any *elected* employee. As discussed above, an appointed state or county employee who would normally be required to participate in a particular matter as part of his job *must* disclose, in writing, to his appointing official and the State Ethics Commission the nature and circumstances of the matter and the financial interest. The appointing official, who receives the disclosure described above, may assume responsibility for the matter, assign responsibility for the matter to another employee or provide the state or county employee with a written determination allowing her to participate in the matter. Both the disclosure and the appointing official's determination are public records and, in addition, must be filed with the State Ethics Commission.

Example: A state employee responsible for approving small business grants must make a written disclosure to her appointing official when a grant application to fund expansion of a day care center across the street from her home is assigned to her and may not participate in reviewing the grant *unless* the appointing authority provides her with a written determination that will allow her to do so. Both the disclosure and the written determination must be filed with the State Ethics Commission.

### ***Municipal Employees***

As noted above, an *appointed* municipal employee may choose to abstain from a matter in which she has a prohibited financial interest and, if she does so, need not make a disclosure. In order to participate in a matter involving abutting property, a municipal employee must disclose, in writing, to her appointing official the nature and circumstances of the matter and the financial interest. The appointing official, who receives the disclosure described above, may assume responsibility for the matter, assign responsibility for the matter to another employee or provide the municipal employee with a written determination allowing her to participate in the matter. Both the disclosure and the appointing official's determination are maintained as a public record by the appointing official and are *not* filed with the State Ethics Commission.

This exemption is *not* available to any elected municipal employee.

Example: The appointed department of public works director may make a disclosure and receive a written determination from his appointing official that will allow him to negotiate a contract that will build a new road in front of his property or he may abstain and his appointing authority may assume responsibility for negotiating the contract or assign it to another. The exemption is not available to the elected Board of Health member approving septic systems in a subdivision abutting her property; rather, she must abstain.

An additional exemption is available to *municipal* employees. It allows a municipal employee to act provided that the particular matter is one of general policy and provided further that the issue affecting the private financial interests of the municipal official and his immediate family members also affects a “substantial segment” of the municipality’s population. The Ethics Commission has advised that at least 10% of a municipality’s population is a “substantial segment” for the purposes of the conflict of interest law; therefore, a municipal employee may act on matters affecting his own financial interests, or the interests of immediate family members, if the financial interest also affects at least 10% of his municipality’s residents (as determined by the most recent federal census).

Example: An elected city councilor who owns a home in the city may participate in the establishment of residential tax rates. While the tax rate is a matter in which he has a financial interest, it is shared by more than 10% of the population, i.e., all homeowners in the municipality.

## VII. RULE OF NECESSITY

If more than one member of a board or committee is disqualified because of actual conflicts of interest, the board may not be able to act because it does not have a quorum. (If the number for a quorum is *not* set by law, a quorum is generally a majority of the board members.) In these instances, as a matter of last resort, the board can use what is called the rule of necessity to permit the participation of the disqualified members in order to allow the board to act. Prior to invoking the rule of necessity, public officials should review the Ethics Commission’s Primer on Self-Dealing, Financial Interests and the Rule of Necessity ([www.mass.gov/ethics/primer\\_19.html](http://www.mass.gov/ethics/primer_19.html)) or contact the city solicitor, town counsel or the Ethics Commission.

## VIII. CONCLUSION

While certain private relationships may not trigger the restrictions discussed above, they may require

disclosure and compliance with other sections of the conflict of interest law. Again, for further advice, contact your town counsel, city solicitor or the Legal Division of the State Ethics Commission at 617-371-9500.

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<sup>1/</sup>Note, however, that general legislation is not a particular matter. Thus, a public official may act on matters of general legislation, and certain home-rule petitions. For example, a legislator, a town manager or a state agency head may draft, promote or oppose general legislation, or legislation related to a municipal government’s organization, powers, duties, finances or property. Matters involving *other* types of “special legislation,” regulations or administrative policies are *not* eligible for this exemption. For a determination as to whether a bill is “general legislation” or “special legislation,” contact the city solicitor, town counsel, agency counsel or the Legal Division of the State Ethics Commission.

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### COMMISSION ADVISORY NO. 05-03

#### **ELECTED OFFICIALS VOTING ON BUDGETS AND SIGNING PAYROLL WARRANTS THAT INCLUDE SALARIES FOR FAMILY MEMBERS**

The conflict of interest law is intended to ensure that public employees act in the best interests of the citizens they represent, and do not pursue their own self-interests or other private interests. The law prohibits a public employee from participating, by voting, discussing, delegating or otherwise acting, in any matter that affects:

- his or her own financial interests or those of a business partner;
- the financial interests of his or her immediate family members (i.e., the employee’s spouse; and the parents, siblings and children of either the employee or the employee’s spouse);
- the financial interests of a private or “after-hours” employer, or anyone with whom the employee is negotiating or has an arrangement for prospective employment; or
- any organization, either charitable or for-profit, in which the employee is serving as an officer,

director, partner or trustee.

The term “public employee” includes both elected and appointed state, county and municipal employees, whether paid or unpaid, full-time or part-time. An unpaid volunteer board member as well as, in some instances, a consultant who is a contractor are considered public employees for purposes of the conflict of interest law.

## **I. PARTICIPATION IN A PARTICULAR MATTER**

The conflict of interest law defines participation as participating in agency action or in a particular matter personally and substantially through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. Thus, a public employee participates not only when he makes a final decision or votes on a matter, but also when he discusses the merits of a matter with a colleague or makes a “non-binding” recommendation. A particular matter is any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination or finding.<sup>1/</sup>

## **II. DETERMINING PROHIBITED FINANCIAL INTERESTS**

The restrictions of the conflict of interest law apply regardless of the size of the financial interest. They apply in any instance when the private financial interests are directly and immediately affected, or when it is reasonably foreseeable that the financial interests *would* be affected. Also, the conflict of interest law prohibits *any* type of official action in such matters, regardless of whether the proposed action would positively *or negatively* affect the private financial interests.

Example: A city councilor whose mother is a clerk for the water department may not vote *in favor or against* a motion to impose a two week unpaid furlough for all water department employees.

## **III. PARTICIPATING IN VOTES AND DISCUSSIONS ON BUDGETS OR SIGNING WARRANTS THAT INCLUDE SALARIES OF FAMILY MEMBERS**

In situations where an elected public employee’s family members are employed by the same city, town or agency, the employee may not participate in any discussion or vote on any budget item that would affect the family member’s salary or sign a payroll warrant that includes the family member’s pay.<sup>2/</sup>

Example: A school committee member whose

daughter is a school teacher in town may not discuss or vote on a school department payroll warrant, which includes the regular weekly salary of all school department employees, because his daughter has a financial interest in that warrant.

This prohibition includes voting on a budget line item that will merely maintain the salary of a family member at its present level, approving “automatic” salary step increases in a budget, or signing a payroll warrant. The prohibition applies even in cases where a number of other employees (or all employees) are given similar increases. Discussing or making nonbinding recommendations on the budget line items affecting immediate family members’ salaries is also prohibited.

However, a public employee may vote on other line items that do *not* affect the financial interest of a family member and the whole budget, including salaries, once the following procedure has been followed: the board must identify the budget line item that includes the family member’s salary and vote on it separately. The public employee whose family member’s salary is affected by this line item must abstain from the discussion and vote. After all such conflicts are dealt with through this line item procedure, the board may then vote on the budget as a whole package, with all members participating in the final vote to approve the “bottom line.”

Example: A city councilor whose father works as a custodian for the school department must abstain from voting on a recommendation about the line item of the budget that includes her father’s salary. She should leave the room during any deliberation and vote on this matter. She may discuss any other line item as long as it has no impact, directly or indirectly, on her father’s salary. She may also participate in the final vote to approve the budget as a whole at the end of this process.

## **IV. ABSTAINING WHEN A CONFLICT OF INTEREST OCCURS**

As discussed above, not only must a public employee abstain from voting, he may not participate in any official discussion of the matter. Ordinarily, the best course of action is simply to leave the room during the deliberation and vote of the board.

Example: A selectman whose son is a police officer and who discusses increasing health insurance benefits for police officers but abstains from the final vote will have participated through his discussing the health insurance benefit in a particular matter affecting his son’s financial interest.

An elected public employee is not required to disclose the reason for his abstention.

## V. RULE OF NECESSITY

If more than one member of a board or committee is disqualified because of actual conflicts of interest, the board may not be able to act because it does not have a quorum. (If the number for a quorum is *not* set by law, a quorum is generally a majority of the board members.) In these instances, as a matter of last resort, the board can use what is called the rule of necessity to permit the participation of the disqualified members in order to allow the board to act. Prior to invoking the rule of necessity, public officials should review the Ethics Commission's Primer on Self-Dealing, Financial Interests and the Rule of Necessity ([http://www.mass.gov/ethics/primer\\_19.html](http://www.mass.gov/ethics/primer_19.html)) or contact the city solicitor, town counsel or the Ethics Commission.

## VI. CONCLUSION

While certain private relationships may not trigger the restrictions discussed above, they may require disclosure and compliance with other sections of the conflict of interest law. Again, for further advice, contact your town counsel, city solicitor or the Legal Division of the State Ethics Commission at 617-371-9500.

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<sup>1</sup>Note, however, that general legislation is not a particular matter. Thus, a public official may act on matters of general legislation, and certain home-rule petitions. For example, a legislator, a town manager or a state agency head may draft, promote or oppose general legislation, or legislation related to a municipal government's organization, powers, duties, finances or property. Matters involving *other* types of "special legislation," regulations or administrative policies are *not* eligible for this exemption. For a determination as to whether a bill is "general legislation" or "special legislation," contact the city solicitor, town counsel, agency counsel or the Legal Division of the State Ethics Commission.

<sup>2</sup>An exemption is available for an appointed municipal employee, which will allow him to act on a budget affecting an immediate family member's financial interest. He must receive advance, written permission to participate from the person or board that appointed him to his job (the appointing official). To receive this permission, the employee must first advise his appointing official in writing of the conflict. If the appointing official decides to allow the employee to participate, the determination must be made in writing, in advance of any action, that the financial interest of the employee's family member "is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee." Both the disclosure and the appointing authority's determination must be filed with the town clerk to allow for public review. See Advisory 86-02: Nepotism ([www.mass.gov/ethics/adv8602.htm](http://www.mass.gov/ethics/adv8602.htm)).

## COMMISSION ADVISORY NO. 05-04

### VOTING ON MATTERS INVOLVING COMPETITORS

The conflict of interest law is intended to ensure that public employees act in the best interests of the citizens they represent, and do not pursue their own self-interests or other private interests. The law prohibits a public employee from participating, by voting, discussing, delegating or otherwise acting, in any matter that affects:

- his or her own financial interests or those of a business partner;
- the financial interests of his or her immediate family members (i.e., the employee's spouse; and the parents, siblings and children of either the employee or the employee's spouse);
- the financial interests of a private or "after-hours" employer, or anyone with whom the employee is negotiating or has an arrangement for prospective employment; or
- any organization, either charitable or for-profit, in which the employee is serving as an officer, director, partner or trustee.

The term "public employee" includes both elected and appointed state, county and municipal employees, whether paid or unpaid, full-time or part-time. An unpaid volunteer board member as well as, in some instances, a consultant who is a contractor are considered public employees for purposes of the conflict of interest law.

## I. PARTICIPATION IN A PARTICULAR MATTER

The conflict of interest law defines participation as participating in agency action or in a particular matter personally and substantially through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. Thus, a public employee participates not only when he makes a final decision or vote on a matter, but also when he discusses the merits of a matter with a colleague or makes a "non-binding" recommendation. A particular matter is any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination or finding.<sup>1</sup>

## II. DETERMINING PROHIBITED FINANCIAL INTERESTS

The restrictions of the conflict of interest law apply regardless of the size of the financial interest. They

apply in any instance when the private financial interests are directly and immediately affected, or when it is reasonably foreseeable that the financial interests *would* be affected. Also, the conflict of interest law prohibits *any* type of official action in such matters, regardless of whether the proposed action would positively *or negatively* affect the private financial interests.

Example: Generally, a state employee may not participate in reviewing a license for an automotive service station to conduct emissions testing where his father's service station is located across the street and is a direct competitor in providing emissions testing. It does not matter whether the state employee will approve or reject the license application. (A state employee is required to disclose the potential conflict of interest to his appointing authority who may provide the employee with an exemption, as discussed below. Similar exemptions may also be available to municipal employees.)

### III. PARTICIPATING IN MATTERS CONCERNING BUSINESS COMPETITORS

A public employee may not participate in matters affecting the financial interests of competitors if those particular matters also affect the public employee's financial interests. There is no one easy "rule" for a public employee to rely upon when deciding who competitors are and whether the competitors' particular matters will also affect the public employee's financial interest. In some smaller communities, every similar business may be in competition; in larger cities it is possible that the "competitive zone" is much smaller. Local authorities are often in a better position than the Commission to identify the local factors that would determine a competitor. We suggest that an appointed public employee rely on his appointing official or town or city counsel to make such a determination. A public employee who has potential conflicts involving possible competitors should seek guidance from town or city counsel or from the Commission.

Example: A municipal employee who holds liquor licenses (or whose place of business holds a license) may not vote on any liquor license matter involving a competitor.

Example: A state inspector whose family owns a restaurant may not inspect a restaurant owned by a competitor of his family's restaurant.

### IV. ABSTAINING WHEN A CONFLICT OF INTEREST OCCURS

Not only must a public employee abstain from voting, she may not participate in any official discussion

of the matter. Ordinarily, the best course of action is simply to leave the room during the deliberation and vote of the board.

Example: A selectman who discusses the environmental and traffic impacts of a license application for a gas station owned by her son but abstains from the final vote will have participated through her discussion of the license application.

While a municipal employee and members of boards and commissions at both the state and municipal levels are not required to disclose the reason for the abstention, an appointed state or county employee who would normally be required to participate in a particular matter as part of her job *must* disclose, in writing, to her state appointing official and the State Ethics Commission *even if* she wishes to abstain. The appointing official then determines if such an abstention should occur by following the exemption process discussed below. This disclosure is required even if the appointed state or county employee abstains.

### V. EXEMPTIONS

Statutory exemptions can, in certain instances, allow a public employee to take actions that would otherwise be prohibited.

#### *State and County Employees*

One exemption is available to all *appointed* state and county employees. This exemption is *not* available to any *elected* employee. As discussed above, an appointed state or county employee who would normally be required to participate in a particular matter as part of his job *must* disclose, in writing, to his appointing official and the State Ethics Commission the nature and circumstances of the matter and the financial interest. The appointing official, who receives the disclosure described above, may assume responsibility for the matter, assign responsibility for the matter to another employee or provide the state or county employee with a written determination allowing her to participate in the matter. Both the disclosure and the appointing official's determination are public records and, in addition, must be filed with the State Ethics Commission.

Example: A state employee responsible for approving small business grants must make a written disclosure to her appointing official when her spouse's grant application is assigned to her and may not participate in reviewing *any* of the grant applications including her spouse's *unless* the appointing authority provides her with a written determination that will allow her to do so. Both the disclosure and the written determination



must be filed with the State Ethics Commission.  
***Municipal Employees***

As noted above, an *appointed* municipal employee may choose to abstain from a matter in which she has a prohibited financial interest and, if she does so, need not make a disclosure. In order to participate in a matter involving abutting property, a municipal employee must disclose, in writing, to her appointing official the nature and circumstances of the matter and the financial interest. The appointing official, who receives the disclosure described above, may assume responsibility for the matter, assign responsibility for the matter to another employee or provide the municipal employee with a written determination allowing her to participate in the matter. Both the disclosure and the appointing official's determination are maintained as a public record by the appointing official and are *not* filed with the State Ethics Commission.

This exemption is *not* available to any elected municipal employee.

Example: An appointed building inspector may make a disclosure and receive a written determination from his appointing official that will allow him to inspect a retail clothing store's renovations where his wife owns a competing retail store. The exemption is not available to an elected Recreation Commissioner voting to hire a private landscaping company that is a direct competitor of her family landscaping business; rather, she must abstain.

An additional exemption is available to *municipal* employees. It allows a municipal employee to act provided that the particular matter is one of general policy and provided further that the issue affecting the private financial interests of the municipal official and his immediate family members also affects a "substantial segment" of the municipality's population. The Ethics Commission has advised that at least 10% of a municipality's population is a "substantial segment" for the purposes of the conflict of interest law; therefore, a municipal employee may act on matters affecting his own financial interests, or the interests of immediate family members, if the financial interest also affects at least 10% of his municipality's residents (as determined by the most recent federal census).

Example: An elected city councilor who owns a gas station located just outside the border of the city in a neighboring town may not participate in a decision to increase taxes on gas stations located in the city. Of the 12 gas stations located in the city, three are located less than a mile from his gas station and are direct competitors of his gas station. The vote on whether city gas stations

will be assessed additional taxes would affect the financial interest of his competitors. That financial interest, the tax on gas stations, is *not* shared by a substantial segment of the population. He may not participate in the discussion or vote.

## VI. RULE OF NECESSITY

Finally, if more than one member of a board or committee is disqualified because of actual conflicts of interest, the board may not be able to act because it does not have a quorum. (If the number for a quorum is *not* set by law, a quorum is generally a majority of the board members.) In these instances, as a matter of last resort, the board can use what is called the rule of necessity to permit the participation of the disqualified members in order to allow the board to act. Prior to invoking the rule of necessity, public officials should review the Ethics Commission's Primer on Self-Dealing, Financial Interests and the Rule of Necessity ([www.mass.gov/ethics/primer\\_19.html](http://www.mass.gov/ethics/primer_19.html)) or contact the city solicitor, town counsel or the Ethics Commission.

## VIII. CONCLUSION

While certain private relationships may not trigger the restrictions discussed above, they may require disclosure and compliance with other sections of the conflict of interest law. Again, for further advice, contact your town counsel, city solicitor or the Legal Division of the State Ethics Commission at 617-371-9500.

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<sup>1/</sup>Note, however, that general legislation is not a particular matter. Thus, a public official may act on matters of general legislation, and certain home-rule petitions. For example, a legislator, a town manager or a state agency head may draft, promote or oppose general legislation, or legislation related to a municipal government's organization, powers, duties, finances or property. Matters involving *other* types of "special legislation," regulations or administrative policies are *not* eligible for this exemption. For a determination as to whether a bill is "general legislation" or "special legislation," contact the city solicitor, town counsel, agency counsel or the Legal Division of the State Ethics Commission.

## COMMISSION ADVISORY 05-05

### THE RULE OF NECESSITY FOR ELECTED MUNICIPAL OFFICIALS

If an elected member of a town or city board has a conflict of interest with respect to a matter before the board that involves his own financial interest or that of a partner, an immediate family member or a business organization with which the board member has certain affiliations, that member will be disqualified from acting as a board member on that matter.<sup>1/</sup> In some cases, especially when more than one member is disqualified, a board cannot act because it does not have a quorum or some other number of members required to take a valid affirmative vote. (If the number for a quorum is **not** set by law, a quorum is generally a majority of the board members.) In these circumstances, the board may be able to use what is called the Rule of Necessity to permit the participation of the disqualified member(s) in order to allow the board to act.

The Rule of Necessity is not a law written and passed by the Legislature. Rather, the Rule of Necessity was developed by judges who applied it in their court decisions. The Rule of Necessity may only be used as a last resort. We strongly suggest 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 the conflict of interest law.

The Rule of Necessity works in the following way:

1. The Rule of Necessity may only be used when an elected board is legally required to act on a matter and it lacks enough members to take valid official action solely due to board members being disqualified by conflicts of interest from participating in the matter.

Example: A five member elected board has a meeting and all members are present. Three of the five members have conflicts in a matter before the board. Three members are the quorum necessary for a decision. The two members without conflicts do not make a quorum. The board cannot act. The Rule of Necessity will permit all members to participate in that matter.

Example: A five member elected board has a meeting and four members are present (one member is sick at home). Two of the four present members have conflicts. A quorum is three. The one member who is sick at home does not have a conflict. The Rule of Necessity may **not** be used because there is a quorum of the board which is able to act. The absence of one member does not permit use of the Rule of Necessity.

Example: A five member elected board has a meeting and all members are present. One member has a conflict and is disqualified. The vote is a two-to-two tie. The Rule of Necessity may **not** be used to break the tie. In general, a tie vote defeats the issue being voted on. (Stated differently, a tie vote will maintain the status quo.)

Example: A five member elected board has a meeting and all members are present. A quorum is three. However, one agenda item, on which board action is legally required, needs four votes, rather than the usual simple majority, for an affirmative decision. Two of the board members have conflicts. Although a quorum is available, the required four votes needed for this particular matter cannot be obtained without the participation of one or both of the members who have conflicts. The Rule of Necessity may be invoked and all five of the board members could participate.

If one or more members of an elected board have “appearances” of conflicts of interest that can be dispelled by making a written disclosure, the Rule of Necessity may not be invoked. Section 23(b)(3) of the conflict law prohibits a public official from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that the public official is likely to act or fail to act as a result of kinship, rank or position. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his or her appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion.

Example: One member of a three member elected board has a daughter who is a candidate for a police officer position. A second member has a niece who is a candidate for the same position. This member can make a disclosure to dispel the appearance of a conflict of interest and may then participate in the matter. Thus, the three member board has a quorum and is able to act and the Rule of Necessity may not be invoked.

2. Before invoking the Rule of Necessity, every effort must be made to find another board or other authority in the municipality with the legal power to act in place of the board that could not obtain a quorum due to conflicts of interest. (Municipal counsel should be consulted to identify another municipal board or authority to act.)

3. While the absence of one or more board members is generally not sufficient cause to invoke the Rule of Necessity, when a board is legally required to take action by a certain time and is unable to do so because

of the lack of a quorum, the Rule of Necessity may be invoked.

Example: A statute requires selectmen to approve payroll warrants on a weekly basis. One selectman of a three member board is absent and the board cannot otherwise obtain a quorum due to the disqualification of one selectman whose immediate family member works for the town. The Rule of Necessity may be invoked.

4. The Rule of Necessity should be invoked by one or more of the otherwise disqualified members, upon advice from town or city counsel or the State Ethics Commission.

5. If it is proper for the Rule of Necessity to be used, it should be clearly indicated in the minutes of the meeting that as a result of disqualification of members due to conflicts of interests, the board lacked a sufficient number of members necessary to take a valid vote and, as a last resort, that all those disqualified may now participate under the Rule of Necessity. Each disqualified member who wishes to participate under the Rule of Necessity must first disclose publicly the facts that created the conflict.

Example: Two members of a three member elected board have conflicts of interest that prohibit them from participating in a matter involving property owned by a private school for which they serve as trustees. No other board exists which can act on the matter before the board. One of the board members with a conflict should invoke the Rule of Necessity and direct that it be included in the minutes. Both of the board members who had been prohibited from participating may then do so. Prior to such participation, however, they must disclose the fact that they serve as trustees and may then participate in the matter.

It should be noted that invoking the Rule of Necessity does not require all previously disqualified members to participate; it merely permits their participation.

In some instances, where a single elected official is the only person who, by law, can take a specific action, and that elected official has a conflict of interest, the rule of necessity may be invoked for the limited purpose of designating another person to carry out the action.

Example: A mayor, whose spouse is a firefighter, is the sole collective bargaining authority for the city. She may invoke the rule of necessity to designate an alternate to serve as the city's

collective bargaining representative with the firefighter's union.

\* \* \*

For more information about the state conflict of interest and financial disclosure laws (G.L. c. 268A & c. 268B), including the subjects discussed in this Advisory, please contact:

State Ethics Commission ([www.mass.gov/ethics](http://www.mass.gov/ethics))  
One Ashburton Place, Room 619  
Boston, MA 02108  
(617) 371-9500

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<sup>1/</sup> Elected state and county officials and appointed municipal officials who cannot participate in matters because of a conflict of interest should contact the Ethics Commission for advice regarding the rule of necessity.

**State Ethics Commission**  
**Enforcement Actions**  
2005

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## Summaries of Enforcement Actions Calendar Year 2005

**In the Matter of Michael H. Rotondi** - The Commission approved a Disposition Agreement in which former Stoneham Town Moderator Michael H. Rotondi admitted violating G.L. c. 268A, § 19, the state's conflict of interest law, and agreed to pay a \$2,000 fine for participating in a matter in which he had a financial interest. According to the Disposition Agreement, in April 2003, Rotondi, who earned \$200 annually as town moderator, sought enrollment in the town pension system. The town retirement board informed him that he did not qualify because he did not earn more than \$200. Rotondi then asked the Town Administrator to change a Town Meeting warrant so as to authorize a transfer of \$5 from the town moderator's operational account to the salary account and changed the article on the May 5, 2003 Town Meeting warrant to increase Rotondi's salary from \$200 to \$205. Rotondi presided over the Town Meeting as moderator.

**In the Matter of Kevin Joyce** - The Commission fined former Boston Inspectional Services Department (ISD) Commissioner Kevin Joyce \$5,000 for violating the state's conflict of interest law by demoting, then firing a subordinate when she refused, as Joyce directed, to get two quotes higher than one previously received from a company where a friend of his was employed. During fall 2000, ISD selected Tekinsight.com, Inc. to update the mayorsfoodcourt website operated by ISD. TekInsight assigned its employee Melissa Fetzer, a friend of Joyce, to work on the project. When Joyce learned that the update would not be funded under a citywide contract, he directed Principal Administrative Assistant Julie Fothergill to obtain two quotes higher than \$7,900, the amount sought by TekInsight for the update, in order to secure payment for Fetzer and/or TekInsight. In January 2001, after Fothergill did not obtain the quotes Joyce requested, Joyce transferred her to the ISD Legal Division where she was assigned an office with no phone or computer. Later in January, Fothergill notified Joyce through her attorneys that she intended to file a civil suit against Joyce and the City for the demotion. In February 2001, Joyce transferred her out of the ISD Legal Division into the Planning Zoning Division. In May 2001, Joyce terminated Fothergill. By demoting and terminating Fothergill for disobeying his orders to commit illegal actions by getting two quotes higher than the amount sought by TekInsight, rather than on the merits of her work performance, Joyce used his ISD position to obtain an unwarranted privilege in violation of § 23(b)(2). The City of Boston paid Fothergill \$240,000 to settle her wrongful termination suit in September 2003. Joyce resigned as ISD Commissioner in April 2004 following the release of a report from the Boston Finance Committee finding Joyce responsible for Fothergill's wrongful termination, costing the City over \$400,000, as well as numerous administrative failures in contract and personnel matters.

**In the Matter of Jacob Kulian** - The Massachusetts State Ethics Commission fined former Middleborough Assessor Jacob Kulian \$10,215 for violating the state's conflict of interest law, G.L. c. 268A, by taking actions that reduced his property taxes. The Commission received \$8,000 as a civil penalty; the remaining \$2,215 will be reimbursed to the Town of Middleborough for unpaid property tax abatements and reductions Kulian was not entitled to receive. According to the Disposition Agreement, Kulian was an elected Assessor between 1995 and April 2004. During that time, Kulian: directed the Assessor-Appraiser, an employee of the Board of Assessors, to reduce his property assessment in 1997 and 2000 resulting in reductions to his property tax bill totaling \$1,401; participated in granting himself a tax abatement in 2004 resulting in a reduction to his property tax bill of \$814; and participated in granting himself a statutory exemption based on age and income eligibility that could have resulted in a tax abatement of \$500. Section 23(b)(2) of the conflict law prohibits a public employee from using or attempting to use his position to secure for himself or others an unwarranted privilege of substantial value not properly available to similarly situated individuals. By directing the Assessor-Appraiser to reduce his property assessment, Kulian repeatedly used his position to get such an unwarranted privilege. Section 19 prohibits a municipal employee from officially participating in matters in which he has a financial interest. By repeatedly participating in matters involving reductions in his property tax, Kulian participated in matters in which he had a financial interest.

**In the Matter of Richard Kenney** - The Massachusetts State Ethics Commission issued a Decision and Order finding that Kingston Selectman Richard Kenney violated § 23(b)(3) of the state's conflict of interest law, G.L. c. 268A, by asking the Chief of Police to change a ticket for a Kingston resident who Kenney knew and who was then a Town board member. Kenney was ordered to pay a civil penalty of \$500. According to the Decision and Order, on May 7, 2001, a Kingston resident, who was at the time a member of the Silver Lake Regional School Committee, was stopped for not having a valid inspection sticker. He was not cited for the sticker infraction, but instead was given a \$25 ticket for not wearing his seat belt. At the May 7, 2001 Town Meeting, Kenney told the Chief about the ticket and asked the Chief to change the ticket to a warning. The Chief told Kenney to have the resident call him the next day. The next morning, the resident contacted the Chief. He told the Chief that he had not asked Kenney to intervene on his behalf. The Chief explained the process for contesting the ticket; he did not change the ticket. At the continuation of the Town Meeting on May 8, 2001, Kenney chastised the Chief for having the resident call him if he was not going to do anything about the ticket. The Chief testified at the evidentiary hearing held on December 1, 2004 that he could not change the ticket to a warning because to do so would be "fixing a ticket" which

is against the law. Section 23(b)(3) of the conflict law prohibits a public official from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that anyone can improperly influence or unduly enjoy the public official's favor in the performance of his official duties. By asking the Chief to change a ticket to a warning for a fellow Town official that he knew and that he served with on several Town committees, Kenney violated § 23(b)(3).

**In the Matter of Chanrithy Uong** - The Massachusetts State Ethics Commission issued a Decision and Order concluding the adjudicatory hearing of Lowell City Councilor Chanrithy Uong by finding that Uong violated M.G.L. c. 268A, the state's conflict of interest law. Uong was ordered to pay a civil penalty of \$6,000 and to cease and desist violating the law by relinquishing his Lowell High School (LHS) housemaster position within 30 days. According to the Decision and Order, the Commission found that Uong violated § 20 by, while serving as a city councilor and a LHS guidance counselor, accepting appointment to the housemaster position. Section 20 of the conflict of interest law generally prohibits a municipal official from having a financial interest in a contract made by a municipal agency of the same city or town. An exemption to this section of the law allowed Uong to continue to hold the position of guidance counselor at LHS after his election in 1999 to the city council. The exemption, however, prohibits a municipal employee who is elected to the city council from being eligible for appointment or re-appointment to a new position while he serves on the city council or for six months thereafter. In April 2001, the Commission issued an opinion advising Uong that he could not relinquish his position as guidance counselor and accept a new position as an assistant principal or a principal while continuing to serve as a city councilor. Following the issuance of the opinion, Uong was advised that he could seek a legislative change or appeal the decision to the superior court. Uong did not pursue these options. In March 2002, Uong applied for an LHS housemaster position. Uong won appointment and, in August 2002, began serving as housemaster with a starting salary of \$81,033, an increase of about \$21,000 over his guidance counselor salary. LHS does not have principals or assistant principals; the housemaster position is the high school equivalent of the position of assistant principal at the middle and elementary schools.

**In the Matter of Ruvane E. Grossman** - The Massachusetts State Ethics Commission fined Ruvane E. "Rip" Grossman, a former consultant to the University of Massachusetts Medical School (UMMS), \$10,000 for violating the state's conflict of interest law. Grossman, a Missouri resident, provided intellectual property consulting services to UMMS to help license technologies developed by UMMS. At the same time, he was also consulting for CytRx Corporation, a California intellectual property marketing firm. By bringing UMMS and CytRx together

on the licensing matter while he was consulting for both of them, Grossman violated G.L. c. 268A, §§ 4 and 6. According to a Disposition Agreement, Grossman brought UMMS and CytRx together to discuss marketing UMMS's ribonucleic acid interference (RNAi) technology. RNAi technology is an important life science and therapeutic technology. Grossman participated in the negotiation of a licensing agreement between UMMS and CytRx by attending meetings, making suggestions and discussing the relevant matters as both an agent for CytRx and as a UMMS consultant. At the time Grossman so participated, he had a consulting contract with UMMS for a maximum of \$84,000, in addition to a consulting contract with CytRx for \$5,000 a month and a "success fee" of at least \$150,000. In April 2003, UMMS signed a licensing agreement with CytRx by which CytRx would market the RNAi technology and UMMS would receive \$200,000, 1.8 million shares in CytRx stock, royalty payments and other beneficial commitments from CytRx. In May 2003, after senior UMMS officials learned of Grossman's dual role, UMMS reviewed the licensing agreement. UMMS determined that it would be advantageous to leave the licensing agreement in place but took additional actions including: terminating Grossman's relationship with UMMS; requiring that Grossman forfeit the success fee of \$53,000 and 100,000 shares of CytRx stock valued at \$240,000 as of October 2003, when the termination agreement was made; and setting restrictive terms under which CytRx could employ Grossman in the future, ensuring that Grossman would not receive his forfeited commission in the future, not have contact with UMMS about the licenses and not participate in the interpretation of the licenses. Section 4 of the conflict of interest law prohibits a state employee from receiving compensation from or acting on behalf of anyone other than the Commonwealth in connection with any matter in which the Commonwealth is a party or has a direct and substantial interest. Section 6 prohibits a state employee from participating in a particular matter in which he has a financial interest.

**In the Matter of Paul R. Murphy** - The Massachusetts State Ethics Commission concluded public proceedings against former Salem Police Captain Paul R. Murphy by approving a Disposition Agreement in which Murphy admitted violating the state's conflict of interest law, G.L. c. 268A, by intervening in matters involving his daughter Patricia, also a former Salem police officer. Murphy paid a civil penalty of \$6,000. According to the Disposition Agreement, Murphy, who was terminated as a Salem police officer in September 2003 and is appealing the termination with the Civil Service Commission, was second in command after the Chief. Patricia was first a reserve officer and then a permanent patrol officer until her termination in June 2004. She, too, is appealing the termination. Murphy violated § 19 of the conflict of interest law in 2000 by: asking Lt. Mary Butler to obtain medical information that would allow Patricia to attend the police

academy in summer 2000; communicating concerns to Lt. Butler and the Chief when Patricia was not allowed to attend the academy; and asking Lt. Butler and the Chief to make an exemption for Patricia that would allow her to attend. Murphy also violated § 19 in 2001 by asking the Chief to defer the decision to appoint three full-time permanent officers until after Patricia attended the spring 2001 police academy in order to maintain Patricia's seniority over the another appointee, who had previously completed the academy. Finally, Murphy violated § 23(b)(2) in 2002 by obtaining confidential information about a sexual harassment complaint Patricia filed and using it in an attempt to demonstrate to the Chief that Lt. Butler, who served as the department's sexual harassment officer and reviewed Patricia's complaint, was biased against Patricia. Section 19 of the conflict of interest law generally prohibits a public employee from officially participating in matters in which an immediate family member has a financial interest. Section 23(b)(2) of the conflict law prohibits a public employee from using or attempting to use his position to obtain for himself or others an unwarranted privilege of substantial value.

**In the Matter of Kevin F. Capalbo** - The Commission fined Shrewsbury Planning Board Member Kevin F. Capalbo \$1,000 for participating in matters involving the Park Grove Farm subdivision at the same time that he was seeking \$500 from Robert Cole, one of the developers of the subdivision. Capalbo was seeking the \$500 for damage that Capalbo's wife's car had incurred while in a parking lot owned by Cole. According to a Disposition Agreement, on October 3, 2002, Capalbo's wife's car hit a metal pipe in an unpaved parking lot owned by Cole. That evening Capalbo, who had not yet learned of the damage to his wife's car, voted to approve the Park Grove Farm subdivision, subject to 28 conditions. When Capalbo learned of the damage to the car, \$883.38, he sought from Cole reimbursement for the \$500 deductible of his insurance policy. Cole declined to pay the deductible and told Capalbo to sue him. A few weeks after this conversation, when Capalbo called to discuss the issue further, Cole agreed to pay the \$500 deductible. Capalbo sought payment from Cole in a letter dated November 2, 2002. In the meantime, there had been a number of complaints from neighbors regarding the work being done at the subdivision. Capalbo was aware of these complaints. When Capalbo was unable to reach Cole by phone to inquire as to the payment status, Capalbo visited the Park Grove Farm subdivision to speak with Cole personally. Cole was not at the site. Capalbo asked the foreman to have Cole contact him. Cole paid the \$500 deductible on November 19, 2002. According to Cole, he did so because he felt that Capalbo was linking his request for payment to his role as a Planning Board member overseeing the outstanding subdivision issues. Capalbo continued to participate as a Planning Board member in Cole's subdivision without disclosing his private dealings with Cole. Section 23(b)(3) of the conflict law prohibits a

public official from knowingly or with reason to know acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that anyone can improperly influence or unduly enjoy the public employee's favor in the performance of his official duties. By continuing to participate as a Planning Board member in matters concerning the Park Grove Farm subdivision while seeking payment for damages to his wife's car from the subdivision developer, Capalbo violated § 23(b)(3).

**In the Matter of Josef Fryer** - Dover Municipal Well Inspector Josef Fryer paid a \$2,000 civil penalty to resolve allegations that he violated the state's conflict of interest law by inspecting wells of Dover Water Company customers. Fryer is a one-third owner, with his siblings, of Dover Water Company, a private family business that supplies water services. According to a Disposition Agreement, Fryer conducted well inspections for an average of two Dover Water Company customers a year who had applied to the Dover Board of Health for permits to dig their own wells. If successful, the applicants would receive water from their own wells and would no longer do business with Dover Water Company. Fryer reviewed well applications, met with the driller to make sure that the actual well placement matched the placement on the application and approved the well if it passed a test for water volume and quality. Section 19 prohibits a municipal employee from officially participating in matters in which he or his immediate family has a financial interest. By participating in well inspections that could result in Dover Water Company losing customers, Fryer participated in matters affecting his family business in violation of § 19.

**In the Matter of James Byrne** - The Commission issued a Disposition Agreement in which James Byrne, president and co-owner of Whitman-based Construction Monitoring Services, Inc. (CMS), admitted violating the conflict of interest law by offering a ski trip to an Old Rochester Regional School District employee to influence the employee's reports regarding CMS. Byrne paid a \$2,000 civil penalty. According to the Disposition Agreement, CMS planned a ski outing in winter 2002 for its employees that included weekend accommodations, lift tickets and ski lessons. Byrne offered to pay for Steven Shiraka, facilities and grounds manager of the school district, and his family to go on the ski weekend. The cost of the weekend was approximately \$500. As facilities and grounds manager, Shiraka was responsible for overseeing CMS work. He had also made at least two negative reports to the superintendent regarding CMS' performance on a project to expand the junior-senior high school of the district. In offering the ski trip, Byrne intended to influence Shiraka as to the tenor and substance of Shiraka's future reports as to CMS' job performance. Shiraka rejected the offer.

**In the Matter of John R. Llewellyn** - The Commission issued a Disposition Agreement in which former Rockland selectman John R. Llewellyn admitted violating M.G.L. c. 268A, the state's conflict of interest law, and agreed to resign his position as deputy chief in the Rockland Police Department. Llewellyn also paid a civil penalty of \$2,000. According to the Disposition Agreement, Llewellyn served as a Rockland police officer since 1988 and was promoted to patrol sergeant in 1997. In 1999, he was elected to the board of selectmen. Section 20 of the conflict of interest law generally prohibits a municipal official from having a financial interest in a contract made by a municipal agency of the same city or town. An exemption to this section of the law allowed Llewellyn to continue to hold the position of police sergeant after his election in 1999 to the board of selectmen. The exemption, however, prohibits a municipal employee who is elected to the board of selectmen from being eligible for appointment or re-appointment to a new position while he serves on the board or for six months thereafter. In September 2004, Llewellyn received advice from the Commission that he could not accept a promotion to a new position, such as deputy chief, while continuing to serve as a selectman or for six months thereafter. In December 2004, the police chief offered Llewellyn the deputy chief position. Llewellyn accepted the job as of January 2005 and sought to resign from the board of selectmen. When he learned of the costs involved for holding a special election to fill a selectman vacancy, Llewellyn decided to stay on the Board until April 2005, when the next election was scheduled to occur.

**COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION**

**SUFFOLK, ss COMMISSION ADJUDICATORY  
DOCKET NO. 703**

**IN THE MATTER  
OF  
MICHAEL H. ROTONDI**

**DISPOSITION AGREEMENT**

The State Ethics Commission and Michael Rotondi enter into this Disposition Agreement pursuant to Section 5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented-to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, § 4(j).

On August 14, 2003, pursuant to G.L. c. 268B, § 4(a), the Commission initiated a preliminary inquiry into possible violations of the conflict-of-interest law, G.L. c. 268A, by Rotondi. The Commission has concluded its inquiry and, on October 7, 2003, found reasonable cause to believe that Rotondi violated G.L. c. 268A, § 19.

The Commission and Rotondi now agree to the following findings of fact and conclusions of law:

**Findings of Fact**

1. Rotondi has served as the elected Stoneham town moderator since 1993 receiving a salary of no more than \$200 a year. Rotondi is a municipal employee as that term is defined in G.L. c. 268A, § 1(g).

2. In April 2003, Rotondi approached the town retirement board seeking enrollment in the town pension system. Enrollment in the town pension system would have had significant financial benefits for Rotondi including potential health insurance and pension benefits.

3. In April 2003, the town retirement board informed Rotondi that he did not qualify for enrollment in the town pension system because he was a part-time employee and his salary did not exceed \$200 a year. Rotondi disagreed with the town retirement board's decision, arguing that he was entitled as an elected official to enroll in the retirement system. Rotondi told the town retirement board that he had spoken with the state Public Employee Retirement Administration Commission's counsel who informed Rotondi that he was entitled to enroll in the retirement system as an elected official regardless of the amount of compensation he received. In addition, Rotondi also argued that his compensation exceeded \$200 when taking into consideration health care benefits. The town retirement board denied Rotondi's request to change its ruling.

4. After the town retirement board declined to change its ruling, Rotondi sought to increase his salary to \$205 at Town Meeting. Rotondi as town moderator asked the town administrator to change the warrant for the May 5, 2003 Town Meeting so as to authorize a transfer of \$5 from the town moderator's operational account to the town moderator's salary account, which the town administrator subsequently did. The town administrator also hand-altered the relevant motion on the warrant article for the May 5, 2003 Town Meeting increasing the moderator's salary from \$200 to \$205.

5. Rotondi presided over the May 5, 2003 Town Meeting.

6. Town Meeting members questioned the \$5 increase in Rotondi's compensation. From the podium, Rotondi stated that the \$5 increase was a clerical accounting matter. Rotondi did not explain the effects of the \$5 salary increase or his reason for seeking it. The article, with the \$5 increase for town moderator, passed.

7. Rotondi maintains that it was his intention to respond to the selectman presenting the motion who looked to Rotondi for clarification. It was not Rotondi's intention to respond to the Town Meeting member asking the question or to the Town Meeting as a whole. In retrospect, Rotondi understands that Town Meeting members would have viewed his response as a direct answer to the question.

8. Town Meeting members who felt misled by Rotondi's response at the May 5, 2003 meeting and were not aware of the ramifications of the \$5 increase when they voted on the increase to the town moderator's salary, started a petition drive. They collected 200 signatures in order to convene a special Town Meeting to rescind the \$5 raise.

9. At the July 28, 2003 Town Meeting, by a 2/3 voice vote, the Town Meeting members present and voting rescinded the \$5 increase to the moderator's salary.<sup>1/</sup>

10. The town retirement board met on July 29, 2003 and denied Rotondi's request to be enrolled into the town pension system.

**Conclusions of Law**

11. Section 19 of G.L. c. 268A prohibits a municipal employee from participating<sup>2/</sup> as such an employee in a particular matter<sup>3/</sup> in which, to his knowledge, he has a financial interest.<sup>4/</sup>

12. As town moderator, Rotondi is a municipal employee pursuant to G.L. c. 268A, § 1.

13. Town Meeting's decision to increase the town

moderator's salary was a particular matter.

14. Rotondi participated in that particular matter by presiding over the decision as town moderator and by answering from the podium a significant question about the proposed salary increase.

15. Where as moderator Rotondi would receive the \$5 increase to his salary, and where such increase would make Rotondi eligible for enrollment in the town pension system, Rotondi had a financial interest in the particular matter, and he knew of his financial interest when he so participated.

16. Accordingly, by so participating in the particular matter concerning his compensation, Rotondi violated § 19.

### **Resolution**

In view of the foregoing violation of G.L. c. 268A by Rotondi, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Rotondi:

- (1) that Rotondi pay to the Commission the sum of \$2,000 as a civil penalty for violating G.L. c. 268A, § 19; and
- (2) that Rotondi waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

**DATE:** February 15, 2005

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<sup>1/</sup> Rotondi did not moderate the July 28, 2003 special Town Meeting.

<sup>2/</sup> "Participate" means to 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).

<sup>3/</sup> "Particular matter" means 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).

<sup>4/</sup> "Financial interest" means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality. See *Graham v. McGrail*, 370 Mass. 133 (1976). This definition has embraced private interests, no matter how small, which are direct, immediate or reasonably foreseeable.

See *EC-COI-84-98*. The interest can be affected in either a positive or negative way. *EC-COI-84-96*.

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## **COMMONWEALTH OF MASSACHUSETTS STATE ETHICS COMMISSION**

**SUFFOLK, ss.COMMISSION ADJUDICATORY  
DOCKET NO. 717**

**IN THE MATTER  
OF  
KEVIN JOYCE**

### **DISPOSITION AGREEMENT**

This Disposition Agreement is entered into between the State Ethics Commission and Kevin Joyce pursuant to Section 5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented-to final order enforceable in Superior Court, pursuant to G.L. c. 268B, §4(j).

On March 31, 2004, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Joyce. The Commission has concluded its inquiry and, on November 4, 2004, found reasonable cause to believe that Joyce violated G.L. c. 268A.

The Commission and Joyce now agree to the following findings of fact and conclusions of law:

### **Findings of Fact**

1. During all times relevant, Joyce, an attorney, was the Boston Inspectional Services Department ("ISD") Commissioner, appointed to that position in 1998.

2. The ISD administers the public health, safety and land use code for the City of Boston ("City"). The ISD has over 200 employees. As Commissioner of ISD, Joyce had authority over the management of personnel in that department.

3. Julie Fothergill was an ISD Principal Administrative Assistant until her termination on May 23, 2001. Fothergill first worked for Joyce in the City law department. After Joyce became ISD Commissioner, he hired Fothergill as his assistant in September 1998. During her tenure with the ISD, Fothergill was a member of Joyce's senior management team. She worked directly under Joyce as his advisor, and Joyce consulted with her on almost all of the official decisions that he made as

commissioner.

4. Melissa Fetzer worked for the City as a Senior Intranet Developer/Systems Analyst between 1992 and 1999. In that capacity, she developed the City's Intranet site and assisted in developing the City's Internet website. In 1999, Fetzer became an employee of TekInsight.com, Inc. ("TekInsight"), a private Internet development firm providing technology and management solutions to the state and local government sector, including the City.

5. Joyce and Fetzer became friendly during the course of Fetzer's work for the City. Fetzer also had a personal connection with Joyce through her then boyfriend, ISD Assistant Commissioner John Dorsey. Dorsey and Joyce were close friends. In or about the late 1990s and into 2000, Fetzer and Dorsey vacationed with Joyce and others at Joyce's New Hampshire ski house.

6. As of 2000, the City Purchasing Department ("Purchasing") had a \$9 million contract with TekInsight under which TekInsight was providing computer consulting services to various City of Boston departments and agencies, including ISD. Joyce had no involvement in the procurement of this contract. ISD staff, including Joyce, believed that they could utilize this contract for ISD computer projects.

7. At the time, ISD ran a website called the *mayorsfoodcourt*, which updated the public on the current health department status of restaurants in the city. During summer 2000, ISD determined that the *mayorsfoodcourt* website required upgrade work. TekInsight was selected to perform the work. In turn, TekInsight assigned Fetzer to the job.

8. During fall 2000, Fetzer performed some portion of the *mayorsfoodcourt* upgrade work.

9. During fall 2000, Fothergill attempted to secure funding for the *mayorsfoodcourt* upgrade.

10. On December 6, 2000, Fetzer submitted to Fothergill a \$7,900 "service report"<sup>1/</sup> for payment for work she did on the *mayorsfoodcourt* upgrade.

11. On or about December 6, 2000, Fothergill talked by telephone with Purchasing Department Director William Hannon. Hannon stated that he would not allow the \$9 million technology contract to be used to fund ISD's computer projects, including the *mayorsfoodcourt* upgrade.

12. On or about December 8, 2000, Joyce and Fothergill met with Hannon at City Hall to discuss the funding issue. Hannon told Joyce and Fothergill that ISD could not use the \$9 million purchasing contract to cover certain projects including the *mayorsfoodcourt* upgrade.

Rather, Hannon, who was not aware at this meeting that the work on the *mayorsfoodcourt* upgrade had already been started, said that those projects would have to be publicly bid.

13. After their meeting with Hannon, Fothergill and Joyce drove back to the ISD office together. Fothergill expressed extreme concern over the *mayorsfoodcourt* upgrade situation. Joyce told Fothergill not to tell Fetzer to stop work on the upgrade and to get two quotes higher than TekInsight's \$7,900 from Fothergill's friends who were web designers. Fothergill did not respond to Joyce's directive.

14. During December 2000, Joyce again asked Fothergill about getting the two higher quotes. Fothergill did not respond to Joyce's inquiry.

15. In December, Joyce allowed Fothergill to stay at his ski house and Joyce gave her a \$100 gift certificate to a nearby inn as a Christmas present.

16. On January 3, 2001, Fothergill and other ISD employees signed off on Fetzer's service report for the *mayorsfoodcourt* upgrade, indicating that the work was done.

17. On Thursday January 4, 2001, Joyce came to Fothergill's office and asked if she had obtained the two higher quotes. Fothergill replied that she had not. Joyce asked whether getting quotes was still a possibility; Fothergill said it was not. Joyce walked out. Within minutes, a Joyce administrative assistant told Fothergill that Fothergill had a meeting with the ISD Personnel Director later that day. Fothergill had not requested to meet with the ISD Personnel Director and this was the first notice to her of the meeting.

18. According to Joyce, he does not remember the above conversations with Fothergill where he told her to get two higher quotes for the *mayorsfoodcourt* upgrade, although he acknowledges that conversations concerning additional quotes may have taken place.

19. Later on January 4, 2001, Fothergill met with the ISD Personnel Director. He informed Fothergill that Joyce was transferring her to the ISD Legal Division. Fothergill had not requested the transfer. She was to report to an assistant commissioner. Fothergill asked for two weeks to move her personal possessions. The Personnel Director, after asking Joyce, told Fothergill that she had until the next Monday to move. The next day, however, an ISD health inspector was sent to Fothergill's office with two boxes and told her she was being moved out that day. Fothergill was moved into an office with no phone or computer.

20. Prior to Fothergill's transfer to the ISD Legal



Division, Joyce had recommended and Fothergill had received several promotions and salary increases, the last one occurring in November 2000. In November 2000 Joyce approved a substantial salary increase for Fothergill.

21. In January 2001, after being transferred to the ISD Legal Division, Fothergill took approximately three weeks sick leave. On January 16, 2001, Joyce received a letter from a law firm retained by Fothergill stating that Joyce's actions constituted adverse job action and change in the terms and conditions of Fothergill's employment in violation of several statutes, including G.L. c. 268A. A request was made for all documents relating to TekInsight and the *mayorsfoodcourt* upgrade.

22. In February 2001, Joyce transferred Fothergill out of the ISD Legal Division. Joyce placed Fothergill under the supervision of the assistant commissioner for Planning & Zoning.

23. On May 23, 2001, Joyce terminated Fothergill.

24. On May 30, 2001, Fothergill filed a civil suit against Joyce and the City based on retaliatory demotions and termination. In her complaint, Fothergill alleged that Joyce had attempted to manipulate the bidding system to facilitate payment to TekInsight for the work on the *mayorsfoodcourt* upgrade, and that she had been demoted and terminated in retaliation for not helping Joyce in these endeavors.

25. On September 2003, the City paid Fothergill \$240,000 to settle her wrongful termination suit.

26. The Boston Finance Committee ("the FinCom") investigated these events. On March 31, 2004, the FinCom released a report on its investigation. The FinCom found that Joyce was responsible for Fothergill's wrongful termination costing the City over \$400,000. The FinCom also found numerous administrative failures in contract and personnel matters.

27. On April 7, 2004, following the release of the FinCom report, Joyce tendered his resignation as ISD Commissioner.

### Conclusions of Law

28. Section 23(b)(2) prohibits municipal employees from, knowingly or with reason to know, using or attempting to use their official position to secure for themselves or others unwarranted privileges or exemptions of substantial value not properly available to similarly situated individuals.

29. As the ISD Commissioner, Joyce was a municipal employee pursuant to G.L. c. 268A, § 1.

30. By, as ISD Commissioner, demoting and terminating Fothergill in 2001, Joyce knowingly used his

ISD Commissioner position.

31. The power to demote or terminate a subordinate employee is one of the prerogatives or privileges of management, including the management of a municipal agency.

32. The privilege of using such power to demote or terminate a subordinate employee based on private or personal reasons unrelated to the merits of the subordinate's work performance is unwarranted and not properly available to managers of municipal agencies such as Joyce.

33. Where Joyce demoted and terminated Fothergill for her refusal to act as described above, namely her unwillingness to obtain bids higher than \$7,900, rather than on the merits of her work performance, Joyce used his ISD position to obtain an unwarranted privilege not properly available to him as a municipal manager.

34. This unwarranted privilege was of substantial value for Joyce because, without the power to punish his ISD subordinates for disobeying his orders to commit illegal actions, he would have lost his ability to compel his ISD subordinates to assist him in providing substantially valuable benefits to his friends, as he sought to do with Fetzer and/or TekInsight.

35. Thus, by demoting and terminating Fothergill for her refusal to act as described above, Joyce violated § 23(b)(2) on each occasion.

### Resolution

In view of the foregoing violations of G.L. c. 268A by Joyce, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Joyce:

- (1) that Joyce pay to the Commission the sum of \$5,000 as a civil penalty for a course of conduct violating G.L. c. 268A, § 23(b)(2); and
- (2) that he waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

**DATE:** March 7, 2005

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<sup>1/</sup> The service report states, "The undersigned customer acknowledges the work was performed and agrees that this work plus any parts will be billed to the above address." TekInsight required a signed service report before issuing an invoice. There is no dispute that the work described was in fact ultimately performed.

COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY  
DOCKET NO. 721

IN THE MATTER  
OF  
JACOB KULIAN

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Jacob Kulian pursuant to Section 5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented-to final order enforceable in Superior Court, pursuant to G.L. c. 268B, §4(j).

On August 3, 2004, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Kulian. The Commission has concluded its inquiry and, on February 3, 2005, found reasonable cause to believe that Kulian violated G.L. c. 268A, §§ 19 and 23(b)(2).

The Commission and Kulian now agree to the following findings of fact and conclusions of law:

**Findings of Fact**

1. From 1995 through April 3, 2004, Kulian was an elected member of the Middleborough Board of Assessors ("the Board").

2. During all times relevant, Kulian and his wife owned and lived in a single-family home in Middleborough.

3. In 1995, shortly after Kulian's election to the Board, the Board appointed an Assessor-Appraiser. The Assessor-Appraiser runs the day-to-day operations of the Assessors' Office and is an employee of the Board. The Assessor-Appraiser's duties include maintenance and processing of the Board's computer assessment information.

4. Sometime in summer 1997, Kulian instructed the Assessor-Appraiser to lower Kulian's home's assessed value to a certain figure. There was no legitimate basis for the reduction. In order to meet Kulian's stated figure, the Assessor-Appraiser went into the computer and reduced Kulian's property's assessed value by 8%. The 8% reduction to the assessment of Kulian's property continued through FY99. The total net benefit from Kulian's 1997 conduct reducing his property's assessment (affecting tax years 1997, 1998 and 1999) was \$447.

5. In 2000, all Middleborough home assessed values rose as a result of a revaluation. In summer 2000, Kulian again instructed the Assessor-Appraiser to lower his home's assessed value to a certain amount. Again, there was no legitimate basis for the reduction. In order to meet Kulian's stated figure, the Assessor-Appraiser went into the computer and further reduced Kulian's assessed property value from 8% to 13%. The 13% reduction to the assessment of Kulian's property continued through FY03. The total net benefit from Kulian's 2000 conduct in reducing his property assessment (affecting tax years 2000, 2001 and 2002) was \$954.

6. In spring 2003, the 13% reduction made to the assessed value of Kulian's property was discovered and reversed.

7. On December 22, 2003, the Kulians applied to the Board for an abatement indicating that their property was assessed too high. On January 8, 2004, the Board, including Kulian, approved Kulian's abatement application. The benefit from Kulian's 2004 abatement was \$814.

8. On December 31, 2003, the Kulians applied to the Board for a FY04 \$500 Statutory Exemption based on age and income eligibility.<sup>1/</sup> The Board, including Kulian, voted on January 5, 2004 to approve the Kulians' statutory exemption application. Kulian knew when he voted that he was not eligible for the exemption as his income exceeded the eligibility requirements. The result of the vote was a reduction in the Kulians' FY04 tax bill of \$500. The reduction was removed, however, in spring 2004 before the Kulians paid their property tax bill.

**Conclusions of Law**

9. As a Board member, Kulian was a municipal employee pursuant to G.L. c. 268A, § 1.

*Kulian Directs Assessor-Appraiser to Reduce his Property Assessment in 1997 and 2000*

10. Section 23(b)(2) prohibits public employees from, knowingly or with reason to know, using or attempting to use their official position to secure for themselves or others unwarranted privileges or exemptions of substantial value not properly available to similarly situated individuals.

11. The unjustified reductions in Kulian's property value assessments were each unwarranted privileges which were not properly available to Kulian or other similarly-situated property owners.

12. Where the reductions in property value assessments resulted in a decrease in Kulian's annual property tax liability of \$50 or more, each was of substantial value.<sup>2/</sup>

13. Kulian knowingly used his assessor position when he directed his subordinate, the Assessor-Appraiser, to make the reductions to his property value assessment.

14. Thus, by directing the Assessor-Appraiser to reduce his property value assessments in 1997 and 2000 (totaling \$1,401 in tax savings), Kulian repeatedly and knowingly used his assessor position to obtain unwarranted privileges of substantial value not properly available to other similarly situated individuals in violation of § 23(b)(2).

#### *Kulian Participates in 2004 Tax Abatement*

15. Section 19 of G.L. c. 268A prohibits a municipal employee from participating<sup>3/</sup> as such an employee in a particular matter<sup>4/</sup> in which, to his knowledge, he has a financial interest.<sup>5/</sup>

16. The Board's decision to approve Kulian's 2004 tax abatement application was a particular matter.

17. Kulian participated in that particular matter by voting as a Board member in favor of his own application.

18. Where, as the property owner, Kulian would receive an annual tax break of \$814 if the abatement were approved, Kulian had a financial interest in that particular matter. Kulian knew of his financial interest in the particular matter when he voted to approve his own abatement.

19. Accordingly, by so participating in the particular matter of his own property tax abatement, Kulian violated § 19.

#### *Kulian Participates in 2004 Statutory Exemption*

20. The Board's decision to approve Kulian's 2004 Statutory Exemption based on age and income eligibility was a particular matter.

21. Kulian participated in that particular matter by voting as a Board member in favor of his own Statutory Exemption application.

22. Where, as the property owner, Kulian would receive an annual tax break of \$500 if the Statutory Exemption application was approved, Kulian had a financial interest in that particular matter. Kulian knew of his financial interest in the particular matter when he voted to approve his own Statutory Exemption.

23. Accordingly, by so participating in the

particular matter of his own Statutory Exemption application, Kulian violated § 19.

### **Resolution**

In view of the foregoing violation of G.L. c. 268A by Kulian, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Kulian:

- (1) that Kulian pay to the Commission the sum of \$8,000 as a civil penalty for repeatedly violating G.L. c. 268A, §§ 19 and 23(b)(2);
- (2) that Kulian reimburse the Town of Middleborough the sum of \$2,215 (\$447 from the 1997 reduction, \$954 from the 2000 reduction and \$814 from the 2004 abatement) for property tax reductions to which he was not entitled; and
- (3) that Kulian waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement or any other related administrative or judicial proceedings to which the Commission is or may be a party.

**DATE:** April 21, 2005

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<sup>1/</sup> General Laws, c. 59, § 5 provides exemptions from having to pay property tax to certain organizations and individuals that meet certain criteria. Paragraph 41(c) provides, in part, "Real property, to the amount of four thousand dollars of taxable valuation or the sum of five hundred dollars, whichever would amount in an exemption of the greater amount of taxes due, of a person who has reached his seventieth birthday prior to the fiscal year for which an exemption is sought and occupied by said person as his domicile, or of a person who owns the same jointly with his spouse, either of whom has reached his seventieth birthday prior to the fiscal year for which an exemption is sought and occupied by them as their domicile, or for a person who has reached his seventieth birthday prior to the fiscal year for which an exemption is sought who owns the same jointly or as a tenant in common with a person not his spouse and occupied by him as his domicile."

<sup>2/</sup> Anything worth \$50 or more is of substantial value. *In re LIAM*, 2003 SEC 1114.

<sup>3/</sup> "Participate" means to 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).

<sup>4/</sup> "Particular matter" means 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).

<sup>5/</sup> “Financial interest” means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality. See *Graham v. McGrail*, 370 Mass. 133 (1976). This definition has embraced private interests, no matter how small, which are direct, immediate or reasonably foreseeable. See *EC-COI-84-98*. The interest can be affected in either a positive or negative way. *EC-COI-84-96*.

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**COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION**

**SUFFOLK, ss.COMMISSION ADJUDICATORY  
DOCKET NO. 711**

**IN THE MATTER  
OF  
RICHARD KENNEY**

Appearances: Karen Beth Gray, Esq.  
Counsel for Petitioner

Richard Kenney, *pro se*

Commissioners: Daher, Ch., Roach, Todd and  
Maclin

Presiding Officer: Commissioner M. Tracey  
Maclin

**DECISION AND ORDER**

**I. Procedural History**

On September 16, 2004, the Petitioner initiated these proceedings by issuing an Order to Show Cause (OTSC) under the Commission’s Rules of Practice and Procedure.<sup>1/</sup> The OTSC alleges that the Respondent, Richard Kenney (Kenney), a member of the Board of Selectmen in the Town of Kingston (Town), violated G.L. c. 268A, § 23(b)(3) by asking the Chief of Police to change a seat belt ticket to a warning for a Town resident and board member that Kenney knew. The OTSC further alleges that by doing so, Kenney knew or had reason to know that he was acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that the Chief of Police and/or the Town resident could improperly influence or unduly enjoy Kenney’s favor in the performance of his official duties and/or that Kenney was likely to act or fail to act as a result of kinship, rank, position or undue influence of the Town resident.

On October 21, 2004, Kenney filed an Answer to the OTSC. In his Answer, he admitted a number of the factual allegations in the OTSC, but otherwise denied that he violated G.L. c. 268A, § 23(b)(3).

A pre-hearing conference was held on November 17, 2004. On that same date, the parties submitted Stipulations of Fact and Law as well as Document Stipulations.

An evidentiary hearing was held on December 1, 2004. The Petitioner presented a closing argument to the Presiding Officer on that date. Kenney waived his right to present a closing argument, relying instead on his subsequent written submissions.<sup>2/</sup>

The Petitioner submitted a brief on January 28, 2005. Kenney submitted letters on January 27, 2005 and February 1, 2005.<sup>3/</sup>

The Commission began its deliberations in executive session on this matter on December 20, 2004.<sup>4/</sup> In rendering this Decision and Order, each undersigned member of the Commission has considered the testimony, the evidence in the public record including the hearing transcript and the arguments of the parties.

**II. Record Issues**

Subsequent to the evidentiary hearing on December 1, 2004, several issues were raised concerning the contents of the record in this matter.

**A. The Letter from Robert Pinato**

After the conclusion of the evidentiary hearing on December 1, 2004, the Commission received a letter dated November 30, 2004 from a Town resident, Robert Pinato, submitted on behalf of Kenney.<sup>5/</sup> The Presiding Officer provided the parties with an opportunity to submit comments on the letter. Kenney submitted no comments. The Petitioner objected to the inclusion of the letter as part of the record on the grounds that it was not presented during the evidentiary hearing, it was hearsay, it contained irrelevant material, it was not under oath or affirmation and it was an ex parte communication. By Order dated February 25, 2005, the Presiding Officer struck the letter from the record on the grounds that it was submitted in an untimely manner, it constituted hearsay and it was an impermissible ex parte communication in violation of the Commission’s Rules of Practice and Procedure.<sup>6/</sup>

**B. Petitioner’s Motion for Exclusion of Certain Documents**

On February 1, 2005, the Petitioner filed a Motion for Exclusion of Certain Documents (Motion) seeking to exclude a memorandum<sup>7/</sup> and a newspaper article<sup>8/</sup> that

Kenney had submitted as enclosures to his January 26, 2005 letter to the Commission. The Petitioner objected to these documents on the grounds that the memorandum was previously determined to be inadmissible during the evidentiary hearing on December 1, 2004 and the newspaper article, which was not offered at the hearing, was irrelevant.

By Order dated February 25, 2005, the Presiding Officer allowed the Motion in part and denied it in part. The Motion was allowed by striking the memorandum from Kenney's submission on the grounds that he had failed to show that the decision to exclude it during the evidentiary hearing on the basis that it was confidential,<sup>9/</sup> was erroneous.<sup>10/</sup> Further, Kenney was allowed to and did, in fact, question Gordon Fogg about the relevant statements in his memorandum during the December 1, 2004 evidentiary hearing. The Motion was denied by allowing the newspaper article to remain part of Kenney's submission on the grounds that it was relevant to his argument as to what action the Commission should take on this matter and that it was already in the public domain.

### **III. Findings of Fact**

1. Kenney was elected to the Town of Kingston's (Town) Board of Selectmen (Board) in 1999. He was subsequently re-elected to another term expiring in 2005. At all times relevant to this matter, Kenney was a Selectman in Town.

2. Kenney is a former Boston police officer. He was a motorcycle police officer for three or four years.

3. Gordon Fogg was hired as a police officer in Town in 1974 and promoted to the position of Chief of Police (Chief Fogg) in 1996. He retired as Chief on October 1, 2004.

4. Chief Fogg first meet Kenney when Kenney was elected to the Board. Chief Fogg does not socialize with Kenney or other members of the Board. He and Kenney are not friends. Their interactions have been only as Selectman and Chief.

5. Brian Caseau was elected to the Town's School Committee, the Silver Lake Regional School Committee (School Committee), in May 1998. In May 2001, he was re-elected to another term from which he resigned on October 31, 2003. At all times relevant to this matter, Caseau was an elected member of the School Committee.

6. In September 1999, Kenney was appointed by the Board to the Town Owned Property Evaluation Committee (Property Committee). In October 1999, Caseau was appointed by the Board to the Property Committee from which he resigned in June 2001. Kenney

nominated Caseau and voted in favor of his appointment.

7. The Board also appointed Caseau to the Town's Zoning Board of Appeals in May 2000 which appointment expired in June 2001. Kenney voted in favor of Caseau's appointment.

8. In March 2000, both Kenney and Caseau were elected to the Town's Democratic Committee.

9. Kenney knew Caseau and knew that he was an elected School Committee member. Kenney does not consider Caseau a social friend, although they have had a beer together from time to time after a meeting or on one or two other occasions.

10. Chief Fogg knew Caseau from being in the community and as a member of the School Committee. He did not have a personal relationship with Caseau.

### ***The Ticket***

11. In May 2001, the policy of the Town's Police Department concerning tickets was that a Town police officer would enforce the traffic laws of the Commonwealth within the Town and issue citations and take other actions as appropriate. A police officer at the scene has the discretion to do nothing, to issue a verbal warning or to issue a written warning. He may also issue a citation or make an arrest depending on the circumstances.

12. A police officer may issue a ticket to an individual whenever he deems there has been a violation of the law. The individual is either issued a fine which he pays or contests in court.

13. A ticket and a citation are synonymous and may be used interchangeably. A warning is a ticket, but there is never a fine involved and there is no further action beyond the issuance of a warning.

14. According to Chief Fogg, the term "fixing a ticket" means to take some action outside of the proper legal channels to make the ticket go away or to change it from a citation to a warning. He also testified that once a ticket has been given, it cannot be converted into a warning because it is against the law.<sup>11/</sup>

15. On May 7, 2001, a Town police officer stopped Caseau for an expired inspection sticker on his vehicle. Rather than write him for the inspection sticker violation, the police officer chose to write Caseau a ticket for a seat belt violation.<sup>12/</sup>

16. There is a \$25 fine for a seat belt violation<sup>13/</sup> and a \$35 fine for not having a valid inspection sticker. There is no insurance surcharge for a seat belt violation.<sup>14/</sup>

17. After Caseau was issued the ticket for the seat belt violation, he had the option of either paying the fine or requesting a hearing.<sup>15/</sup>

### ***Discussions About the Ticket***

18. The 2001 Town Meeting began on May 7, 2001 and continued the next night on May 8, 2001.

19. On the first night of the Town Meeting, in response to a greeting by Kenney, Caseau told him that he had just received a ticket for a seat belt violation.<sup>16/</sup> Although Caseau did not ask Kenney to do anything about the ticket, Kenney wondered why else would he tell him about it. Kenney did not tell Caseau that he would even try to do anything. Kenney took it upon himself to ask Chief Fogg if he could make it a warning because there would be no financial situation involved for Caseau who was broke and had been out of work for five or six months.

20. At the first night of the Town Meeting, Kenney asked Chief Fogg to change Caseau's seat belt violation ticket to a warning. Chief Fogg testified that Kenney did not give him any reasons for asking him to change the ticket. He told Kenney to have Caseau call him about it the next day. Chief Fogg believed that Kenney was acting as a Selectman when he talked to him.<sup>17/</sup>

21. Kenney saw Caseau outside the Town Meeting. He told Caseau that Chief Fogg had said that he could give him a call in the morning. He also said that maybe Chief Fogg could help him out with a warning.

22. Caseau called Chief Fogg the next morning at the Police Station. Caseau told him that he had not asked Kenney to intervene on his behalf. He said that the officer had been very good to him and had already given him a break because he had stopped him for an inspection sticker and chose only to write him for the seat belt violation. Chief Fogg told Caseau that he was very uncomfortable with the whole thing because Kenney was a Selectman and Caseau was on the School Committee. In keeping with his usual practice when people asked about tickets, Chief Fogg explained to Caseau the process for applying for a hearing.

23. Chief Fogg did not change Caseau's ticket.

24. At the continuation of the Town Meeting the next night, Kenney asked Chief Fogg how he made out with the ticket. He asked Chief Fogg why he had Caseau call him if he was not going to do anything and that he should have just told Kenney that. Chief Fogg told Kenney that he wanted to talk to Caseau to explain the appeal process and to make sure that the police officer had treated Caseau properly. When Chief Fogg told Kenney that he could not change the ticket to a warning, Kenney

responded "Oh, bull, Bull or something, It's done all the time." and walked away. Kenney appeared angry and was a little grouchy with Chief Fogg.

25. Chief Fogg testified that after this conversation between him and Kenney, Brian Donnelly, a member of the School Committee, approached Chief Fogg with a big grin on his face. Donnelly said "Hey, Chief, thanks for fixing those tickets for me."

26. Chief Fogg was very uncomfortable because Kenney had approached him in a very public place and he knew that what Kenney had asked him to do was illegal. He felt pressure because Kenney was one of his bosses.<sup>18/</sup>

27. Chief Fogg documented the incident with Kenney with a memo to the file dated May 10, 2001. He wrote that Kenney had asked him to fix a ticket for Caseau because he was very concerned about the appearance of a conflict of interest. He had a member of the Board asking him, the Chief, to fix a ticket for a member of the School Committee. Chief Fogg thought that it was illegal so he documented what took place for future reference because he did not want to end up on the wrong side of the podium before the Commission.

28. Chief Fogg testified that he has never fixed a ticket and that no one, other than Kenney, has ever asked him to fix a ticket.<sup>19/</sup>

29. Kenney did not think that what he asked Chief Fogg to do was "a big deal." Kenney testified that it was not "an unusual thing," particularly in light of Caseau's mitigating circumstances. He felt that whether to give a warning as opposed to a ticket was the police officer's discretion. As a former police officer, he usually used his discretion to give warnings.

30. Caseau was a constituent of Kenney's. Kenney testified that he had a history of helping people out in Town and that he would have done the same thing for anybody in Town.

31. Kenney did not file any written disclosure consistent with § 23(b)(3) concerning this matter.

### ***The Board's Oversight of Chief Fogg***

32. The Board appoints the Chief and may remove him with or without cause by majority vote. It is also involved with various Police Department matters such as the overall budget and individual budget items, negotiating police union contracts, acting as its appointing authority, handling certain disciplinary matters and reviewing the Chief's proposed rules and regulations.

33. The Board's decisions on Police Department

matters have an effect on Chief Fogg's ability to do his job. It was important for Chief Fogg to have a good working relationship with the Board members because they are his boss and the elected representatives of the people of the community.<sup>20/</sup>

34. In May 2001, Chief Fogg was in the middle of a five year contract. The Board was aware that he was looking for other employment. In June 2001, it voted to amend his employment agreement to increase his compensation. Kenney voted in favor of the amendment.

35. The Board conducted annual performance evaluations for Chief Fogg. Kenney gave Chief Fogg a score of 38 out of 45 points on his Employee Performance Evaluation dated April 22, 2000. He also noted that Chief Fogg was "A very good police chief, knows his job, and does it well!!

36. Kenney gave Chief Fogg a score of 31 out of 45 points on his Performance Evaluation Rating Sheet in 2003 and noted: "On several occasions following through on complaints from my constituents I have asked for assistance from the P.C. either directly or through the Town Administrator. I have been unhappy with the results. . . . It should be understood that the Selectmen are the C.E.O. of the Town elected by the taxpayers of the Town and that the Chief ultimately reports to the B.O.S." It was the only performance evaluation that Chief Fogg received in eight years from any Board member which found fault with his performance other than another member who complained about Chief Fogg's not wearing a uniform.

37. Chief Fogg believed that it would have been very difficult for him to find another job if he had been terminated by the Board.<sup>21/</sup>

#### **IV. Decision**

Section 23(b)(3) of G.L. c. 268A is violated if a municipal employee knowingly or with reason to know, "act[s] in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person." Section 23(b)(3) further provides that "[i]t shall be unreasonable to so conclude if such . . . employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion."

Thus, in order to establish a violation of G.L. c. 268B, § 23(b)(3), the Petitioner must prove, by a preponderance of the evidence,<sup>22/</sup> that: Kenney (1) was

a municipal employee; (2) who, knowingly or with reason to know, acted in a manner; (3) which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude; (4) that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person.<sup>23/</sup>

As the Commission has noted, "[t]here is no simple formula for identifying when . . . relationships are sufficiently significant that they implicate § 23(b)(3)."<sup>24/</sup> In determining whether there has been a violation, the focus is on the perception of the citizens of the community, not the participants.<sup>25/</sup> In upholding the Commission's interpretation of § 23(b)(3), the Supreme Judicial Court concluded:

We have . . . noted that the purpose of the statute "was as much to prevent giving the appearance of conflict as to suppress all tendency to wrongdoing." . . . The commission has stated that "[s]ection 23(b)(3) is concerned with the appearance of a conflict of interest as viewed by the reasonable person," not whether preferential treatment was given. . . . The commission has chosen to interpret this statute as a prophylactic measure, and the language of the statute accords with its interpretation.<sup>26/</sup>

The Commission's rulings have concluded that "acting in a manner" refers to the taking of official action as a public employee.<sup>27/</sup> "The Commission . . . evaluate[s] whether the public employee is poised to act in his official capacity and whether, due to his private relationship or interest, an appearance arises that the integrity of the public official's action might be undermined by the relationship or interest."<sup>28/</sup>

Applying these legal principles to the facts, we find that the Petitioner has proven, by a preponderance of the evidence, that Kenney violated G.L. c. 268A, § 23(b)(3).

#### **A. Municipal Employee**

The OTSC alleges that Kenney was an employee of a municipal agency. Kenney admits<sup>29/</sup> that he was at all relevant times a member of the Board and that he was an employee of a municipal agency.<sup>30/</sup> We find, by a preponderance of the evidence, that Kenney was a municipal employee.<sup>31/</sup>

#### **B. Who, Knowingly or With Reason to Know, Acted in a Manner**

The OTSC alleges that Kenney, knowingly or with reason to know, acted in a manner. Acting in a

manner, as discussed above, refers to the taking of official action as a public employee. There was no evidence presented of any personal or social relationship between Kenney and Chief Fogg. Chief Fogg testified that he did not know Kenney until Kenney was elected to the Board and that he had only a business relationship and interaction with the Board members. Furthermore, Chief Fogg testified that he believed that Kenney was acting as a Selectman when he made his request given the lack of a personal relationship between the two and the fact that the Board was responsible for his hiring and firing as well as for a variety of police matters ranging from budget issues to its internal rules and regulations.

Kenney's testimony also supports the conclusion that he was acting as a Selectman when he made his request to Chief Fogg. Kenney testified that Caseau was one of his constituents. He further testified that he believed that Caseau told him about the ticket because he wanted his help as a Selectman. We find, by a preponderance of the evidence, that Kenney acted in a manner.

**C. Which Would Cause a Reasonable Person, Having Knowledge of the Relevant Circumstances, to Conclude that Any Person can Improperly Influence or Unduly Enjoy his Favor in the Performance of His Official Duties or that He is Likely to Act or Fail to Act as a Result of Kinship, Rank, Position or Undue Influence of Any Party or Person**

Kenney admits that he asked Chief Fogg if he could change Caseau's ticket to a warning.<sup>32/</sup> The issue therefore, is whether the Petitioner has demonstrated, by a preponderance of the evidence, that Kenney knew or had reason to know that he was acting "in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that [Caseau] . . . unduly enjoy[ed] his favor in the performance of his official duties, or that he [was] likely to act or fail to act as a result of [Caseau's] rank or position."

Kenney admits that he knew Caseau and further, that he knew that Caseau was a member of the School Committee.<sup>33/</sup> Kenney nominated Caseau for a position on the Town's Property Committee and then served on that Committee with him. He voted to appoint Caseau to the Zoning Board of Appeals. Kenney and Caseau served together on the Town Democratic Committee. Kenney testified that he and Caseau shared beers from time to time, sometimes after meetings as well as other times. He further testified that he was aware that Caseau was broke and had been out of work for five or six months. As such, Caseau was not merely a constituent of Kenney's. Rather, he was a fellow Town official that Kenney had nominated for a Town position, voted on his nomination, served with on a board and committee and

with whom he socialized on occasion. Under these circumstances, we find, by a preponderance of the evidence, that a reasonable person could conclude that Kenney acted in making his request to Chief Fogg as a result of Caseau's rank or position as a fellow Town official with whom he had socialized.

We further find, by a preponderance of the evidence, that a reasonable person could conclude that Caseau could unduly enjoy Kenney's favor in the performance of his official duty based on the nature of Kenney's request to Chief Fogg. The improper request was based on Kenney's understanding of an implied request from Caseau to use his position as a Selectman to assist him.

Kenney admits that he asked Chief Fogg to change the ticket to a warning not on the merits, but rather on the basis of Caseau's financial situation. Although he testified that he would have done the same thing for anyone in Town, there is no evidence in the record that Kenney has ever been asked to do so by anyone while a Selectman or that he has ever, in fact, asked Chief Fogg to change a ticket in any other situation. Moreover, although Kenney testified that his request was no "big deal" and that it was done all the time, the record does not contain any evidence to support these assertions or any evidence of a custom or practice in the Town's Police Department in such situations. In short, there is no evidence in the record to support Kenney's testimony on this issue.

In contrast, Chief Fogg testified that no one other than Kenney in this case had ever asked him to fix a ticket and that he has never done so. He further testified that "fixing a ticket" means to take some action outside of the proper legal channels to make the ticket go away or to change it from a citation to a warning. As such, Kenney's request to Chief Fogg was to Chief Fogg, an illegal request to fix a ticket. Moreover, Chief Fogg's belief that Kenney's request to change the ticket to a warning was illegal is consistent with the provisions of G.L. c. 90C.<sup>34/</sup>

Kenney's own testimony supports this conclusion as well. Chief Fogg testified, and § 3(A)(1) of G.L. c. 90C expressly provides, that a police officer who observes a violation or has it brought to his attention, is vested with discretion in determining whether to issue the offender a warning or a citation. Kenney testified that while he was a police officer, he used his discretion to give warnings rather than citations. As such, his testimony as to the widespread nature of the practice and the exercise of discretion may be construed as a reference to the initial exercise of discretion made at the scene by the police officer. The lawful exercise of discretion in the first instance is distinctly different from an after the fact request made by a Selectman to the Chief of Police to



make a change based not on the merits, but rather on the personal financial situation of the violator.

Finally, we find, by a preponderance of the evidence, that a reasonable person could conclude that the type of request made by Kenney was improper. Although it may be appropriate to ask that a ticket be reviewed to ensure that it was issued properly and not in error and that the person was not mistreated by the police officer, we find that a reasonable person could conclude that a Selectman asking the Chief of Police to change a ticket without providing any reason for that request was improper. Asking for a ticket to be reviewed to ensure that it was issued properly is significantly different from requesting an after the fact change in an official decision made by a law enforcement officer, particularly when there is no legitimate reason offered in support of the request. Moreover, even if Kenney had told Chief Fogg about his reason for requesting the change, *i.e.* Caseau's financial situation, we further find that a reasonable person could conclude that such a request was improper.

In conclusion, we find by a preponderance of the evidence that Kenney violated G.L. c. 268A, § 23(b)(3).<sup>35/</sup>

## V. Order

Having concluded that the Respondent violated G.L. c. 268A, § 23(b)(3) and pursuant to the authority granted it by G.L. c. 268B, § 4(j), the State Ethics Commission hereby **orders** Richard Kenney to pay a civil penalty of **\$500**.

**DATE AUTHORIZED:** April 7, 2005

**DATE ISSUED:** April 28, 2005

<sup>1/</sup> 930 CMR 1.00 *et seq.*

<sup>2/</sup> Kenney also declined a subsequent offer to present a closing argument to the Commission at its February 3, 2005 meeting.

<sup>3/</sup> Given Kenney's *pro se* status, the Presiding Officer accepted these letters as Kenney's brief.

<sup>4/</sup> G.L. c. 268B, § 4(i); 930 CMR 1.01(9)(m)(1).

<sup>5/</sup> The Presiding Officer was unaware of the existence of the letter until after the evidentiary hearing had been concluded.

<sup>6/</sup> 930 CMR 1.02(8).

<sup>7/</sup> April 21, 2004 Memo to File from Chief Gordon Fogg.

<sup>8/</sup> April 16, 2004 newspaper article entitled *State Police lieutenant could face discipline*.

<sup>9/</sup> The memo was stricken as an exhibit during the December 1, 2004 evidentiary hearing based on the testimony of Gordon Fogg that it was a disciplinary file which was a confidential matter, not for public disclosure.

*See* G.L. c. 4, § 7, Clause Twenty Sixth (c) & (f).

<sup>10/</sup> Although the Presiding Officer advised Kenney that he could submit materials demonstrating that the memorandum was not confidential, Kenney did not do so.

<sup>11/</sup> The Presiding Officer found Chief Fogg's testimony on this point to be credible.

<sup>12/</sup> Section 13A of G.L. c. 90 provides that the seat belt law "shall be enforced by law enforcement agencies only when an operator of a motor vehicle has been stopped for a violation of the motor vehicle laws or some other offense."

<sup>13/</sup> *Id.*

<sup>14/</sup> *Id.*

<sup>15/</sup> *Id.*; G.L. c. 90C, § 3.

<sup>16/</sup> Although Kenney testified that the only thing he knew about was an inspection sticker, in both his Answer and the Stipulations of Fact and Law that he signed, he admitted that he "asked [Chief Fogg] to change [Caseau's] seatbelt violation ticket to a warning." Answer, ¶8; Stipulations of Fact and Law, ¶9. To the extent that his testimony is inconsistent, we credit his Answer and the Stipulations of Fact and Law.

<sup>17/</sup> The Presiding Officer found Chief Fogg's testimony on this point to be credible.

<sup>18/</sup> The Presiding Officer found Chief Fogg's testimony on this point to be credible.

<sup>19/</sup> The Presiding Officer found Chief Fogg's testimony on this point to be credible.

<sup>20/</sup> The Presiding Officer found Chief Fogg's testimony on this point to be credible.

<sup>21/</sup> The Presiding Officer found Chief Fogg's testimony on this point to be credible.

<sup>22/</sup> 930 CMR 1.01(9)(m)(2).

<sup>23/</sup> *In Re Mazareas*, 2002 SEC 1050, 1053 (*footnote omitted*).

<sup>24/</sup> *In Re Massa*, 1998 SEC 910, 912.

<sup>25/</sup> *In Re Hebert*, 1996 SEC 800, 810.

<sup>26/</sup> *Scaccia v. State Ethics Commission*, 431 Mass. 351, 359 (2000) (*citations omitted*).

<sup>27/</sup> *In Re Mazareas*, 2002 SEC at 1054; *In Re Flanagan*, 1996 SEC 757, 763.

COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY  
DOCKET NO. 709

IN THE MATTER  
OF  
CHANRITHY UONG

Appearances: Laurie Ellen Weisman, Esq.  
Stephen P. Fauteux, Esq.  
Counsel for Petitioner

Philip S. Nyman, Esq.  
Barbara M. Callahan, Esq.  
Leonard A. Shamas, Esq.  
Counsel for Respondent

Commissioners: Daher, Ch., Roach, Todd, Maclin, Moore

Presiding Officer: Commissioner J. Owen Todd

**DECISION AND ORDER**

**I. Procedural History**

This matter was commenced on July 1, 2004, with the issuance of an Order to Show Cause (“OTSC”) by Petitioner against Respondent Chanrithy Uong (“Uong”). The OTSC alleged that Respondent, originally a guidance counselor at Lowell High School (“LHS”) who was elected as a Lowell city councilor, repeatedly violated § 20 of G.L. c. 268A by accepting appointment to an LHS housemaster position in mid-2002 and by being reappointed to the housemaster position in 2003 and 2004 while continuing to serve as a city councillor.

In his Answer, filed on July 27, 2004, Respondent admitted most of the general factual chronology of the OTSC, but denied that his appointment and reappointments as a housemaster violated § 20. The Answer pleaded nine affirmative defenses, including the “city councillor’s exemption” and the statute of limitations.

A pre-hearing conference was held on August 16, 2004, before Commissioner Todd. At the pre-hearing conference, Respondent made and filed a motion for Commissioner Todd to recuse himself. Petitioner took no position on Respondent’s motion. On August 18, 2004, Commissioner Todd issued a written ruling denying Respondent’s motion.

Also on August 18, 2004, a Scheduling Order was issued scheduling discovery and other matters in preparation for an adjudicatory hearing scheduled for September 28, 2004, by agreement of the parties. Subsequently, on Respondent’s motion and over

<sup>28/</sup> *In Re Hebert*, 1996 at 810; *In Re Mazareas*, 2002 SEC at 1054.

<sup>29/</sup> Answer, ¶¶ 3-14; Stipulations of Fact and Law, ¶3.

<sup>30/</sup> Municipal agency is defined as “any department or office of city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder.” G.L. c. 268A, § 1(f).

<sup>31/</sup> Municipal employee is defined in relevant part as “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).

<sup>32/</sup> Answer, ¶8; Stipulations of Fact and Law, ¶9.

<sup>33/</sup> Answer, ¶7; Stipulations of Fact and Law, ¶6.

<sup>34/</sup> Section 2 of G.L. c. 90C, referred to as the “No Fix Law,” provides for the manner in which citations are to be given. Sections 9 and 10 govern what may be done with a citation after it has been issued. Section 9 provides that it is unlawful and official misconduct to dispose of a citation in a manner other than as required by the provisions of c. 90C. Section 10 prohibits knowingly falsifying a citation or disposing of a citation other than as required by the provisions of c. 90C. Once Caseau received the ticket, he had the option of either paying the fine or requesting a hearing to contest responsibility. G.L. c. 90, § 13A; G.L. c. 90C, § 3. G.L. c. 90C does not contain any express provision that would allow a ticket to be changed by a police officer after it has been issued based solely on the financial situation of the violator. Such a request appears contrary to both the express language of the statute and one of the purposes underlying the no-fix law to prevent manipulation or misuse of the citation process. *Commonwealth v. Carapelluci*, 429 Mass. 579, 582 (1999).

<sup>35/</sup> In light of our finding, we do not address the issue of whether a reasonable person, having knowledge of the relevant circumstances, could conclude that Chief Fogg could improperly influence or unduly enjoy Kenney’s favor in the performance of his official duties or that Kenney was likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person.

Petitioner's opposition, the adjudicatory hearing was rescheduled to October 28, 2004. Between the pre-hearing conference and the October 28, 2004 hearing, the parties conducted discovery, exchanged exhibit and witness lists and agreed to certain stipulations.

On October 23, 2004, Respondent filed an amended motion for Commissioner Todd to recuse himself. Petitioner took no position on Respondent's motion. On October 22, 2004, Commissioner Todd issued a written ruling denying Respondent's amended motion.

The hearing of this matter occurred on October 28, 2004. At the hearing, Respondent orally renewed his motion for Commissioner Todd to recuse himself and the renewed motion was orally denied. The parties' stipulations were by agreement made part of the evidentiary record. In addition, documents were admitted into evidence as Exhibits 1, S-2 through S-37 and 38 through 45. Both parties called, examined and cross-examined witnesses.

The parties' counsel made both opening and closing statements. The hearing was recorded and transcribed by a professional court reporter. The parties waived the opportunity to orally argue their cases before the full Commission. The parties submitted their briefs on January 28, 2005. Commissioner Todd certified the hearing transcript on February 3, 2005. The Commission began its deliberations in this matter on February 3, 2005 and continued those deliberations on March 3, 2005, April 7, 2005, May 5, 2005 and June 2, 2005.

## **II. Findings of Fact**

1. In 1999, Uong was a paid, appointed guidance counselor at LHS. As a LHS guidance counselor, Uong was a municipal employee of the City of Lowell.

2. In November 1999, Uong was elected as a Lowell city councillor. Uong was re-elected as a city councillor in November 2001 and again in November 2003. At present, Uong continues to serve on the Lowell City Council. The position of Lowell city councillor is compensated by a salary of about \$15,000 per year. As a Lowell city councillor, Uong is a Lowell municipal employee.

3. Uong relied on the city councillor's exemption in G.L. c. 268A, § 20 to allow him to serve as both a Lowell city councillor and a LHS guidance counselor. To satisfy the requirements of the § 20 city councillor's exemption, Uong declined his city councillor compensation and did not vote or act as a city councillor on any matter within the purview of the Lowell school department. Uong has continued to decline his city councillor's compensation and to not vote or act as a city councillor on any matter within the purview of the school department to the present.

4. On December 8, 1999, Uong sought an opinion from the Lowell city manager and the city solicitor as to whether he could: (a) donate the city councillor's salary that he was ineligible to receive to charity; and (b) apply for an assistant principal's position at a Lowell middle school while continuing to serve as a city councillor. Uong also asked for assistance in preparing a Home Rule Petition, if the answer to his first question was "no."

5. On December 14, 1999, the Lowell City Solicitor advised Uong: (a) that assuming Uong opted to continue to receive his guidance counselor salary, he was not entitled to also receive the city councillor's salary and, thus, could not donate that salary to charity; and (b) that Uong could continue to hold his LHS guidance counselor position while serving as city councillor, "but would not be eligible for appointment to an additional position (Assistant Principal) while a member of the City Council or for six months thereafter." Uong understood the City Solicitor's advice, but disagreed with it. The City Solicitor also advised Uong that a Home Rule Petition could be filed seeking the amendment of § 20 and offered to assist Uong in preparing the Petition. The City Solicitor's opinion was referred to the Commission's Legal Division for review.

6. On April 10, 2001, the Commission issued a formal opinion regarding Uong that was designated as *EC-COI-01-1*. In summary, the formal opinion advised Uong that G.L. c. 268A, § 20 would not permit him to relinquish his paid position as a "school counselor" and accept a paid position as an assistant principal or principal while a member of the City Council or for six months thereafter.

7. Uong received a copy of *EC-COI-01-1* in or about April 2001. Uong read the opinion. Uong understood the opinion, but disagreed with it. On May 3, 2001, Uong called the Commission's Legal Division and spoke to Senior Staff Counsel Christopher N. Popov, who advised Uong that he could seek a legislative change or appeal to the superior court.<sup>17</sup> Uong was aware that he could seek a legislative change, but he did not pursue it. Uong also did not seek to have the opinion reviewed by the Superior Court.

8. Uong was not appointed to the assistant principal position and he remained a guidance counselor at LHS until 2002.

9. Uong's annual salary as a LHS guidance counselor was \$53,462 in 1999, \$58,125 in 2000, \$59,288 in 2001 and \$60,029 in 2002. Uong was compensated as a guidance counselor pursuant to collective bargaining agreements entered into between the School Committee of the City of Lowell ("School Committee") and the Lowell School Administrators Association ("LSAA"). During that same time period, Uong's core duties as a guidance counselor remained substantially unchanged.

Those duties included counseling students about course selection and future career options, and helping students resolve difficulties in both academic and nonacademic work.

10. By letter to the Lowell Public Schools Assistant Superintendent dated March 19, 2002, Uong, then a city councillor and a LHS guidance counselor, applied for a position as a LHS housemaster. The housemaster position, then also known as a “submaster” position, had been posted.

11. LHS does not have “principals” or “assistant principals.” The LHS headmaster position is the high school equivalent of the position of principal at the middle and elementary schools. A housemaster reports to the headmaster and is the closest equivalent in the high school administration to an assistant principal at the middle and elementary schools. A housemaster is responsible for student discipline, as well as other management, operational and instructional leadership duties. The position of LHS housemaster, unlike that of guidance counselor, requires state certifications for service as a teacher and as a secondary school principal.

12. Uong competed as one of seven candidates for the housemaster position. A selection committee reviewed the applications and Uong was chosen as one of four final candidates. In or about May 2002, Uong was appointed to the housemaster position. The LHS headmaster and the Lowell Superintendent of Schools jointly made the appointment.

13. Uong began serving as a housemaster on August 20, 2002. Upon his becoming a LHS housemaster, Uong relinquished his position and compensation as a guidance counselor and was paid only as a housemaster. Uong’s initial annual salary as a housemaster was \$81,033, an increase of about \$21,000 over his guidance counselor salary. A change of assignment notice filed in the Personnel Office of the Lowell City Schools, dated July 6, 2002 and effective August 20, 2002, reflects that Uong would be paid as a “Submaster” out of “City” funds.

14. Uong was reappointed to the housemaster position in or about May 2003, with a salary of \$82,653, which was increased to \$83,479 on January 1, 2004. Uong was again reappointed as housemaster in or about May 2004, with a salary of \$84,314. Uong has continued to serve as both a city councilor and housemaster to the present.

15. Since his appointment in 2002, Uong has served and been compensated as a LHS housemaster pursuant to the governing collective bargaining agreement between the School Committee and the LSAA. The collective bargaining agreement is a contract made by a municipal agency of the City of Lowell (the School

Committee) in which the City is an interested party.

16. Since his appointment as a LHS housemaster in 2002, Respondent has known or had reason to know that, by virtue of his paid employment as a LHS housemaster, he has a financial interest in the collective bargaining agreement between the School Committee and the LSAA.

17. Uong is well-regarded in Lowell for his service as a city councillor and community leader and his effective performance as guidance counselor and housemaster at the LHS, where he is an important and valued member of the staff.

18. On June 15, 2004, the Commission found reasonable cause to believe that Uong violated G. L. c. 268A, § 20 and authorized adjudicatory proceedings. The OTSC in this matter was issued, served and filed by Petitioner on July 1, 2004.

### **III. Decision**

#### **A. Respondent’s Statute of Limitations Affirmative Defense**

Respondent argues as an affirmative defense that the three year limitations period began to run in December 1999 when he first made known his intention to seek an assistant principal position, and thus, the 2004 OTSC was time barred.

The Commission’s Rules of Practice and Procedure set forth, at 930 CMR 1.02 (10), a “statute of limitations” for the issuance of Commission orders to show cause. The regulation requires that an order to show cause “must be issued within three years after a disinterested person learned of the violation” and in no event more than six years after the violation. Under the regulation, the respondent must affirmatively plead the statute of limitations defense, in which case, the petitioner has the burden of showing that a disinterested person learned of the violation no more than three years before the order was issued. This burden is met as to all violations other than § 23 violations by the petitioner’s submission into evidence of three affidavits (from the Commission investigator responsible for the case, from the Attorney General’s Office and from the appropriate district attorney’s office). Finally, the regulation provides that if the petitioner meets this burden, then “the respondent will prevail on the statute of limitations defense only if he/she shows that more than three (3) years before the order was issued the relevant events” were either “a matter of general knowledge in the community” or the subject of a complaint to the Commission, the Attorney General’s office or the appropriate district attorney’s office.

## *Respondent has Not Proved his Statute of Limitations Affirmative Defense*

First, Petitioner has met its burden under the Commission's statute of limitations regulation and Respondent has not. Petitioner submitted into evidence the required affidavits from the Commission investigator responsible for the case, the Attorney General's Office and the Middlesex District Attorney's office (Exs.38, 39 & 40), thus meeting its burden of showing that "a disinterested person learned of the violation no more than three years before the order was issued." Respondent failed to show that more than three years before the OTSC was issued the relevant events were either "a matter of general knowledge in the community" or the subject of a complaint to the Commission, the Attorney General's office or the appropriate district attorney's office.

Second, given that Uong's housemaster appointment (and first alleged § 20 violation) occurred in May 2002 and the OTSC was issued just over two years later on July 1, 2004, it is not possible that the applicable three year limitations period had run on the violation at the time the OTSC was issued. The limitations period runs from the date when, in the terms of the Commission's regulation, "a disinterested person" learns of the violation and a violation cannot be learned of before it occurs.<sup>2/</sup> Respondent provides no legal authority for his argument that the limitations period began to run at the time he made known his intention to seek an assistant principal position – a position to which he was not in fact appointed and, thus, as to which he did not violate § 20. Contrary to Respondent's argument, reason to know that "Respondent was considering what turned out to be his course of action regarding his employment" is not the same as reason to know of a cause of action for a violation of § 20. Respondent's argument is inconsistent with the basic principle that a limitations period for a cause of action runs from the point when the cause of action in question first accrues. Obviously, a cause of action for a § 20 violation cannot accrue before the violation is committed. Intent to commit a § 20 violation is not in itself a G.L. c. 268A violation and can not trigger the running of the statute of limitations prior to the actual commission of the violation.<sup>3/</sup>

### **B. Section 20**

Section 20 of G.L. c. 268A, in relevant part, prohibits a municipal employee from having "a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, in which the city or town is an interested party of which financial interest he has knowledge or has reason to know." As we have previously observed, § 20 is intended to prevent a municipal employee from influencing the award of contracts by any municipal agency in a way which might

be beneficial to the employee and is concerned with the potential for impropriety as well as with actual improprieties. *EC-COI-01-1, EC-COI-99-2*, see *Quinn v. State Ethics Commission*, 401 Mass. 210, 214 ("Chapter 268A is concerned with the appearance of and the potential for impropriety as well as with actual improprieties").<sup>4/</sup>

Thus, to find a violation of § 20, there need not be proof of actual inside influence. Instead, the Commission need only find that: (a) the respondent was a municipal employee; (b) who had a direct or indirect financial interest of which he had knowledge or reason to know; (c) in a contract made by a municipal agency; (d) in which the municipality is an interested party. *In re Pathiakis*, 2004 SEC 1167, 1176. The burden of proof as to the respondent's alleged G.L. c. 268A, § 20 violation is on the petitioner, which must prove its case by a preponderance of the evidence. 930 CMR 1.01(9)(m)(2). The weight to be attached to any evidence in the record rests within the sound discretion of the Commission. *Id.* 1.01(9)(l)(3).

If the petitioner meets its burden of proving the above-stated elements of a § 20 violation, the violation will be found unless the respondent proves that his financial interest in the municipal contract was permitted by an exemption to § 20. Under Commission precedent, the burden of proving compliance with an exemption to a prohibition under G.L. c. 268A is on the public official claiming the exemption. *In re Pathiakis*, at 1172; *In re Cellucci*, 1988 SEC 346, 349.

### **C. Petitioner's Case**

In the OTSC in this matter, Petitioner did not simply plead the elements of Uong's alleged § 20 violations. In addition, Petitioner pleaded that the city councillor's exemption was "the only § 20 exemption available to Uong," that Uong "relied on the city councilor's exemption to enable him to serve as both guidance counselor and elected city councilor" and that Uong "violated the city councilor's exemption and § 20" by accepting appointment and two reappointments to the LHS housemaster position while continuing to serve as a city councillor. In doing so, Petitioner incorporated proof of Uong's alleged violations of the city councillor's exemption into its case-in-chief.<sup>5/</sup>

### **D. Petitioner Has Proved the Elements of Uong's Alleged § 20 violations**

Petitioner has proved by a preponderance of the evidence each of the elements of Uong's alleged § 20 violations. First, the parties have stipulated, the evidence shows and we find that Respondent is, as an elected member of the Lowell city council, which is a Lowell municipal agency<sup>6/</sup>, a Lowell municipal employee<sup>7/</sup> for

the purposes of § 20. Second, the parties' stipulations that Uong, while already serving as an elected city councillor, was appointed as a LHS housemaster in 2002 and has served as both an unpaid city councillor and a compensated housemaster since that time (with reappointments in 2003 and 2004), together with other evidence in the record, establish and we find that Respondent has had since his 2002 housemaster appointment, a financial interest of which he has had knowledge or reason to know in a contract made by a Lowell municipal agency in which the City of Lowell is an interested party. More specifically, the evidence shows and we find that Respondent's employment and compensation as a LHS housemaster is, and has been, pursuant to collective bargaining agreements between the School Committee and the LSAA, that those agreements have been and are contracts made by a Lowell municipal agency (the School Committee)<sup>8/</sup> in which the City of Lowell has been and is an interested party<sup>9/</sup>, and that Uong has and has had a financial interest<sup>10/</sup> in those contracts. Finally, the evidence shows and we find that Respondent knew or should have known of his financial interest given that he has been paid an annual salary of over \$80,000 since 2002 for his services as a LHS housemaster and has declined the \$15,000 salary for serving as a city councillor in order to accept his housemaster salary. These findings apply to both Uong's 2002 appointment and his 2003 and 2004 reappointments.

Having found that the preponderance of the evidence in the record establishes each of the elements of Uong's alleged § 20 violations, we turn to the question of whether Respondent's financial interest was exempted from § 20's prohibition by any applicable exemption.

### **E. The City Councillor's Exemption**

While there are several exemptions to § 20, the only exemption which is relevant to this matter is the so-called "city councillor's exemption." This exemption provides,

This section [§ 20] shall not prohibit an employee of a municipality with a city or town council form of government from holding the elected office of councillor in such municipality, nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office; provided, however, that no such councillor may vote or act on any matter which is within the purview of the agency by which he is employed or over which he has official responsibility; and provided, further, that no councillor shall be eligible for appointment to such additional position while a member of said council or for six months thereafter. Any violation of the provisions of this paragraph which has substantially influenced the action taken by a

municipal agency in any matter shall be grounds for avoiding, rescinding or canceling such action on such terms as the interest of the municipality and innocent third parties require. No such elected councillor shall receive compensation for more than one office or position held in a municipality, but shall have the right to choose which compensation he shall receive.

Beginning with the OTSC, Petitioner's case conceded Respondent's compliance with all of the requirements of the city councillor's exemption excepting only the appointment restriction: "and provided, further, that no councillor shall be eligible for appointment to such additional position while a member of said council or for six months thereafter," in the exemption's first sentence. Petitioner sought to prove that Uong violated the city councillor's exemption by being appointed to an "additional position" when he was appointed as a housemaster in 2002 and when he was reappointed to that same position in 2003 and 2004. Respondent in turn attempted to prove his compliance with the appointment restriction, arguing that the housemaster position was a "substituted" rather than additional position.

The primary statutory interpretation issue of this matter is, therefore, the meaning of the provision "and provided, further, that no councillor shall be eligible for appointment to such additional position while a member of said council or for six months thereafter" in the first sentence of the city councillor's exemption. The parties have focused on the meaning of the words "such additional position." Petitioner argues that the phrase is ambiguous and that the Commission was correct in *EC-COI-01-1* to rely on legislative history and to conclude that the phrase prohibits appointments to any new municipal position, even "promotions" from one position to another. Respondent counters that the meaning of the statutory language at issue is clear and unambiguous and that the Commission erred in considering legislative history in construing the exemption in *EC-COI-01-1*. Respondent argues that "such additional position" refers to a third position (*added to* the preexisting municipal employment and the elected councillor's position) and not to a position "substituted" for the original municipal employee position.

#### *"Such Additional Position"*

We begin our analysis with the plain meaning of the statutory language of the city councillor's exemption appointment prohibition.<sup>11/</sup> According to common and ordinary usage, the phrase "such additional position" in the first sentence of the city councillor's exemption would normally be read as referring back to a position previously identified in the sentence, as "such" commonly means "of a kind previously specified."<sup>12/</sup> The first sentence of the city councillor's exemption refers to only two positions,

the elected office of councillor and municipal employment (i.e., “an employee of a municipality”). Given that the full provision states “and provided, further, that *no councillor shall be eligible for appointment to such additional position* while a member of said council or for six months thereafter” (emphasis added), it is clear that the “such additional position” referred to is not the *elected* councillor position, but rather the municipal employee position.

It is also clear that a municipal employee, for example a school department employee, who is elected to the city council and continues to hold his school department position, in ordinary usage holds that position *in addition* to his city councillor position, even though he held the position before his election. In other words, *relative to and from the perspective of his elected councillor position,*<sup>13/</sup> his original school department employee position is an *additional* position.<sup>14/</sup>

Similarly, a sitting city councillor first appointed after his election to a school department position would be appointed to a position *additional* to his elected office. Further, because “additional position” in the context of the city councillor’s exemption clearly refers to “a position in addition to the elected position of councillor,” the city councillor’s post-election appointment to the school department position would be an appointment to an “additional position” even if the city councillor were to give up a previously held appointed municipal position in order to accept the new appointment.

Accordingly, as a matter of plain meaning, the phrase “such additional position” in the appointment prohibition clause of the city councillor’s exemption refers to any appointed municipal employee position in addition to the elected office of councillor (including but not limited to the specific municipal employee position held before the councillor’s election). Therefore, as we found in *EC-COI-01-1*, the appointment prohibition of the city councillor’s exemption does not merely bar a municipal employee who is elected as a city councillor from being appointed to a second appointed municipal position,<sup>15/</sup> it also bars his appointment to any new municipal position, even if he gives up his original appointed position in order to accept the new appointment.<sup>16/</sup> Indeed, if applied literally, the appointment prohibition would bar a municipal employee who is elected as a city councillor from being reappointed after his election to his original municipal position. We are obligated, however, to “give the statute a workable meaning.” *Graham*, 370 Mass. at 140.

#### *Reappointments to the Same Position held Prior to Election are not Barred*

We have previously (in construing the “selectman’s exemption” on which the city councillor’s exemption is based) declined to apply the statutory language literally to bar reappointment to the same position

held prior to election on the grounds that to do so would defeat the legislative purpose of the exemption. In *EC-COI-82-107*, we concluded that the limitation on appointment eligibility of the selectman’s exemption “was intended to prohibit only new, post-elective appointments to municipal positions and was not intended to prohibit municipal employees from eligibility for reappointment to positions held immediately prior to their election as selectman...To construe § 20 so that a selectmen [sic] could not be eligible for reappointment for positions held prior to election would, in effect, nullify the legislative purpose in enacting St. 1982, c. 107, and would be inconsistent with the Commission’s obligation to give G. L. c. 268A a workable meaning.”

The conclusion of *EC-COI-82-107* concerning the selectman’s exemption is also applicable to the city councillor’s exemption.<sup>17/</sup> Accordingly, consistent with *EC-COI-82-107*, we construe the appointment prohibition of the city councillor’s exemption not to bar reappointment of a city councillor to the same municipal employee position he held prior to his election in order not to nullify the statute’s legislative purpose<sup>18/</sup> and to give the statute a workable meaning.<sup>19/</sup>

#### *Appointments to Positions Not Held Prior to Election are Barred*

Accordingly, we construe the appointment prohibition of the city councillor’s exemption to bar all post-election appointments of councillors to positions of municipal employment which are not reappointments to the same positions held by the councillors *prior to their election*.<sup>20/</sup> Therefore, we conclude that the city councillor’s exemption: (a) allows a city employee who is elected to the city council to continue in the same city position he occupies at the time of his election; and (b) disqualifies city councilors from appointment to any new municipal employment positions until they have been off the council for six months.<sup>21/</sup> Thus, with the city councillor’s exemption the Legislature has made it allowable under § 20 for an appointed paid municipal employee to also serve (with some restrictions) as an elected city councillor while at the same time ensuring (through the appointment prohibition) that the employee does not thereby gain (by virtue of his city councillor position) an “inside track” to any new appointed municipal position.

#### **F. Uong’s Appointment and Reappointments as Housemaster Violated the City Councillor’s Exemption Appointment Prohibition and § 20**

Petitioner has proved by a preponderance of the evidence that the LHS housemaster position was a new and different position from Uong’s original, pre-city council election, paid city position as a LHS guidance counselor.

First, the evidence establishes that the two positions require different qualifications and involve different duties. The evidence shows that a guidance counselor counsels students while a housemaster is responsible for student discipline, as well as other management, operational, and instructional leadership duties. In addition, whereas the position of guidance counselor requires state certification for service as a guidance counselor, the position of housemaster requires state certifications for service as a teacher and as a secondary school principal. Second, Uong was appointed as a LHS housemaster as a result of an open and competitive application, selection and appointment process. The evidence shows that Uong formally applied for the housemaster position by letter and competed for the position with several other applicants, three of whom were interviewed as finalists along with Uong. Uong's 2002 appointment as a housemaster was thus not a reappointment to a position held before his election to the city council (which is permitted by the city councillor's exemption), but rather a new appointment to a new paid city position. This conclusion also applies to Uong's 2003 and 2004 reappointments as housemaster.

Accordingly, we conclude that Uong's 2002 housemaster appointment was an appointment for which he was not eligible under the appointment eligibility prohibition of the city councillor's exemption. We reach the same conclusion regarding his 2003 and 2004 reappointments as housemaster. In short, because Uong did not hold the housemaster position prior to his election as a city councillor, he was not eligible for appointment (or reappointment) to the housemaster position while he was on the council and for six months thereafter.

Based on the statutory analysis set forth above, we do not accept Uong's contention that the appointment eligibility prohibition of the city councillor's exemption did not apply to his appointment as housemaster because upon his appointment to that position he gave up his former guidance counselor position. Uong's contention is unsupported by the language of the exemption and his interpretation of the statute would undermine its legislative purpose.

Therefore, Uong's appointment and reappointments to the housemaster position while he continued to serve as a city councillor violated the appointment eligibility prohibition of the city councillor's exemption to § 20 and were not allowed under the exemption. Thus, by, while serving as a city councillor, accepting appointment in 2002 to the new position of housemaster and reappointments to that position in 2003 and 2004 and thereby having a financial interest in the municipal contract under which he has served and is serving in that new position which is not exempt from § 20, Uong repeatedly violated § 20. Uong's continued service in the housemaster position based on appointments and reappointments for which he

was not eligible is an ongoing § 20 violation.

#### **IV. Conclusion**

Uong violated § 20 by, while serving as a city councillor in 2002, accepting appointment to the paid municipal position of housemaster and as a result having to his knowledge a financial interest in a contract with a Lowell municipal agency in which the city was an interested party that was not exempt under city councillor's exemption or any other exemption to § 20. Each of his subsequent acceptances of his reappointments as housemaster in 2003 and 2004 have similarly violated § 20. Uong's violation of § 20 has continued and is ongoing as he continues, in addition to being an elected city councillor, to serve as a salaried housemaster based on appointments and reappointments for which he was not eligible.

#### **V. Order**

Having concluded that Respondent Uong has violated and is violating G.L. c. 268A, § 20, the Commission, pursuant to the authority granted it by G.L. c. 268B, § 4(j), hereby orders Uong to pay a civil penalty of \$6,000 for violating G.L. c. 268A, § 20, and further orders Uong to cease and desist from violating G.L. c. 268A, § 20, by relinquishing his LHS housemaster position within thirty (30) days of the issuance date of this Decision and Order.<sup>22/</sup>

**DATE AUTHORIZED:** June 2, 2005

**DATE ISSUED:** June 6, 2005

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<sup>1/</sup> While Uong testified that he did not recall Popov advising him of these options (Transcript at 197), we find Popov's testimony on this point, which is supported by Exhibit 45, to be credible.

<sup>2/</sup> The Supreme Judicial Court has held that the statute of limitations on a conflict of interest law violation is tolled until the Commission has "some reason to know" that conduct potentially violating the statute has occurred. *Life Insurance Association of Massachusetts, Inc. v. State Ethics Commission*, 431 Mass. 1002, 1003 (2000). See *Zora v. State Ethics Commission*, 415 Mass. 640, 646-48 (1993); *Nantucket v. Beinecke*, 379 Mass. 345, 349-50 (1979).

<sup>3/</sup> Respondent's Answer set forth eight "affirmative defenses" in addition to the statute of limitations. All but one of these are legal arguments rather than affirmative defenses. Respondent's "city councillor's exemption" affirmative defense is discussed *infra*.

<sup>4/</sup> As articulated by William G. Buss, Jr., a leading commentator on G.L. c. 268A:

...section 7 [the state counterpart to § 20] announces a rule the basis of which is that, if no exemption is applicable, any state employee is in a position to influence the awarding of contracts by any state agency in a way which may be financially beneficial to himself. In a sense, the rule is a prophylactic one. Because it is impossible to articulate a



standard by which one can distinguish between employees in a position to influence and those who are not, all will be treated as though they have influence.(footnote omitted) Therefore, because a state employee, in some circumstances, might use his position to see that contracts are awarded, not just to his own company but to companies with which his company does business, it is assumed by the statute that such circumstances always exist unless an exemption can be shown to be applicable.

W. G. Buss, *The Massachusetts Conflict-of-Interest Statute: An Analysis*, 45 B.U.L. Rev. 299, 373-74 (1965); See *EC-COI-82-109*.

<sup>5/</sup> In his Answer to the OTSC, Respondent pleaded the city councillor's exemption as his fourth affirmative defense.

<sup>6/</sup> The conflict of interest statute defines "municipal agency" as "any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder." *G. L. c. 268A, § 1(f)*.

<sup>7/</sup> For the purposes of *G. L. c. 268A*, a "municipal employee" is any 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", with two exclusions not here relevant. *G. L. c. 268A, § 1(g)*.

<sup>8/</sup> Under Massachusetts law the duty of maintaining public school education is placed with the cities and towns. *G. L. c. 71, § 1*. This duty is delegated to the municipality's school committee. *G. L. 43, §§ 31 & 33, G. L. c. 71, § 37*.

<sup>9/</sup> The preamble to the collective bargaining agreement states, "it is hoped that the Agreement entered into will contribute to the betterment of public education in the City of Lowell." Also, as the direct beneficiary of the contract, the City was an interested party for § 20 purposes. See *Pathiakis*.

<sup>10/</sup> Although, as the Court has noted, *G. L. c. 268A* is "deficient in not containing a definition of 'financial interest,'" "[t]he interest of a school employee in his own compensation ... is unquestionably a 'financial interest,' ..." *Graham v. McGrail*, 370 Mass. 133, 138-139 (1976).

<sup>11/</sup> *Int'l Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 392 Mass. 811, 813 (1984) ("The intent of the legislature is to be determined primarily from the words of the statute, given their natural import in common and approved usage, and with reference to the conditions existing at the time of enactment. This intent is discerned for the ordinary meaning of the words in a statute considered in the context of the objectives which the law seeks to fulfill.")

<sup>12/</sup> See *Black's Law Dictionary* (Fifth Edition), which defines "such" as, "Of that kind, having a particular quality or character specified. Identical with, being the same as what has been mentioned. Alike, similar, of the like kind. 'Such' represents the object already particularized in terms which are not mentioned, and is a descriptive and relative word, referring to the last antecedent."

<sup>13/</sup> The appointment restriction provision of the city councillor's exemption addresses the dual municipal office holding situation from the perspective of the elected councillor's position.

<sup>14/</sup> "Additional" means "existing or coming by way of addition" and is synonymous with "added." *Webster's Third New International*

*Dictionary* (unabridged 1993). "Addition" is the process of adding. *Id.* "Add" means to join or unite so as to bring about an increase (in number, quantity or size). *Id.* "Additional" thus refers to anything joined or combined with anything else resulting in an increase (in number, quantity or size); each joined thing is "additional" to the other. Here, for example, an appointed municipal position held by an elected city councillor is, from the perspective of the elected position, an "additional" position which combined with the elected position results in the holding of two municipal positions.

<sup>15/</sup> If the Legislature's intent had been to merely prohibit a city councillor's addition of a second appointed position (and to allow the substitution of a new appointed position for a previously held one) it could readily have done so by providing, for example, "no councillor shall simultaneously serve in more than one appointed position." By contrast, in providing that "no councillor shall be eligible for appointment to *such additional position*" (emphasis added), the Legislature evidently intended to impose a greater restriction on councillors' eligibility for appointed municipal positions.

<sup>16/</sup> In *EC-COI-01-1*, our analysis of the plain meaning of the phrase "such additional position" led us to the question of whether the phrase "such additional position" includes a municipal position "that exists by way of substitution for the prior municipal position." Thus, we found that while the plain language of the city councillor's exemption "at a minimum" prohibits "adding a third paid municipal employee position," it is "unclear whether it is also meant to prohibit substituting the city councillor's pre-existing municipal position for another position in which he has a financial interest in a contract, such as changing from school counselor to assistant principal or principal." In *EC-COI-01-1*, this perceived lack of clarity was resolved in the affirmative by reference to legislative history. In retrospect, our earlier analysis created unnecessary uncertainty by focusing excessively on the meaning of the words "such" and "additional" individually rather than construing them according to their ordinary meanings in the context in which they are used. As set forth in this decision, construed in context it is clear that the phrase "such additional position" includes a so-called "substituted" position. While our analysis of the city councillor's exemption in this decision finds more clarity in the statutory language and thus relies less on the statute's legislative history than that in *EC-COI-01-1*, the ultimate conclusions and application of the law set forth in the advisory opinion were sound.

<sup>17/</sup> The city councillor's exemption was enacted in 1999 through an act (An Act Allowing Certain Municipal Employees to Serve as City Councillors) amending the existing town councillor's exemption to § 20 which was, in turn, enacted in 1985 and modeled on the selectman's exemption as originally enacted in 1982. As we stated in *EC-COI-01-1*, "[b]ecause the relevant language in the selectman's exemption is identical to the language in the current city councillor's exemption and the language first appeared when the Legislature added the selectman's exemption to § 20, we may look to the legislative history of the selectman's exemption to determine the legislative intent of the phrase "such additional position."

<sup>18/</sup> As described in *EC-COI-01-1*, the apparent legislative purpose of the city councillor's exemption was to both allow municipal employees to be elected as councillors while continuing their municipal employment and to bar councillors from gaining appointment to municipal positions through their elected office. Thus, a memorandum to the Governor and Lieutenant Governor from Director of Legislative Research of the Office of the Governor's Legal Counsel dated April 6, 1999 (the day before the Governor signed his approval of the Act) states, "Representative Knuttilla advises the Legislative Office that this bill is intended to address the specific circumstances of a City Councillor in Fitchburg who also holds the position of teacher in the City. ... Because the City Councillor wants to announce for re-election to the City Council, and keep his teaching job and salary,

this bill has been filed to provide city employees seeking to run for city council with the same exception currently enjoyed by municipal employees seeking to run for selectman or town councillor.” As we had earlier observed in *EC-COI-82-107*, the appointment ineligibility provision was not part of the selectman’s exemption as originally drafted but was added by amendment after the Legislature “was made aware of concerns over potential abuses in the dual status arrangement in particular where selectmen could potentially acquire other municipal positions by virtue of their incumbency in the office of selectman.”

<sup>19/</sup> To interpret the statute to forbid such reappointments would thwart the Legislature’s intent to allow municipal employees to serve as elected city councillors. Such an interpretation would, for example, render the exemption illusory for school department employees and other municipal employees who are reappointed annually and would be forced to choose between their municipal employment and their elected office as soon as their annual reappointment came up after their election to the council.

<sup>20/</sup> It is fully consistent with and indeed necessary to the purpose of the city councillor’s exemption to apply the exemption’s appointment prohibition to bar appointment to any new city position, particularly any new more highly paid city position. To do otherwise would leave open to municipal employees elected to the city council an “inside track” to appointment to different and better paid municipal positions, which the legislature evidently intended to foreclose with the exemption’s appointment restriction.

<sup>21/</sup> This conclusion is supported by the following statement of the sponsoring legislator (Rep. Cellucci) in his May 26, 1982 letter to Governor King explaining the operation and effect of the “selectman’s exemption” legislation,

Thus, for example , a teacher can be elected and serve as a selectman in the town he teaches [sic], but he cannot vote, on a matter which effects [sic] the school system, but a selectman who is not a teacher or other municipal employee cannot be appointed as a teacher or other municipal employee during his [selectman’s] term or for six months thereafter.

<sup>22/</sup> Under G. L. c. 268A, § 21, the Commission, “the district attorney for the district or the city or town or state may bring a civil action against any person who has acted to his economic advantage in violation of [§ 20], and may recover damages for the city or town in the amount of the economic advantage or five hundred dollars, whichever is greater. If there has been no final criminal judgment of conviction or acquittal of the same violation, the [commission], the district attorney or the city or town or state may in the discretion of the court recover additional damages for the city or town in an amount not exceeding twice the amount of the economic recovery or five hundred dollars, whichever is greater, and a judgment for such damages shall bar any criminal prosecution for the same violation.” While we considered whether Uong should also return to the City the additional salary he received as a housemaster above what he would have received as a guidance counselor, we have decided to take no action on that issue at this time. The amount of the fine and the requirement that Uong give up the housemaster position reflect the seriousness of Uong’s violations of G. L. c. 268A, § 20. In determining to make this Order, we have taken into account Uong’s record of service to the Lowell Public Schools and the City as a whole.

**COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION**  
**SUFFOLK, ss.COMMISSION ADJUDICATORY  
DOCKET NO. 723**

**IN THE MATTER  
OF  
RUVANE E. GROSSMAN**

**DISPOSITION AGREEMENT**

The State Ethics Commission and Ruvane E. Grossman enter into this Disposition Agreement pursuant to Section 5 of the Commission’s Enforcement Procedures. This Agreement constitutes a consented-to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, § 4(j).

On February 19, 2004, the Commission initiated, pursuant to G.L. c. 268B, § 4(a), a preliminary inquiry into possible violations of the conflict-of-interest law, G.L. c. 268A, by Grossman. The Commission has concluded its inquiry and, on April 7, 2005, found reasonable cause to believe that Grossman violated G.L. c. 268A.

The Commission and Grossman now agree to the following findings of fact and conclusions of law.

**Findings of Fact**

1. At the time relevant, Grossman was the founder and president of Rip Grossman & Associates, Inc. (“RGA”), a closely held consulting corporation located in Kansas. RGA specialized in business development and strategic alliances, especially in the health care and pharmaceutical fields. Grossman had extensive experience in the pharmaceutical industry, and expertise in business development and licensing.

2. RGA executed a one-year contract with the University of Massachusetts Medical School (“UMMS”) calling for RGA to provide intellectual property consulting services for \$1,750/day but not to exceed \$84,000 over the period of the contract, which was from July 1, 2002 to June 30, 2003.

3. More specifically, the contract stated that Grossman would personally assist UMMS in the development and implementation of licensing plans for UMMS’s technologies, and to personally handle all telephone and face-to-face contacts with designated outside companies or individuals.

4. The RGA-UMMS contract also specified the following:

No officer or employee of the Commonwealth

shall participate in any decision relating to this Contract which affects his/her personal interest or the interests of any corporation, partnership, or association in which (s)he is directly or indirectly interested, as set forth in G.L. c. 268A. No officer or employee of the Commonwealth shall have any interest, direct or indirect, in this Contract or the proceeds thereof.

5. In February 2003, UMMS decided to license its ribonucleic acid interference (“RNAi”) technology, an important life science and therapeutic technology. UMMS decided to use Grossman to help find a marketing firm for the RNAi technology.

6. At that time, Grossman, through RGA, had a consulting contract with CytRx Corporation, a publicly traded intellectual property marketing firm located in California. CytRx was focused on the development and commercialization of high-value human therapeutics.

7. Pursuant to its contract with CytRx, RGA was entitled to \$5,000/month and a “success fee” upon the consummation of any new business that RGA brought to CytRx, plus reimbursement for other expenses. The success fee was to be at least \$150,000 per product acquired or divested.

8. RGA’s contract with CytRx also specified that RGA could not be retained to consult on any matters competitive with CytRx’s interest.

9. In or about March/April 2003, Grossman brought UMMS and CytRx together to discuss marketing UMMS’s RNAi technology. He did so both as an agent for CytRx and as a UMMS consultant.

10. During the following weeks, the parties proceeded to negotiate the terms of a licensing agreement.

11. Grossman was present at and participated in those negotiations by attending meetings, making suggestions and discussing the relevant matters. He did so both as an agent for CytRx and as a UMMS consultant. He had no decision making authority for either party and did not participate in the internal UMMS process of reviewing and approving the agreement.

12. Grossman was also privy to confidential information regarding CytRx’s negotiation strategy and development plans. On at least one occasion in March or April 2003, Grossman sent a letter to UMMS on behalf of CytRx.

13. In April 2003, UMMS signed a licensing agreement with CytRx by which CytRx would market the RNAi technology, and UMMS would receive \$200,000,

1.8 million shares of CytRx stock, royalty payments, and other beneficial commitments from CytRx.

14. In May 2003, a UMMS Deputy Chancellor learned that Grossman was simultaneously representing CytRx and UMMS regarding the RNAi licensing agreement.

15. Concerned by Grossman’s dual agency, UMMS conducted a review of its licensing agreement with CytRx. Based on that review, UMMS determined that the licensing agreement had not been harmed by Grossman’s conduct, and that it would be advantageous to leave the licensing agreement in place.

16. Nevertheless, UMMS subsequently executed Memoranda of Clarification with both CytRx and RGA. The memorandum with CytRx specified that, in the future, CytRx would have no business relationships with current or former UMMS employees without the prior written approval of UMMS.

17. The memorandum with RGA terminated RGA’s relationship with UMMS. The memorandum also required RGA to forfeit its success fee from CytRx to UMMS, which fee was later determined to be \$53,000 in cash and 100,000 shares of CytRx stock, valued at \$240,000 as of October 2003. In addition, the agreement set terms under which CytRx could employ Grossman in the future, including provisions that CytRx would ensure that Grossman would not receive any of his forfeited commission and would not have any contact with UMMS about the licenses or participate in their interpretation. Grossman could contract with CytRx provided that he and CytRx complied with the terms of that agreement.

### **Conclusions of Law**

18. General Laws c. 268A, § 1(q) defines a “state employee” as a person performing services for a state agency. This definition includes those who provide such services pursuant to a contract of hire or engagement, and on a part-time or consultant basis.

19. Where the consulting contract is between a state agency and a corporation, the Commission considers the following five factors in determining whether an individual within the corporation may be deemed a state employee:

- (a) Whether the individual’s services are expressly or impliedly contracted for;
- (b) The type and size of the corporation;
- (c) The degree of specialized knowledge or expertise required of the service;

- (d) 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
- (e) The extent to which the person has performed similar services for the public entity in the past.

*EC-COI-92-6.*

20. In this case, RGA was a closely held consulting corporation whose contract with UMMS specified that Grossman, the founder and president of the corporation, would personally provide the consulting services to UMMS. Grossman had extensive experience in the pharmaceutical industry, and expertise in business development and licensing. Thus, Grossman was a state employee within the meaning of G.L. c. 268A.

21. G.L. c. 268A, § 1(o) defines a “special state employee” as a state employee who is not elected and who in fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days.<sup>1/</sup>

22. Pursuant to RGA’s contract with UMMS, Grossman earned compensation as a UMMS consultant for less than 800 hours during the preceding three hundred and sixty-five days, which made him a special state employee.

*Section 4*

23. G.L. c. 268A, § 4(a) prohibits a state employee from, otherwise than as provided by law for the proper discharge of official duties, 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, otherwise than in the proper discharge of his official duties, acting 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.

24. The RNAi licensing agreement between UMMS and CytRx was a particular matter.

25. As a party to the agreement, UMMS, a state agency, had a direct and substantial interest in the particular matter.

26. By bringing the RNAi licensing deal to CytRx’s attention, by attending and participating in the negotiations on behalf of CytRx, and by communicating

with UMMS on behalf of CytRx, Grossman acted as an agent for CytRx, someone other than the state, in relation to the RNAi licensing particular matter. This conduct was not performed in the proper discharge of Grossman’s official duties as a UMMS consultant.

27. RGA had a contract with CytRx pursuant to which it would receive compensation for bringing the RNAi deal to CytRx, and for assisting CytRx in developing its negotiation and marketing strategy for the new technology. Thus, Grossman requested compensation from CytRx, someone other than the state, in relation to the RNAi licensing particular matter. This arrangement was not provided by law for the proper discharge of Grossman’s official duties as a UMMS consultant.

28. Sections 4(a) and 4(c) do not apply to special state employees unless, among other things, the special state employee has at any time participated in or had official responsibility for the particular matter as a state employee.

29. As the RGA-UMMS contract called for Grossman to assist UMMS in the development and implementation of licensing plans for UMMS’s technologies, Grossman had official responsibility for the particular matter. In addition, Grossman participated in the particular matter as a state employee when he brought CytRx and UMMS together to negotiate the RNAi licensing agreement, and when he attended and contributed to the negotiation meetings.

30. Thus, by acting as agent for and requesting compensation from CytRx in relation to the RNAi licensing deal while having official responsibility for and participating in the matter as a UMMS consultant as described above, Grossman violated § 4(a) and (c) on several occasions.

*Section 6*

31. G.L. c. 268A, § 6 prohibits a state employee from participating in a particular matter in which, to his knowledge, he has a financial interest.

32. As noted above, Grossman participated as a state employee in the RNAi licensing particular matter by attending and contributing to the negotiations as a UMMS consultant.

33. When he so participated, Grossman knew that he had a financial interest in the matter because his consulting contract with CytRx called for him to receive compensation for his work regarding the RNAi matter, and a success fee based on the outcome of the deal.

34. Thus, by participating in the RNAi licensing particular matter when he knew that he had a financial

interest in the matter, Grossman violated § 6 on several occasions.

### Resolution

In view of the foregoing violations of G.L. c. 268A by Grossman,<sup>2/</sup> the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Grossman:

- (1) that Grossman pay to the Commission the sum of \$10,000 as a civil penalty for violating the above-mentioned sections of G.L. c. 268A;
- (2) that Grossman complies with the Memorandum of Clarification between RGA and UMMS; and
- (3) that Grossman waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

**DATE: June 9, 2005**

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<sup>1/</sup> Section 1(o) further provides, “For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special state employee shall be in such a status on days for which he is not compensated as well as on days on which he earns compensation.”

<sup>2/</sup> There is evidence that the UMMS Executive Director of the Office of Technology Management—who had signed RGA’s consulting contract with UMMS—was aware that Grossman also had a contractual arrangement with CytRx, and was aware that Grossman was acting on behalf of both parties in attempting to facilitate the licensing agreement.

Nevertheless, the Commission does not find the executive director’s knowledge mitigating. Grossman’s conduct in being a double agent violates the conflict-of-interest law. When other UMMS officials learned of and reviewed the situation, UMMS decided to terminate the executive director because he had shown bad judgment in allowing Grossman to serve both sides of the table. Moreover, for § 6 purposes, a hiring official’s knowledge of a conflict is not enough. Section 6 requires that a public employee’s appointing authority make a written determination regarding the propriety of the employee’s participation. In this case, the executive director may have known of the situation, but he did not make a written determination allowing Grossman to participate on behalf of UMMS. It was Grossman’s responsibility to see that this procedure was followed by filing a written disclosure with the executive director that would have commenced a formal, written determination process. *See In re Hanlon*, 1986 SEC 253 (strict compliance with the written disclosure and authorization provisions of § 6 ensure that all due consideration is given to issues that may be controversial or have the potential for abuse; ultimately, the primary responsibility for compliance rests on the public employee seeking the exemption). As to the § 4 violation, the executive director had no authority to permit the dual agency in direct contravention of the conflict-of-interest law.

## COMMONWEALTH OF MASSACHUSETTS STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY  
DOCKET NO. 715

IN THE MATTER  
OF  
PAUL R. MURPHY

### DISPOSITION AGREEMENT

The State Ethics Commission and Paul R. Murphy (“Murphy”) enter into this Disposition Agreement pursuant to Section 5 of the Commission’s Enforcement Procedures. This Agreement constitutes a consented-to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, § 4(j).

On November 12, 2003, the Commission initiated, pursuant to G.L. c. 268B, § 4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Murphy. The Commission has concluded its inquiry and, on August 3, 2004, found reasonable cause to believe that Murphy violated G.L. c. 268A, §§ 19 and 23.

The Commission and Murphy now agree to the following findings of fact and conclusions of law:

### Background Facts

1. Murphy was during the time relevant a City of Salem (the “City”) police captain. As such, Murphy was a municipal employee as that term is defined in G.L. c. 268A, §1. In September 2003 Murphy was terminated as a Salem police officer. He is currently appealing that termination with the Civil Service Commission and is now retired.

2. Murphy was the Salem Police Department’s (the “Department”) executive officer. As such he was second in command after the chief.

3. During the time relevant, Murphy’s daughter Patricia was first a reserve officer and then permanent patrol officer in the Department. In June 2004 Patricia was terminated as a Salem Police officer. She, too, is currently appealing that termination with the Civil Service Commission.

### A. Intervening in Police Academy Issue

#### *Findings of Fact*

4. In early July 2000, the Department received authorization to hire three full-time permanent police officers. Successful completion of the police academy is a prerequisite for such appointments. The next scheduled

academy began on July 31, 2000. The Department screened five reserve officers, including Patricia, to fill the three slots. Patricia would have been selected because of her ranking on the civil service list if she successfully passed the screening. (The screening included background medical and psychological clearance requirements as well as a physical agility test.)

5. On July 11, 2000, Lt. Mary Butler, who was overseeing the screenings of the five reserve officers (the "Lieutenant"), informed Patricia that she was missing medical information that was necessary to clear her to take the physical agility test. Patricia was scheduled to take the test the next day, July 12, 2000. Passing the physical agility test is required for the police academy. The lieutenant informed Patricia that Patricia needed to obtain that information herself immediately.

6. Shortly thereafter, Patricia told Murphy about the need for information.

7. The Department's standard practice was to have the candidate get the records.

8. On July 12, 2000, Murphy came into the Lieutenant's office to complain that the Department should be doing more to assist the candidates than was being done. Because of Murphy's intervention, the Lieutenant agreed to have the Department try to get the records.

9. The records were obtained by Patricia and Patricia took and passed the physical agility test on July 12, 2000.

10. The Department has all reserve officer applicants undergo a psychological evaluation before they become reserve officers. In addition, the Department had recently adopted a policy requiring that the psychological evaluation be updated for any reserve officer who was going to go to the police academy if the existing evaluation was more than six months old.

11. On July 15, 2000, Patricia sat for her evaluation update with the Department's psychologist. Her previous evaluation was done five years earlier when she became a reserve officer.

12. The Department's psychologist decided he needed records from two doctors who previously treated Patricia before he would approve Patricia going to the academy. The Department had Patricia execute releases for her records from these doctors.

13. The Department had set July 19, 2000 as the deadline for candidates to have submitted all their necessary information for the academy.

14. Neither the Lieutenant nor Patricia was able to timely obtain the necessary information. Consequently, on July 19, 2000, the Lieutenant informed Patricia that she would not be attending the July 2000 police academy, and therefore would not receive one of the full-time appointments. Meanwhile, Patricia had quit her job in the private sector in anticipation of attending the academy and receiving a full-time appointment.

15. Shortly after learning that she would not be attending the police academy, Patricia informed Murphy that she had just been notified that she would not be attending the academy.

16. Murphy, as the Department executive officer, was acting-chief at the time because the Chief was on vacation.

17. Murphy immediately called the Lieutenant and complained about how the Department was handling the matter. Murphy observed that the Department had made exceptions to various certification requirements in the past.

18. Murphy then called the Chief, who was in Maine on vacation and communicated a similar complaint, again observing that exceptions had been previously granted.

19. According to Murphy, he does not recall calling Chief St. Pierre in Maine on the evening of July 19, 2000.

20. Chief St. Pierre remembers Murphy calling him in Maine during the evening of July 19, 2000. The Lieutenant also states that, after she had called the Chief in Maine on July 19, 2000, the Chief later called her that same evening and told her that Murphy had called him.

21. The Department phone records show that on July 19, 2000, two calls were placed from the Department to Chief St. Pierre's vacation home in Maine. The first occurred at 5:55 p.m. and lasted for 11 minutes. The second occurred at 8:22 p.m. and lasted for 17 minutes.

22. The Lieutenant and the Chief each inferred from their respective telephone conversations with Murphy that Murphy was asking that the decision be changed. The Chief and the Lieutenant based their conclusion on the fact that Murphy referenced prior accommodations having been made for candidates in similar circumstances.

23. Becoming a full-time permanent police officer would have given Patricia a pay increase and enhanced benefits in comparison with being a reserve officer.

### *Conclusions of Law*

24. Section 19 prohibits a municipal employee from participating<sup>1/</sup> as such in a particular matter<sup>2/</sup> in which to his knowledge he or an immediate family<sup>3/</sup> member, such as a daughter, has a financial interest.

25. As set forth above, the Department's decisions regarding who would be sent to the police academy and under what conditions were particular matters.

26. Murphy participated as a police captain in each of those particular matters by, as described above, (a) on July 12, 2000 asking the Lieutenant to assist Patricia in obtaining the medical information, and (b) by on July 19, 2000 communicating concerns to both the Lieutenant and the Chief about the decision that Patricia would not be allowed to attend the police academy and asking each of them to make an exception to the psychological evaluation update requirement so that Patricia could attend that academy. Patricia had a financial interest in these decisions because her becoming a permanent police officer would involve a salary increase and other enhanced benefits. Murphy knew of those financial interests when he so participated.

27. As his daughter, Patricia was an immediate family member within the meaning of § 19.

28. Therefore, by participating as a police captain in particular matters involving his daughter's financial interests, Murphy violated § 19 on each such occasion.

### **B. May 2001 Seniority Issue**

#### *Findings of Fact*

29. In April 2001, Patricia and another officer entered the police academy. The Chief planned to make three full-time permanent appointments in or about May 2001. He planned to appoint Patricia and the other officer attending the academy, and a third officer who had just been appointed a reserve officer, but had already successfully completed the academy. Had the Chief made the three appointments in May 2001, this third officer would have had seniority rights over Patricia. The effective date of his appointment would have been immediate because he had already completed the academy. Patricia's and the other officer's full-time appointment would not have taken effect until they successfully completed the academy, which would not be until approximately September of 2001.

30. In or about May 2001 Murphy intervened with the Chief just prior to the Chief making the appointments. Murphy questioned the fairness of giving the third officer (who had completed the academy)

seniority over Patricia, since Patricia had been a reserve officer for five years and the third officer had just been appointed a reserve officer. The Chief found Murphy's fairness argument to be persuasive. Consequently, the Chief held off making the appointments until October 2001, with all three officers having an effective appointment date of September 11, 2001. The effect of this was that Patricia, who was ranked higher on the civil service list than the third officer, became senior to that officer.

31. Seniority is important because shift bidding, overtime, details, and layoffs are all determined based on seniority. Therefore, Patricia had a financial interest in this decision by the Chief as to when he made these appointments.

32. Murphy knew of Patricia's financial interest in the appointment decision as described above at the time he asked the Chief to change his plans and defer the appointments.

### *Conclusions of Law*

33. The Chief's decision as to when to appoint the three officers was a particular matter.

34. Murphy participated in that matter by asking the Chief to defer the decision.

35. Patricia was an immediate family member within the meaning of §19.

36. Patricia had a financial interest in the particular matter because she would receive increased pay and benefits.

37. Murphy knew of this interest when he so participated.

38. Therefore, by so acting Murphy violated § 19.

### **C. Accessing Confidential Information**

#### *Findings of Fact*

39. In April 2002, Patricia filed a harassment complaint against two superior officers regarding comments they made about Patricia dating another police officer. The Department's sexual harassment officer, Lt. Mary Butler, conducted an internal investigation of the complaint. In a report dated April 15, 2001, the Lieutenant substantiated the facts in the complaint, but found that the conduct did not rise to the level of sexual harassment.

40. On April 29, 2002, all captains were given a copy of the Lieutenant's report.

41. On April 30, 2002, the Chief and Murphy met to discuss the Lieutenant's report. officers.

42. The Patrol Division Commander, who was a police captain (the "Captain"), also investigated the complaint to determine whether the two officers were following proper supervisory procedures in dealing with Patricia. In early May 2002 he issued a report finding there were supervisory deficiencies.

43. Sometime after this April 30<sup>th</sup> meeting, Murphy accessed the Lieutenant's investigative file regarding Patricia's complaint by using his master key to enter the Lieutenant's locked office. He did so to see if he could uncover any evidence that the Lieutenant was biased against Patricia. Murphy found one document in the Lieutenant's file that he copied by hand, indicating that the Lieutenant was against restoring to Patricia certain vacation days taken while the harassment investigation was pending. Murphy believed this demonstrated bias by the Lieutenant against Patricia. Murphy also took note of the presence in the file of the Chief's May 10, 2002, letter to Patricia informing her of the results of the Captain's internal investigation. Murphy did not remove any documents from the file.

44. On June 4<sup>th</sup> and June 5, 2002, Murphy spoke to the Chief about Patricia's complaint. Murphy questioned the Lieutenant's objectivity and possible bias against Patricia. Murphy also observed that Patricia never received the Chief's May 10, 2002 letter. The Chief questioned Murphy about his knowing this information. Murphy stated that he learned the information by reviewing the Lieutenant's investigative file.

45. The sexual harassment file was confidential pursuant to the Department's Sexual Harassment Policy. Murphy had no legitimate official reason for accessing the file. He did so for personal reasons.

#### *Conclusions of Law*

46. Section 23(b)(2) prohibits a municipal employee from knowingly or with reason to know using or attempting to use his official position to secure an unwarranted privilege of substantial value not otherwise properly available to similarly situated people.

47. Obtaining confidential police department personnel or investigative information for a personal purpose – to be used in trying to advance or protect a family member's interests – is an unwarranted privilege of indeterminable but substantial value.

48. Murphy used his official position as executive officer to obtain this access.

49. This privilege was not otherwise properly available (for private purposes) to similarly situated

50. Murphy knew or had reason to know that accessing the confidential file by using his official position was a privilege not otherwise properly available (for private purposes) to similarly situated officers.

51. Therefore, Murphy violated § 23(b)(2) by so acting.

#### **Resolution**

In view of the foregoing violations of G.L. c. 268A by Murphy, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Murphy:

- (1) that Murphy pay to the Commission the sum of \$6,000 as a civil penalty for his several violations of G.L. c. 268A; and
- (2) that Murphy waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

**DATE:** June 27, 2005

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<sup>1/</sup> "Participate" means to 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).

<sup>2/</sup> "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).

<sup>3/</sup> "Immediate family," the employee and his spouse, and their parents, children, brothers and sisters. G.L. c. 268A, § 1(e).

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**COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION**

**SUFFOLK, ss.COMMISSION ADJUDICATORY  
DOCKET NO. 05-0002**

**IN THE MATTER  
OF  
KEVIN F. CAPALBO**

**DISPOSITION AGREEMENT**

The State Ethics Commission and Kevin F. Capalbo enter into this Disposition Agreement pursuant to Section 5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented-to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, § 4(j).

On December 16, 2003, the Commission initiated, pursuant to G.L. c. 268B, § 4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Capalbo. The Commission has concluded its inquiry and, on June 2, 2005, found reasonable cause to believe that Capalbo violated G.L. c. 268A.

The Commission and Capalbo now agree to the following findings of fact and conclusions of law.

**Findings of Fact**

1. At the time relevant, Capalbo was a member of the Shrewsbury Planning Board, having begun his service on the board in June 2002.

2. Between June 2002 and October 3, 2002, the Shrewsbury Planning Board conducted a public hearing on a 15-lot subdivision known as Park Grove Farm.

3. On the morning of October 3, 2002, Capalbo's wife was driving her car through a parking lot in Shrewsbury when she hit a metal pipe. The parking lot was unpaved, and the pipe was twisted and not easily visible.

4. The parking lot in question was owned by Robert Cole, one of the developers of the Park Grove Farm subdivision.

5. On the evening of October 3, 2002, Cole appeared before the Planning Board for the continued public hearing on the Park Grove Farm subdivision. After the hearing closed, the board, including Capalbo, voted to approve the subdivision plan, subject to 28 conditions. This meant that the Planning Board would continue to supervise and monitor the construction of the subdivision throughout its construction to ensure compliance with the imposed conditions.

6. Capalbo did not learn of the damage to his wife's car until after the October 3, 2002 Planning Board meeting. Upon learning of the damage, Capalbo reported the incident to his insurance company, at which time he was informed that his deductible was \$500.

7. After calling the insurance company, Capalbo called Cole and asked him to pay the \$500 deductible. Cole declined to pay the money and invited Capalbo to sue him. Capalbo told Cole that he wasn't looking to sue, that he just wanted to have his wife's car fixed. He stated that Cole should take responsibility for the deductible because the damage had occurred on Cole's property. They ended their conversation without reaching an agreement.

8. Capalbo called Cole a few weeks later to discuss the issue further. Cole agreed to pay the \$500 for the damage to Capalbo's wife's car.

9. The insurance company later provided Capalbo with a check for \$383.38, representing the difference between the cost to repair the damage (\$883.38) and Capalbo's \$500 deductible.

10. On November 2, 2002, Capalbo sent Cole a letter requesting that Cole pay his auto mechanic the \$500 directly. Attached to the letter was an October 30, 2002 invoice from the auto mechanic indicating a balance due of \$500.

11. In the meantime, there had been a number of complaints from neighbors regarding the work being done at the subdivision site and the condition of the street. Capalbo was aware of these complaints.

12. Despite Cole's agreement to pay Capalbo's auto mechanic, the auto mechanic informed Capalbo shortly after November 2, 2002 that Cole had not yet paid the outstanding \$500 balance. Capalbo informed the auto mechanic that he would contact Cole to inquire as to the payment status.

13. Over the course of the following week, Capalbo attempted, although unsuccessfully, to contact Cole by telephone. Unable to reach Cole by telephone, Capalbo visited the Park Grove Farm subdivision site on or about November 8, 2002 to speak with Cole personally. Cole was not at the site when Capalbo showed up. Capalbo spoke with Cole's foreman, asked the foreman to have Cole call him, and gave the foreman his contact information.

14. Although, at the time, the Planning Board chair encouraged the Planning Board members to visit subdivision sites to familiarize themselves with the state of the developments, Capalbo did not go to the site as a Planning Board member. Rather, Capalbo went to the

site to talk to Cole about the \$500, which Cole had agreed to pay but had not yet paid.

15. The foreman informed Cole of Capalbo's visit to the site and his request that Cole call him.

16. On November 19, 2002, Cole paid Capalbo's auto mechanic \$500.

17. According to Cole, he paid Capalbo the \$500 because he felt that, as a result of all of his contacts with Capalbo—especially Capalbo's visit to the subdivision on November 8<sup>th</sup>—Capalbo was linking his request for the payment to his role as a Planning Board member vis-à-vis the Planning Board's oversight of the outstanding subdivision issues.

18. Capalbo never stated to Cole that Capalbo's actions as a Planning Board member were dependent upon Cole's paying him the \$500.

19. Thereafter, Capalbo continued to participate as a Planning Board member in matters concerning the Park Grove Farm subdivision.

20. The Commission received no evidence that Capalbo as a Planning Board member ever showed favor or disfavor towards Cole and/or the Park Grove Subdivision.

### **Conclusions of Law**

21. As a Shrewsbury Planning Board member, Capalbo was a municipal employee within the meaning of G.L. c. 268A.

22. Section 23(b)(3) prohibits a municipal employee from, knowingly or with reason to know, acting in a manner which would cause a reasonable person, knowing all of the facts, to conclude that anyone can improperly influence or unduly enjoy that person's favor in the performance of his official duties. This subsection goes on to provide that the appearance of impropriety can be avoided if the public employee discloses in writing to his appointing authority all of the relevant circumstances which would otherwise create the appearance of conflict.

23. After Capalbo's wife had damaged her car and Capalbo had asked Cole to pay the \$500 deductible, Capalbo continued to participate as a Planning Board member in matters concerning the Park Grove Farm subdivision.

24. When he participated in these matters, Capalbo knew or had reason to know that he was creating an appearance of impropriety by performing his Planning Board duties regarding the subdivision after having asked

Cole for the \$500 deductible.

25. The Commission finds this appearance of impropriety troubling where Capalbo visited the subdivision site to talk to Cole about the \$500 while having oversight duties as a Planning Board member regarding the subdivision.

26. Thus, Capalbo knew or had reason to know that he was acting in a manner which would cause a reasonable person, knowing all of the relevant facts, to conclude that if Cole agreed to and paid Capalbo's insurance deductible, Cole could improperly influence or unduly enjoy Capalbo's favor in the performance of Capalbo's official duties relating to the subdivision. Thus, Capalbo violated § 23(b)(3).

27. Capalbo did not file any written disclosure to dispel this appearance of impropriety.<sup>1/</sup>

### **Resolution**

In view of the foregoing violations of G.L. c. 268A by Capalbo, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Capalbo:

- (1) that Capalbo pay to the Commission the sum of \$1,000 as a civil penalty for violating § 23(b)(3) of G.L. c. 268A; and
- (2) that Capalbo waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

**DATE:** August 1, 2005

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<sup>1/</sup> According to Capalbo, he verbally disclosed his wife's car accident to the Planning Board chairman and was told by the chairman that the issue was a private matter. The chairman, however, would not confirm that this conversation occurred.

**COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION**

**SUFFOLK,ss. COMMISSION ADJUDICATORY  
DOCKET NO. 05-0003**

**IN THE MATTER  
OF  
JOSEF FRYER**

**DISPOSITION AGREEMENT**

The State Ethics Commission and Josef Fryer enter into this Disposition Agreement pursuant to Section 5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented-to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, § 4(j).

On September 29, 2004, pursuant to G.L. c. 268B, § 4(a), the Commission initiated a preliminary inquiry into possible violations of the conflict-of-interest law, G.L. c. 268A, by Fryer. The Commission has concluded its inquiry and, on May 5, 2005, found reasonable cause to believe that Fryer violated G.L. c. 268A, § 19.

The Commission and Fryer now agree to the following findings of fact and conclusions of law:

**Findings of Fact**

1. Fryer has been the Town of Dover's municipal well inspector for approximately 20 years. As the well inspector Fryer is a municipal employee as that term is defined in G.L. c. 268A, § 1(g).

2. Fryer is appointed well inspector by and reports to the Board of Health ("BOH").

3. As the well inspector, Fryer is a part-time employee. He does not have set hours; rather, he works on and is paid on a per-job basis. Depending on the number of inspections in a given year, Fryer's income as the well inspector has ranged from approximately \$3,000 to \$10,000 annually.

4. Fryer is a one-third owner of Dover Water Company ("Dover Water"), a private family business that supplies water services. His siblings, a brother and a sister, own the remaining two-thirds of the company. Dover Water provides water to approximately 500 homes in Dover. Fryer serves as the salaried superintendent for Dover Water. Fryer's sister runs Dover Water's day-to-day operations.

5. Dover Water's average customer's annual water bill is approximately \$520. Dover Water makes a profit of approximately \$60 per customer per year.<sup>1/</sup>

6. Over the last several years, on average, two Dover Water customers a year applied to the BOH for permits to dig their own wells. If successful, these applicants would receive water from their own wells and would no longer do business with Dover Water. If unsuccessful, they would have to stay with Dover Water and continue to pay the company for their water.

7. These well applications from Dover Water customers, like all well applications, were filed with Fryer as the BOH agent under standard operating procedure. Fryer reviewed each application to make sure the proposed well complied with codes and regulations, primarily set-back regulations. Fryer stamped his approval once all of the basic information on the application conformed to the applicable regulations and the permit application moved forward to the BOH. Once the application had Fryer's stamp of approval, the homeowner arranged for a driller to come in. Fryer met with the driller at the work site to make sure that the actual well-placement matched the placement on the application. A pump test was done for water volume and water quality once the well was drilled. If the pump test passed, Fryer gave approval to connect the well to the house. When Fryer found a problem with the application or well, he asked the applicant for more information or to correct the issue. If the application did not conform to applicable regulations, it was up to the applicant to fix the problem or take the matter to the BOH directly. Fryer does not have the authority to deny a well permit; only the BOH can do so.

8. The BOH receives reports on Fryer's work but does not actively supervise him.

9. The BOH had general knowledge about Fryer's connection to Dover Water, but there were no written disclosures or determinations by the BOH allowing Fryer to participate as the town's well inspector in matters involving Dover Water customers. Fryer did not file any written disclosures specifically addressing his official involvement with applications involving Dover Water customers.

**Conclusions of Law**

10. Section 19 of G.L. c. 268A prohibits a municipal employee from participating<sup>2/</sup> as such an employee in a particular matter<sup>3/</sup> in which, to his knowledge, he or an immediate family<sup>4/</sup> member has a financial interest.<sup>5/</sup>

11. As the well inspector, Fryer is a municipal employee pursuant to G.L. c. 268A, § 1.

12. A decision as to whether a well permit application complies with codes and regulations is a particular matter. The determinations at the site that the

well-placement matches the placement on the application and the approval to connect the well to the house are also particular matters.

13. Fryer participated in such particular matters by reviewing the permit applications, inspecting the proposed well sites, determining whether the proposed wells complied with codes and regulations and approving the permit applications to move forward to the BOH.

14. Where Fryer's company stood to lose money each time a time a Dover Water customer applied for and received a permit to dig a well, Fryer had a financial interest in these particular matters. In addition, where his siblings own two-thirds of Dover Water, they also have a financial interest in such particular matters. Fryer knew of these financial interests when he so participated.

15. Accordingly, by so participating in these particular matters concerning Dover Water customers, Fryer repeatedly violated § 19.

16. The conflict-of-interest law provides an exemption that allows a municipal employee to participate if the municipal employee makes a full written disclosure to and receives a written determination in advance from his appointing authority, the BOH.<sup>6/</sup> While the BOH members were aware that Fryer was somehow involved with Dover Water, no written disclosures or determinations were made nor did the BOH know of the extent of Fryer's involvement with the company when he was participating as the well inspector in matters affecting Dover Water customers.

### Resolution

In view of the foregoing violations of G.L. c. 268A by Fryer, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Fryer:

- (1) that Fryer pay to the Commission the sum of \$2,000 as a civil penalty for repeatedly violating G.L. c. 268A, § 19;
- (2) that Fryer cease and desist from violating G.L. c. 268A, § 19 by either abstaining from participating in particular matters in which he, an immediate family member or Dover Water has a financial interest or by securing an exemption under § 19(b)(1); and
- (3) that Fryer waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may

be a party.

**DATE:** August 2, 2005

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<sup>1/</sup> Dover Water prices, like all water business, are regulated by the Department of Telecommunications and Energy ("the DTE"). The DTE sets the water rates; Dover Water is allowed to make a 10-13% profit.

<sup>2/</sup> "Participate" means to 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).

<sup>3/</sup> "Particular matter" means 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).

<sup>4/</sup> "Immediate family" means the employee and his spouse, and their parents, children, brothers and sisters.

<sup>5/</sup> "Financial interest" means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality. See *Graham v. McGrail*, 370 Mass. 133 (1976). This definition has embraced private interests, no matter how small, which are direct, immediate or reasonably foreseeable. See *EC-COI-84-98*. The interest can be affected in either a positive or negative way. *EC-COI-84-96*.

<sup>6/</sup> Section 19(b)(1) provides an exemption when:

the municipal employee first advises the official responsible for appointment to his position of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives in advance a written determination made by that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee.

**COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION**

**SUFFOLK, ss.COMMISSION ADJUDICATORY  
DOCKET NO. 05-0006**

**IN THE MATTER  
OF  
JAMES BYRNE**

**DISPOSITION AGREEMENT**

This Disposition Agreement is entered into between the State Ethics Commission and James Byrne pursuant to Section 5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented-to final order enforceable in Superior Court, pursuant to G.L. c. 268B, § 4(j).

On May 12, 2004, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Byrne. The Commission concluded its inquiry and, on July 26, 2005, found reasonable cause to believe that Byrne violated G.L. c. 268A, § 3.

The Commission and Byrne now agree to the following findings of fact and conclusions of law:

**Findings of Fact**

1. Byrne is the president and co-owner of Construction Monitoring Services, Inc. ("CMS"). CMS works as a consultant to oversee design and construction on municipal building projects.

2. In 2002, the Old Rochester Regional School District (the "District") contracted with CMS to be the project manager for the expansion of the junior-senior high school (the "Project").

3. At all relevant times, Steven Shiraka was the facilities and grounds manager for the District. Shiraka was listed as an "advisor" on the Project and acted as the school superintendent's project manager in overseeing the Project. As such, Shiraka attended every job and construction meeting and reported back to the school superintendent on a regular basis on the Project's progress, including evaluating CMS' work performance.

4. On at least two occasions during late 2002, Shiraka made negative reports to the Superintendent regarding CMS' performance on the Project. As a result of those reports, the Superintendent approached Byrne with Shiraka's concerns making it clear that CMS' performance had to improve.

5. In winter 2002, CMS planned a ski outing for

its employees that included weekend accommodations, lift tickets and ski lessons. Shortly after the Superintendent's conversation with Byrne, Byrne at the Project site approached Shiraka and offered to pay for Shiraka and his family to go on the ski weekend. The cost of the weekend was approximately \$500. Shiraka declined Byrne's offer.

6. At the time of the ski trip offer, Shiraka's reporting responsibilities were ongoing and had the potential to continue to significantly impact CMS' work on the Project, costs, and through the District, could affect CMS' payment for their work.

**Conclusions of Laws**

7. General Laws chapter 268A, § 3(a) prohibits anyone, otherwise than as provided by law for the proper discharge of official duty, from directly or indirectly giving or offering anything of substantial value to any public employee for or because of any official act performed or to be performed by such employee.

8. As the District's facilities and grounds manager, Shiraka was a public employee.

9. CMS's contract with the District to be the project manager for the Project was a particular matter. Shiraka's regular reports to the school superintendent on CMS' work on the Project were official acts. Shiraka's reports significantly impacted CMS' work on the Project and could ultimately affect its costs and receipt of payment on the contract.

10. An expense paid ski weekend for a family is an item of substantial value.

11. In offering the ski trip to Shiraka, Byrne intended to influence Shiraka as to the tenor and substance of Shiraka's future reports as to CMS' job performance.

12. By so offering an expense-paid family ski weekend to Shiraka, Byrne offered something of substantial value to a public employee for or because of official acts to be performed by Shiraka. The free ski weekend was not otherwise provided by law for the proper discharge of official duties. Therefore Byrne violated G.L. c. 268A, § 3(a) by making the offer.

**Resolution**

In view of the foregoing violation of G.L. c. 268A by Byrne, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Byrne:

(1) that Byrne pay to the Commission the sum of

\$2,000.00 as a civil penalty for violating G.L. c. 268A, § 3(a); and

- (2) that he waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

**DATE:** November 15, 2005

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**COMMONWEALTH OF MASSACHUSETTS  
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION ADJUDICATORY  
DOCKET NO. 05-0007**

**IN THE MATTER  
OF  
JOHN R. LLEWELLYN**

**DISPOSITION AGREEMENT**

This Disposition Agreement is entered into between the State Ethics Commission and John R. Llewellyn pursuant to Section 5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented-to final order enforceable in Superior Court, pursuant to G.L. c. 268B, §4(j).

On June 22, 2005, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Llewellyn. The Commission concluded its inquiry and, on September 21, 2005, found reasonable cause to believe that Llewellyn violated G.L. c. 268A, §20.

The Commission and Llewellyn now agree to the following findings of fact and conclusions of law:

**Findings of Fact**

1. Llewellyn has been a police officer with the Rockland Police Department (RPD) since 1988. The RPD promoted Llewellyn to patrol sergeant in 1997.

2. In 1999, Llewellyn was elected to the Board of Selectmen. Llewellyn served two terms as a selectman for a total of six years. He left the Board in April, 2005.

3. Section 20 of the conflict of interest statute, G.L. c. 268A, generally prohibits a municipal employee, such as a selectman, from having a financial interest in a contract with the same municipality. Llewellyn relied on the selectmen's exemption to §20 to continue to hold his paid patrol sergeant position in the RPD while he served as a selectman. The selectman's exemption, however, prohibits a selectman from being appointed to any additional municipal position while he is a selectman or for six months thereafter.

4. On or about September 24, 2004, Llewellyn contacted the State Ethics Commission and asked whether, as a selectman, he was eligible for promotion to deputy chief in the RPD.

5. The Commission advised Llewellyn that the § 20 selectman's exemption made him ineligible for an additional position, such as deputy chief, while he was a selectman or for six months thereafter.

6. Llewellyn understood that § 20 did not permit him to accept an additional position.

7. In late December, 2004, the RPD chief offered Llewellyn the deputy chief position.

8. Llewellyn accepted the offer in late December, 2004. The promotion went into effect January, 2005.<sup>1/</sup>

9. After accepting the position, Llewellyn sought to resign from the Board of Selectmen. After learning of the costs involved for holding a special election to fill a selectman vacancy, Llewellyn decided to stay on the Board until April, 2005, when the next election was scheduled to occur.

10. Llewellyn left the Board shortly before the April, 2005 election.

**Conclusions of Law**

11. Section 20 of G.L. c. 268A prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, in which the same city or town is an interested party of which financial interest the employee has knowledge or reason to know, unless an exemption applies. The selectmen's exemption to §20, in relevant part, provides the following: "This section shall not prohibit an employee or an official of a town from holding the position of selectman in such town nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office; provided, however, that such selectman shall not, except as hereinafter provided, receive compensation for more than one office or position held in a town, but shall have the right to choose which compensation he

shall receive; provided, further, that no such selectman may vote or any on any matter which is within the purview of the agency by which he is employed or over which he has official responsibility; and, provided further, that no such selectman shall be eligible for appointment to any such additional position while he is still a member of the board of selectmen or for six months thereafter.”

12. As a patrol sergeant and as a selectman, Llewellyn was at all relevant times a municipal employee as that term is defined in G.L. c. 268A, §1.

13. Section 20 prohibited Llewellyn, as a Rockland selectman, from having a financial interest in his RPD patrol sergeant contract unless he complied with the selectman’s exemption.

14. The selectman’s exemption to §20 permits a municipal employee to keep his original, paid, position with the town. Additionally, the selectman’s exemption permits a municipal employee to be reappointed to that *same* municipal position.

15. Thus, Llewellyn could keep his original RPD patrol sergeant’s position while serving as a selectman. Additionally, he could be reappointed to that same position while he was serving as selectman.

16. The selectman’s exemption, however, prohibits a municipal employee who is elected to the Board of Selectmen from being eligible for appointment or re-appointment to a *new* position while he serves on the Board of Selectmen or for six months thereafter. The deputy chief position was such a new position.

17. Therefore, Llewellyn violated § 20 by accepting a promotion to deputy chief while he was still a selectman.

### **Resolution**

In view of the foregoing violation of G.L. c. 268A by Llewellyn, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Llewellyn:

- (1) that Llewellyn pay to the Commission the sum of \$2,000.00 as a civil penalty for violating G.L. c. 268A, §20;
- (2) that Llewellyn resign his position as deputy chief in the Rockland Police Department within 30 days of the time this Disposition Agreement is executed by the Commission through its Executive Director<sup>2/</sup>;

- (3) that Llewellyn waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

**DATE:** December 19, 2005

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<sup>1/</sup> By accepting the promotion to deputy chief, the Commission recognizes that Llewellyn may earn less money. He received, however, significant benefits by accepting the promotion, including being assigned to work regular, day shift hours, as well as being in a better position to eventually become chief.

<sup>2/</sup> Llewellyn will be eligible for reappointment to the deputy chief position six months from the date he left the Board of Selectmen.

## State Ethics Commission

Room 619

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