

ADVICE



EDUCATION



DISCLOSURE



ENFORCEMENT

2006 Advisory Opinions Enforcement Actions

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In the Matter of John Doe, 2006 SEC (page number).

Typographical errors in the original texts of Commission documents have been corrected.

State Ethics Commission

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**Summaries of Advisory Opinions
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EC-COI-06-1 - In order to serve as a foster/pre-adoptive parent, adoptive parent or guardian and receive the corresponding payments for those programs, a state employee will need to qualify for an exemption under § 7 of G.L. c. 268A. Many state employees are eligible for one of the available exemptions. Full-time DSS employees and part-time DSS employees who are not special state employees, however, do not qualify for any exemption under § 7. Thus, in order for these employees to participate in the DSS programs the creation of an additional exemption in § 7 is necessary. All special state employees employed by DSS may use the § 7(e) exemption. All other full-time and part-time state employees who are not special state employees, are generally eligible for the § 7(b) exemption. However, under § 7(b), those state employees may receive compensation from DSS, other than reimbursement, for not more than 500 hours during a calendar year. Compensation for more than 500 hours will require the creation of an additional exemption in § 7. Special state employees not employed by DSS may use the § 7(d) exemption. The Commission is concerned about the impact that the application of the conflict of interest law would have on these children and their foster/adoptive parents or guardians in these circumstances. Therefore, in accordance with its power to prescribe and publish regulations providing for reasonable exemptions from the conflict of interest law, the Commission intends to issue a regulation that will allow DSS employees for whom no statutory exemption applies, to serve as foster/pre-adoptive parents, adoptive parents and guardians and to receive the applicable payments for such service.

EC-COI-06-2 - The Hampshire Council of Governments is a “county agency” for purposes of G. L. c. 268A and a “governmental body” as defined in G. L. c. 268B. The Franklin Regional Council of Governments is a “municipal agency” for the purposes of G. L. c. 268A.

EC-COI-06-3 - Where a state board member is also a municipal employee, the municipality’s financial interest in a particular matter before the state board will not, in and of itself, bar the state board member from participating as such in the particular matter, because a municipality is not a business organization within the meaning of G. L. c. 268A. In the current opinion, the Commission reversed its prior rulings, to the extent that they hold otherwise, that a municipality is a business organization, which had followed Conflict Opinion No. 613, Attorney General Quinn (1974). The Commission also concluded that counties are not business organizations.

EC-COI-06-4 - The conflict of interest law permits a private nonprofit organization to give, and a public employee who does not regulate or otherwise exercise official power over the giver to accept, an unsolicited, “no strings attached” award of substantial value in *bona fide* recognition of the public employee’s outstanding public service, leadership, dedication or potential. Such an award is not a gift in violation of G. L. c. 268A, § 3 or an unwarranted privilege in violation of § 23(b)(2) of the statute.

**CONFLICT OF INTEREST OPINION
EC-COI-06-1**

FACTS^{1/}

INTRODUCTION

The Department of Social Services (DSS) is the state agency responsible for protecting children in the Commonwealth. Its responsibilities include providing substitute care for children who are unable to remain in their homes. DSS fulfills this responsibility by recruiting, evaluating and training private individuals to become foster parents. If a child is unable to return home, DSS is then responsible for finding permanent families for children in its custody through adoption, guardianship or direct custody through the court. Individuals who serve as foster/pre-adoptive parents, adoptive parents and guardians receive various payments from DSS.

QUESTIONS

1. Does the conflict of interest law, G.L. c. 268A, allow DSS employees to serve as foster/pre-adoptive parents, adoptive parents or guardians for a child in the care or custody of DSS and receive from DSS, the corresponding payments applicable to those programs?

2. May other state employees serve as foster/pre-adoptive parents, adoptive parents or guardians for a child in the care or custody of DSS and receive from DSS, the corresponding payments applicable to those programs?

ANSWERS

In order to serve as a foster/pre-adoptive parent, adoptive parent or guardian and receive the corresponding payments for those programs, a state employee will need to qualify for an exemption under § 7 of G.L. c. 268A.

1. Full-time DSS employees and part-time DSS employees who are not special state employees, do not qualify for any exemption under § 7. Thus, in order for these employees to participate in the DSS programs the creation of an additional exemption in § 7 is necessary. All special state employees employed by DSS may use the § 7(e) exemption.

2. All other full-time and part-time state employees who are not special state employees, are generally eligible for the § 7(b) exemption. However, under § 7(b), those state employees may receive compensation from DSS, other than reimbursement, for not more than 500 hours during a calendar year. Compensation for more than 500 hours will require the creation of an additional exemption in § 7. Special state employees not employed by DSS may use the § 7(d) exemption.

DSS was created by the Legislature in 1978 as the Commonwealth's child protective state agency. Its mandate includes protecting children from abuse or neglect, providing social services to families and their children and providing substitute care for children who are unable to remain safely in their home. On a daily basis, there are approximately 10,000 children in DSS custody who must be placed out of their homes. Most of these children are placed in foster homes.

Most foster care situations are temporary and children eventually return home. However, when a child is unable to return home, DSS is responsible for finding a family with which the child can live permanently through adoption, guardianship or custody to a relative. When DSS is unable to return the child home or to find a permanent family, it tries to find an adult who will make a lifelong connection with the child while DSS assists the child in obtaining independent living skills and supports the child in furthering his education and/or obtaining employment.

Encouraging individuals to become foster or adoptive families is a critical priority of DSS.^{2/} It licenses and approves various foster/pre-adoptive parents and homes in accordance with its written guidelines and standards.^{3/} All foster homes are reevaluated annually. DSS also has a mandatory training program for any individual who wants to serve as a foster/pre-adoptive parent^{4/} in addition to providing continuing training opportunities.

A. DSS Foster Care and Other Programs

Foster parents are responsible for the day-to-day care of the child. They provide the child with a place to live, food and clothing as well as paying for other expenses related to raising the child. DSS, as the child's custodian, delegates most routine decisions to foster parents, but retains decision-making authority on non-routine matters. DSS is also responsible for finding families who will adopt children in its custody who cannot return home. Many foster parents agree to become the child's adoptive parents. However, when a child's current foster home does not wish to adopt the child, DSS will recruit, evaluate and train adoptive families for the child in a process similar to the one used to recruit foster families.

When a child cannot return home and DSS is unable to find an adoptive home, a guardianship is considered. This usually occurs with children who are older (over the age of 12). In most guardianship situations, the foster parent the child has been living with will become the child's guardian.

B. The Foster Parent and Child Specific Agreements with DSS

Once a foster/pre-adoptive applicant has been approved or licensed by DSS and has completed pre-service foster parent training, DSS and the foster/pre-adoptive parent are required to enter into a written agreement.²⁷ The written agreement, entitled “An Agreement Between the Massachusetts Department of Social Services and Foster/Adoptive Parents” (Foster Parent Agreement), must be signed by each foster/adoptive parent and an authorized agent of DSS.²⁸ By its terms, it remains in effect through a person’s career as a foster/adoptive parent unless terminated by either party. It further provides that it will be reviewed and updated as part of the foster/adoptive family re-evaluation process.

The Foster Parent Agreement informs foster/adoptive families of their responsibilities. In particular, it sets forth thirty-one (31) separate provisions that the foster/adoptive parent agrees to perform. With his signature, the foster/adoptive parent certifies that he understands the statement of his responsibilities set forth therein and agrees to the terms listed therein. These provisions include the foster/adoptive parent’s agreement to undertake various responsibilities in the following areas: promoting the child’s well-being and meeting the child’s individual needs, including medical and dental needs (§§ 1-2; 9-12); supporting the reunification of the child with his family and supporting family visits as recommended (§§ 3-4); working with DSS, including the DSS social worker assigned to the family, and participating in various conferences (§§ 6, 8); notifying and informing DSS of various matters (§§ 16-18; 20-22; 25-26); complying with DSS regulations and policies, including notifying it of any overpayments made on the child’s behalf by DSS (§§ 27, 31); and maintaining insurance to cover damage to or loss of the foster/adoptive family’s property caused by a child in DSS care or custody (§ 29).

The Foster Parent Agreement also sets forth twenty (20) separate provisions that DSS agrees to perform. These provisions include certain responsibilities in the following areas: providing families with sufficient information regarding the child prior to placement, so that she or he knowledgeably can determine whether to accept the child and to provide ongoing information (§ 1); providing relevant training programs, social workers, family resource workers and other assistance (§§ 3-5, 20); providing a Medical Passport for the child’s medical and dental expenses (§ 8); delegating certain rights regarding care and school-related activities (§§ 9-11); providing information regarding the procedure for review of DSS decisions (§ 14); informing the foster/adoptive family of the range and frequency of payments he will receive for the care of a child in DSS care or custody (§ 7); and providing limited amounts of reimbursement, secondary to other primary insurance for reimbursement on account of theft of or damage to the foster/adoptive family’s

property that is the result of deliberate, malicious action by a child in DSS care or custody (§ 15).

When a child is actually placed in the foster home with a foster or adoptive parent, another document is signed entitled a “Child Placement Agreement” which provides specific information about the child as well as the specific reimbursement rate. The Child Placement Agreement is a three-part document. The first part is used to provide information to the family with whom the child is placed and/or to assist a family resource social worker in identifying a family for a specific child. The second part is used as the agreement between the family and DSS to document roles and responsibilities involving the placement of a specific child with the family. The third and final part is used to document that the Child Placement Agreement has been reviewed and updated no less than once every six months.

C. Payments from DSS

When a child is placed in a foster/pre-adoptive home, DSS is required among other things, to provide the foster/pre-adoptive parent with any subsidy or benefits to which they are entitled under DSS regulations, standards or policies.²⁹ Foster/pre-adoptive parents receive a daily rate based on the age of a child. They may also receive quarterly clothing allowances, holiday and birthday supplements and are eligible for reimbursement for certain additional out-of-pocket expenses and compensation for providing specific services to a child with special needs.³⁰

Basic Daily Rate

Foster/pre-adoptive parents receive reimbursement for providing foster care at rates established by DSS. All such parents receive a basic daily rate for each child in the home based on the age of the child to cover the child’s living expenses.³¹ Current daily rates range from \$17.10 for the youngest children to \$18.59 for the older children. DSS may also provide foster/pre-adoptive parents with quarterly clothing allowances for foster children in their care¹⁰⁷ in addition to other supplements for birthdays (\$50) and holidays (\$100).¹¹⁷

In addition to the daily rate, DSS has a system of reimbursement for exceptional expenses that foster/pre-adoptive families may incur as well as hourly compensation for specialized services they may provide known as Supplemental Reimbursement.¹²⁷ Supplemental Reimbursement consists of two distinct programs and methods of payment.

Supplemental Reimbursement

1. Receiptable Reimbursement Program

The first type of program is the Receiptable Reimbursement Program. The Receiptable

Reimbursement Program is a receipt-based system which compensates foster/pre-adoptive families for exceptional and essential out-of-pocket costs they incur in the process of meeting a child's identified needs related to the child's service plan goal. The foster/pre-adoptive family is reimbursed in accordance with the program's guidelines and restrictions. Only those items which can be documented with a receipt are eligible for reimbursement.

Types of allowable expenses under the Receiptable Reimbursement Program include: medication, medical supplies and equipment not covered by MassHealth; non-MassHealth reimbursed therapy; child-specific activities/events designed to address identified needs and defined goals in the child's service plan; and child care for special needs children. Non-allowable expenses include: driver education; respite care services; and items/expenses which may be purchased or reimbursed through other state/community agencies. In order to obtain such reimbursement, a parent must submit a Supplemental Reimbursement Request/Agreement with the appropriate documentation. The ability to obtain Receiptable Reimbursement is contingent on the availability of funds within the DSS Area Office's spending limits.

2. P.A.C.T. Program

The second type of program is the Parents and Children Together (P.A.C.T.) Program. The P.A.C.T. Program compensates foster/pre-adoptive families who provide planned, specialized services designed to address identified needs related to achievement of a child's service plan goal. Parents are compensated at the standard hourly rate of \$7.50 for a specified number of hours per week. P.A.C.T. services include providing physical therapy to a child, speech/communication exercises or caring for a child on an apnea monitor. The number of service hours is determined by the child's P.A.C.T. team. A parent must submit a Supplemental Reimbursement Request/Agreement which must be approved by the DSS Area Director. When the number of hours exceeds certain maximum levels specified for the child and for the home, the DSS Regional Director must also approve the request. A foster/pre-adoptive family must document the P.A.C.T. services. The ability to obtain P.A.C.T. payments is contingent on the availability of funds within the DSS Area Office's spending limits.

Adoption Subsidy

DSS operates two adoption subsidy programs to support the adoption of children with special needs: a federally supported program governed by the provisions of Title IV-E of the Social Security Act; and a state-funded program created pursuant to G.L. c. 18B, § 21.^{13/} In both programs, the adoption subsidy consists of financial assistance and/or medical assistance through the state's Division of Medical Assistance and is provided on behalf

of a child with special needs after the child has been adopted.^{14/} Financial assistance is intended to aid in the support of a child with special needs and is paid directly to the adoptive parent.^{15/} Medical assistance is intended to supplement family health insurance for a child with special needs and is paid directly to the vendor according to the rates set forth in the current Division of Medical Assistance fee schedule.^{16/} The adoption subsidy ends when the child turns 18. In exceptional circumstances, it may continue until the child is 21 or 22.

The adoptive parent enters into a written agreement with DSS entitled "Adoption Subsidy Agreement." The Adoption Subsidy Agreement confirms the child's eligibility for a Title IV-E or state adoption subsidy and is effective as of the date accepted by both parties as evidenced by their signatures. Benefits to be provided begin as of the date of the adoption unless DSS determines an earlier start date is in the best interests of the child.^{17/} The Adoption Subsidy Agreement specifies the financial assistance and/or medical assistance the adoptive parents will receive on behalf of the adopted child.

DSS regulations provide that, if requested, it will make a one-time payment to the pre-adoptive parent(s) of a child with special needs as defined in 110 CMR 7.209(2) to reimburse the family for expenses directly related to the child's adoption, provided that the child is adopted through a placement made by DSS or its contracted agency or a licensed non-profit placement agency as defined by G.L. c. 28A, § 9.^{18/} Nonrecurring adoption expenses include reasonable and necessary adoption fees, court costs, attorneys' fees and other costs directly related to the adoption, but do not include out-of-pocket expenses for which the family may be or has been reimbursed by other sources.^{19/}

Guardianship Subsidy

Following the finalization of a guardianship, guardians are provided with a guardianship subsidy to help reimburse the cost of caring for the child. If a child is placed under guardianship and the child does not receive support payments from any other state or federal agency, the child is eligible for continued support payments and/or medical assistance from DSS to the same extent as if the child had remained in foster care.^{20/} If the child is receiving support payments from any other state or federal agency, then the child is eligible for support payments and/or medical assistance from DSS only to the extent that it would raise the total support from all sources to the amount the child would be receiving if he had remained in foster care.^{21/} The guardianship subsidy ends when the child turns 18.

The guardian and DSS enter into an agreement entitled "Application/Agreement for Subsidized

Guardianship” (Guardianship Subsidy Agreement).^{22/} The Guardianship Subsidy Agreement sets forth the amount that DSS will pay per day for the care of the child. The guardianship subsidy begins following the date of the allowance of the guardianship petition and/or termination of foster care payments.

DISCUSSION

Section 7 of G.L. c. 268A, the conflict of interest law, prohibits a state employee^{23/} from having, in addition to his state employee position, a “financial interest, directly or indirectly, in a contract made by a state agency, in which the [state] or a state agency is an interested party.” In order to determine whether a state employee may participate in the various DSS programs, it is necessary to determine whether in doing so, they have a financial interest in a state contract for purposes of § 7.

A. The Contracts

The first issue to address is whether the various DSS Agreements such as the Foster Parent Agreement, Child-Specific Agreement, Adoption Subsidy Agreement and Guardianship Subsidy Agreement (hereinafter referred to collectively for convenience as the “DSS Agreements”) constitute “contracts” for purposes of § 7. “A contract is simply a promise supported by consideration, which arises . . . when the terms of an offer are accepted by the party to whom it is extended.”^{24/} The term includes any type of arrangement between two or more parties under which one party undertakes certain obligations in consideration of the promises made by the other party.^{25/}

The Commission, as well as the courts, “have given the term ‘contract’ a broad meaning to cover any arrangement in which goods or services are to be provided in exchange for something of value.”^{26/} The elements of a contract are offer and acceptance, consideration and mutual assent to essential terms.^{27/} Consideration is “[t]he cause, motive, price, or impelling influence which induces a . . . party to enter into a contract.”^{28/} The requirement of consideration is satisfied if there is either a benefit to the promisor or a detriment to the promisee.^{29/}

Based on these facts, we conclude that the DSS Agreements are contracts for purposes of § 7. There is an offer and acceptance. The element of consideration is also present as a result of the various payments made to foster/pre-adoptive parents in return for their agreement to take responsibility for the day-to-day care and supervision of children in the care or custody of DSS. Consideration is similarly present with the subsidies provided to adoptive parents and guardians for taking legal custody of children formerly in the care or custody of DSS.

Further, we do not consider the various DSS

programs to be the type of government benefit programs that we have previously said do not constitute a contract. In the Commission’s prior opinions that reviewed state benefit programs and discussed whether there was a contract for purposes of § 7, the Commission found that cash grant public assistance program benefits as then existing^{30/} that were administered by state or federal government agencies were not contracts.^{31/} The Commission relied on the fact that none of the program benefits at issue were supported by consideration and each was made available pursuant to statutorily defined criteria and eligibility guidelines.^{32/}

Thus, a recipient was not required to work or otherwise provide any bargained-for exchange in order to receive the benefit to which they were entitled. In that situation, there was no consideration and, therefore, no contract. Although the various DSS programs are similar in one way to such programs because they involve statutorily defined eligibility guidelines in order to serve as a foster/adoptive parent, they are markedly different in that they require the individuals participating in the programs to assume various responsibilities on behalf of DSS in return for which they will receive various payments and ongoing support and training from DSS. In addition, adoptive parents and guardians agree to assume legal responsibility for children formerly in the care or custody of DSS. The DSS Agreements define various rights and duties of both parties. Moreover, the benefits available from DSS are not available simply to those who qualify, but rather only to those who qualify and who then actually provide services to a child currently or formerly in the care or custody of DSS.

B. Financial Interest

Having determined that the DSS Agreements are contracts for the purposes of § 7, we next consider whether the state employees who wish to participate in the various DSS programs will have a financial interest in those contracts.

Each foster/pre-adoptive parent, adoptive parent or guardian is entitled to receive various payments. These payments such as the daily rate, as well as the adoption and guardianship subsidies, are intended to cover the basic living expenses for the care of the child. DSS regulations also provide for a quarterly clothing allowance, a birthday supplement and a holiday allowance to foster/pre-adoptive parents for the purpose of purchasing clothing and gifts for the child. Some foster/pre-adoptive parents may also be entitled to receive additional payments for approved costs and expenses beyond those typically incurred in caring for a child through the Receiptable Reimbursement Program as well as an hourly rate for services provided under the P.A.C.T. Program.

Thus, every individual serving in one of the DSS

programs has an obvious financial interest in receiving the various payments or subsidies from DSS. The financial interest includes those payments meant to reimburse parents for out-of-pocket expenses as well as P.A.C.T. payments made for specific services provided by the foster/pre-adoptive parent to the child.

There are other provisions in the DSS Agreements that establish a financial interest in a state contract even if a foster/pre-adoptive parent does not receive any P.A.C.T. payments. For example, § 29 of the Foster Parent Agreement requires foster/adoptive parents to maintain homeowner's insurance. In addition, § 15 provides that DSS will provide limited amounts of reimbursement secondary to other primary insurances (such as homeowner's insurance), for reimbursement on account of theft of or damage to the foster/adoptive family's property that is the result of deliberate, malicious action by a child in DSS care or custody. Each of these provisions establishes a financial interest in a contract with DSS. Accordingly, state employees who participate in the DSS programs have a financial interest in a state contract. Therefore, a qualified state employee who wants to serve as a foster/pre-adoptive parent, adoptive parent or guardian must obtain an exemption under § 7.

C. Exemption Available to Full-Time State Employees and Those Who are Not Special State Employees

1. DSS Employees

All full-time DSS employees and part-time DSS employees whose positions do not qualify for special state employee^{33/} status, do not qualify for any exemptions under § 7. Thus, in order for them to participate in the various DSS programs and receive the corresponding payments, there must be an additional exemption created under § 7.

2. Non-DSS Employees

In general, full-time state employees who do not work for DSS or an agency that regulates the activities of DSS, are eligible for the § 7(b) exemption, provided that they satisfy all of the requirements of that exemption. This exemption is also available to part-time, non-DSS state employees whose positions do not qualify for special state employee status. In each instance, the state employee must be able to satisfy all of the following requirements of the § 7(b) exemption.

As a state employee, he must not participate^{34/} in or have official responsibility^{35/} for any of the activities of the contracting agency, DSS. The state employee may not be employed by DSS. In addition, the state agency for which the employee works must not regulate^{36/} the activities of DSS. The DSS program must be publicly advertised.^{37/} The state employee must file a written disclosure with

the Commission describing his interest in the DSS program.

In addition, because a state employee serving as a foster/pre-adoptive parent, adoptive parent or guardian is providing personal services, he or she must comply with the following additional restrictions. The services for the DSS program must be provided outside of the individual's normal working hours as a state employee. The services may not be required as part of his regular state duties. The state employee may not be compensated^{38/} for his personal services in the DSS program for more than 500 hours during a calendar year. Finally, the head of the contracting agency, DSS, must make and file with the Commission a written certification that no current employee of DSS is available to perform the work as part of their regular duties.

A foster/pre-adoptive parent, adoptive parent or guardian's obligation is to provide care and supervision for the child twenty-four hours a day, seven days a week. The prohibition in the § 7(b) exemption, however, prohibits only the receipt of *compensation* for more than 500 hours during a calendar year. In other contexts, the Commission has previously stated that reimbursement for expenses is not considered compensation.^{39/} As such, receipt of the daily rate, quarterly clothing allowance, annual birthday and holiday supplements, extraordinary out-of-pocket expenses under the Receiptable Reimbursement Program and adoption and guardianship subsidies are not considered compensation for purposes of calculating the 500 hours under § 7(b).^{40/} In other words, if the state employee who is a foster/pre-adoptive parent, adoptive parent or guardian only receives the daily rate, other reimbursements or the adoption or guardianship subsidy, he is not receiving compensation in excess of 500 hours.

In contrast, payments made pursuant to an hourly rate through the P.A.C.T Program to a foster/pre-adoptive parent for providing additional services will be considered compensation for purposes of § 7(b). Those payments do not reimburse a parent for out-of-pocket expenses. Rather, they compensate a parent for providing special services to the child.^{41/} As such, in order to use the § 7(b) exemption, the state employee may not receive such payments for more than 500 hours per year.

In summary, any full-time state employee or part-time employee whose position is not eligible for special state employee status (other than a DSS employee), who satisfies all of the requirements for a § 7(b) exemption, may participate in the DSS programs at the same time that he is holding his state job. However, if he fails to satisfy any of the requirements of that exemption, he may not participate.

For example, a full-time employee of the Department of Conservation and Recreation may serve as a foster parent using the § 7(b) exemption. In addition, a part-time clinician in the Department of Mental Health

or a secretary at the Department of Revenue whose positions are not eligible for special state employee status, may participate using the § 7(b) exemption.

D. Exemptions Available to Certain Unpaid or Part-Time State Employees

In general, unpaid and part-time state employees whose positions qualify for special state employee status may use the § 7(d) or (e) exemption, depending on the state agency they work for.

A special state employee who does not participate in or have official responsibility for any of the activities of the contracting agency, DSS, may use the § 7(d) exemption. Section 7(d) requires that the special state employee file with the Commission, a full disclosure of his interest in the contract.

Having filed a written disclosure of his financial interest with the Commission, the special state employee may then participate in the DSS program. For example, if an employee of the Department of Environmental Protection is a special state employee, she may serve as a foster/pre-adoptive parent by using the § 7(d) exemption because she does not participate in or have official responsibility for any DSS activities.

In contrast, a special state employee, including a DSS employee, who participates in or has official responsibility for any of the activities of DSS, must obtain a § 7(e) exemption. That exemption requires the special state employee to file a written disclosure of his interest in the DSS program with both the Commission and the Governor. In addition, the Governor must approve the exemption. If the special state employee does not obtain the Governor's approval, he may not participate in the DSS program. For example, a part-time employee at DSS who is a special state employee may serve as a foster/pre-adoptive parent only by using the § 7(e) exemption.

CONCLUSION

Our conclusion as to the application of § 7 to the various DSS programs will permit the majority of state employees to serve as foster/pre-adoptive parents, adoptive parents or guardians in compliance with the conflict of interest law. However, we recognize that this opinion will give rise to concerns for certain state employees who now serve or who wish to serve in the DSS programs, including full-time DSS employees,^{42/} who will not be eligible for an exemption under §7. We further recognize the importance of having a sufficient number of trained and licensed individuals available to care for the almost 10,000 children who are in the care and custody of DSS on a daily basis and the obvious hardship to a foster child currently being cared for by such ineligible employees. Accordingly, the Commission, in accordance

with its power to prescribe and publish regulations providing for reasonable exemptions from the conflict of interest law,^{43/} has directed its staff to work on developing a regulation that would allow DSS employees for whom no statutory exemption applies, to serve as foster/pre-adoptive parents, adoptive parents and guardians and to receive the applicable payments for such service.

DATE AUTHORIZED: January 12, 2006

^{1/}The Commission acknowledges the assistance of DSS in providing information about its various programs which are the subject of this opinion.

^{2/} 110 CMR 7.106(1).

^{3/} *Id.* at 7.103, Comment; *Id.* at 7.104, 7.105 & 7.108.

^{4/} *Id.* at 7.103(6).

^{5/} *Id.* at 7.111.

^{6/} *Id.* The term "adoptive parent" in the Foster Parent Agreement refers to a person with whom DSS has placed a child(ren) for adoption, but legalization of the adoption has not yet occurred.

^{7/} 110 CMR 7.112(2)(g).

^{8/} *Id.* at 7.130.

^{9/} *Id.* at 7.130(1).

^{10/} *Id.* at 7.130(2).

^{11/} *Id.* at 7.130(4).

^{12/} *Id.* at 7.130(3).

^{13/} *Id.* at 7.209(1).

^{14/} *Id.*

^{15/} *Id.*

^{16/} *Id.*

^{17/} Until the adoption is legalized, the foster home is paid at the DSS foster home rate.

^{18/} 110 CMR 7.209A.

^{19/} *Id.*

^{20/} *Id.* at 7.303(1).

^{21/} *Id.* at 7.303(2).

^{22/} We note that at the time this opinion was prepared, DSS was in the process of reviewing and revising the Guardianship Subsidy Agreement as well as its policies on the guardianship and adoption subsidies.

^{23/} State employee is defined as "a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council." G.L. c. 268A, § 1(q).

^{24/} 17 C.J.S. *Contracts* § 2 (1999 & 2005 Supp.) (footnote omitted). See *Restatement (Second) of Contracts* § 1 (1981) (“A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”).

^{25/} *EC-COI-95-07*.

^{26/} *EC-COI-92-35; Quinn v. State Ethics Commission*, 401 Mass. 210, 215-16 (1987). See *EC-COI-89-14* (agreement need not be formalized in writing to be a contract for G.L. c. 268A, § 7 purposes); *EC-COI-81-64* (state grant is a contract).

^{27/} 17 C.J.S. *Contracts* § 2 (1999 & 2005 Supp.).

^{28/} *Black’s Law Dictionary* 306 (6th ed. 1990).

^{29/} *Marine Contractors Co., Inc. v. Hurley*, 365 Mass. 280, 286 (1974); *Fall River Housing Joint Tenants Council, Inc. v. Fall River Housing Authority*, 15 Mass. App. 992, 993 (1983).

^{30/} *EC-COI-92-35* (Aid to Families with Dependent Children; Emergency Aid to the Elderly, Disabled and Children; Supplemental Security Income).

^{31/} *Id.* Compare *EC-COI-96-4* (Section 8 Program rent subsidies and Massachusetts Rental Voucher Programs are contracts for purposes of § 7).

^{32/} *EC-COI-92-35*.

^{33/} Special state employee is defined as “a state employee: (1) who is performing services or holding an office, position, employment or membership for which no compensation is provided, or (2) who is not an elected official and (a) occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the [Commission] prior to the commencement of any personal or private employment, or (b) 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. 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.” G.L. c. 268A, § 1(o).

^{34/} Participate is defined as “participate in agency action or in a particular matter personally and substantially as a state . . . employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.” G.L. c. 268A, § 1(j).

^{35/} Official responsibility is defined as “the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action.” G.L. c. 268A, § 1(i).

^{36/} See *EC-COI-03-2* (discussing meaning of term regulate).

^{37/} The § 7(b) requirement that the contract be made after public notice may be satisfied by advertisement in a newspaper of general circulation or multiple public postings, including on the DSS website. See *EC-COI-95-07; 87-24*.

^{38/} Compensation is defined as “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).

^{39/} The Commission has frequently said the reimbursement for expenses is not compensation for purposes of §§ 4, 11 or 17, all of which prohibit a public employee from receiving compensation from anyone other than their public employer in connection with a particular matter in which their public employer is a party or has a direct and substantial interest. See *EC-COI-85-2; 85-47; 84-81; 82-131; 81-142; 81-181*. In the case of a state employee who received reimbursement for his lodging at a condominium owned by another state employee, the Commission stated that this was not a financial interest in a state contract for purposes of § 7 for either the lodging state employee or the owner state employee because the lodging reimbursement was analogous to other benefits which accrue to state employees by virtue of their employment status as part of their primary employment contract. *EC-COI-84-27*. In contrast, a reimbursement made to a state employee serving in a DSS program would not be part of his primary state employment contract.

^{40/} This conclusion is consistent with the federal and state tax codes which exclude such payments from a taxpayer’s gross income. See 26 U.S.C. § 131(a) (gross income does not include amounts received by foster care provider as qualified foster care payments); *Id.*, § 131(b) (qualified foster care payments include those made pursuant to a state’s foster care program which are paid by state to foster care provider for caring for qualified foster individual in foster care provider’s home); G.L. c. 62, § 2(a) (gross income defined as federal gross income).

^{41/} This interpretation is consistent with the definition of compensation in § 1(a) of G.L. c. 268A even if P.A.C.T. payments are not considered income for state and federal income tax purposes.

^{42/} In its regulations, DSS states that it “shall . . . support its own employees who wish to become foster or pre-adoptive parents by providing opportunities for them to do so.” 110 CMR 7.106(1).

^{43/} G.L. c. 268B, § 3(a)(2).

CONFLICT OF INTEREST OPINION EC-COI-06-2

INTRODUCTION

This opinion reviews two forms of councils of governments that were created following the dissolution of certain county governments in the late 1990's. The Commission has been asked to review *EC-COI-99-5*, in which it concluded that the Hampshire Council of Governments is a "municipal agency" for purposes of the conflict of interest law, in light of legislation enacted following the issuance of that opinion. In addition, we have been asked to consider the Franklin Regional Council of Governments, also in light of that legislation.

QUESTIONS

1. Is the Hampshire Council of Governments a "county agency" for purposes of G. L. c. 268A?
2. Is the Hampshire Council of Governments a "governmental body" as defined in G. L. c. 268B?
3. Is the Franklin Regional Council of Governments a "county agency" for the purposes of G. L. c. 268A?

ANSWERS

1. Yes.
2. Yes.
3. No. The Franklin Regional Council of Governments is a "municipal agency" for purposes of G. L. c. 268A.

FACTS

Hampshire Council of Governments

Pursuant to St. 1998, c. 300, § 45 (the 1998 Act),^{1/} Hampshire County government was dissolved, and, as a result, the Hampshire Council of Governments was created. Some functions that the former Hampshire County performed were transferred to the Commonwealth, and others to the Hampshire Council of Governments.

The Commission, in *EC-COI-99-5*, considered, for the first time, the jurisdictional issue of regional councils of governments. After analyzing the 1998 Act, the Commission concluded that, for purposes of the conflict of interest law, the Hampshire Council of Governments (Hampshire Council) was a "municipal agency" of each of its member municipalities, primarily because it is controlled by, and serves the municipal level of government. As a result, the Commission concluded, consistent with Commission precedent,^{2/} that every member of the

Hampshire Council and all Hampshire Council employees were municipal employees of each of the member municipalities.

Following the release of *EC-COI-99-5* in 1999, the Legislature enacted G. L. c. 34B. Chapter 34B, which reiterates much of the 1998 Act, concerns the "Abolition of County Government."^{3/} Chapter 34B defines "abolished county" to include the former counties of: Middlesex, Hampden, Worcester, Hampshire, Essex, and Berkshire.^{4/} For example, c. 34B covers the transfer of duties to the Commonwealth, the status of abolished counties' liabilities and assets, the status of the county sheriffs and the retirement systems, and the creation of regional charter commissions and regional councils of governments.

Franklin Regional Council of Governments

The Franklin Regional Council of Governments (Franklin Council) was created as a result of the dissolution of Franklin County government pursuant to St. 1996, c. 151, § 567.^{5/} It was established within the geographical boundaries of former Franklin County and succeeded to "any and all regional planning activities or functions"^{6/} that Franklin County had under several prior laws.^{7/}

There was a transition period during which the former Franklin County Commissioners served the balances of their current terms but functioned as the Franklin Council of Governments Committee. This Committee continues to serve as the Chief Executive Officer of the Franklin Council, and has the powers of selectmen pursuant to G. L. c. 41, §§ 52 and 56.^{8/} Two members of the Committee are chosen by the voters of the (former) Franklin County at the state election. As former County Commissioners completed their terms, new members of the Committee are chosen to represent each of the municipalities, one from each city or town.^{9/} In addition, a Franklin Regional Advisory Board, consisting of a member of the board of selectmen of each town, was created to serve as the legislative and appropriating authority for the Franklin Council.^{10/}

"Any political subdivision of the commonwealth may enter into agreement with the Franklin Council of Governments to perform jointly or for the other, in cooperation with other entities, any service, activity or undertaking which such political subdivision is authorized by law to perform."^{11/} The Franklin Council may impose a regional assessment, allocated among the Franklin Council members. The regional assessment is based on the Council's budget. "The regional assessment shall be retained by the [Council] and shall be used solely for the purpose of providing regional or municipal services or both."^{12/}

G. L. c. 34B

As noted above, the Franklin Council was created

by a separate special act, approximately two years before the dissolution of Hampshire County, and the ensuing creation of the Hampshire Council. Each of the “abolished” counties as specified in G. L. c. 34B (Middlesex, Hampden, Worcester, Hampshire, Essex, and Berkshire) was dissolved *after* Franklin County government.

Although the former Franklin County is mentioned twice in c. 34B, the Legislature distinguished the former Franklin County from these other former or “abolished” counties.^{13/} For example, “All persons employed by the former Franklin County *or by an abolished county*, or by Hampshire county as of September 1, 1998, whose work functions primarily concern the operation and maintenance of said county’s court facilities shall be transferred to the commonwealth under the administrative office of the trial court as of the effective date of the transfer, which in the case of Hampshire county shall be September 1, 1998.”^{14/} Further, in § 12, Franklin is distinguished from the others. “[T]he sheriff of an abolished county, including Franklin county, in office immediately before the transfer date, and, in Hampshire county, on September 1, 1998 shall become an employee of the commonwealth with salary to be paid by the commonwealth.”

Other than as described above, the former Franklin County is not mentioned in c. 34B. In particular, c. 34B, § 20, entitled, “Cities and towns; regional charter commissions; regional councils of government,” begins by describing how a municipality “within or contiguous to an abolished county or to be abolished county” may join a regional charter commission. Section 20 goes on to describe how a “regional council of government established *pursuant to this section* may administer and provide regional services to cities and towns.”^{15/}

Finally, § 20(1) of c. 34B states, “The provisions of chapter 268A and 268B that are applicable to a county agency and county employees shall apply to a regional council of government and its employees.”^{16/}

DISCUSSION

Were we only to compare the Franklin Council with the Hampshire Council, which was analyzed in *EC-COI-99-5*, then our opinion would be brief. The attributes of the Franklin Council are sufficiently similar to those of the Hampshire Council, notwithstanding the fact that each governmental body was created pursuant to different enabling legislation, that we would conclude that the Franklin Council is a regional municipal agency for purposes of the conflict of interest law. However, we must also consider the effect of G. L. c. 34B, § 20(1) on our analysis of both the Hampshire and Franklin Councils.

The Hampshire Council

The plain language of G. L. c. 34B, § 20(1)

contradicts the Commission’s conclusion in *EC-COI-99-5* that the Hampshire Council is a municipal agency. Given that Chapter 34B, and, more specifically, § 20 applies to the Hampshire Council, there is little doubt that the Legislature intended § 20(1) to apply to the Hampshire Council. Thus, notwithstanding that “county” government in Hampshire no longer exists for purposes of *most* General Laws, the Legislature has intended, through the plain language of G. L. c. 34B § 20(1), that the “county” provisions in G. L. c. 268A apply to the Hampshire Council and its employees.^{17/}

Further, the plain language of c. 34B shows a clear legislative intent to apply G. L. c. 268B also to the Hampshire Council, thereby imposing the requirement on certain Hampshire Council personnel to file Statements of Financial Interests (SFI). Under G. L. c. 268B, § 5, candidates for “public office,”^{18/} “public officials,”^{19/} and “public employees”^{20/} must file SFI’s. For example, a “public employee,” means “any person who holds a *major policymaking position*^{21/} in a *governmental body*.”^{22/} “Governmental body” as defined in G. L. c. 268B, § 1(h) “means any state or county agency, authority, board, bureau, commission, council, department, division, or other entity”^{23/}

Thus, any Hampshire Council employee who is a “public employee” as defined in c. 268B must “file a statement of financial interests for the preceding calendar year with the commission within thirty days after becoming a public employee, on or before May first of each year thereafter that such person is a public employee.”^{24/}

The Franklin Council

We next consider whether the Franklin Council is a state, county, or municipal agency under c. 268A and the application of c. 34B to the former Franklin County. As discussed below, we conclude that the Franklin Council is a regional “municipal agency,” not a “county agency,” for purposes of G. L. c. 268A.

We can assume that the Legislature is aware of prior statutes when it enacts a new provision relating to the same subject matter^{25/} and that it acted rationally.^{26/} Here, when the Legislature enacted G. L. c. 34B, it was obviously aware of the fact that it had passed legislation abolishing Franklin County and establishing the Franklin Council.^{27/} The two specific references to Franklin within c. 34B make that clear. It is also obvious that when the Legislature intended to treat the various former counties differently, it explicitly so stated. For example, in G. L. c. 34B, § 1, Middlesex, Hampden, Worcester, Hampshire, Essex, and Berkshire are defined, for purposes of c. 34B, as “abolished counties” and each has different “transfer dates” as defined in the section. Chapter 34B does not indicate that the Legislature considered Franklin to be an “abolished county” as defined in that chapter.

General Laws Chapter 34B, § 20, entitled “Cities and towns; regional charter commissions; regional councils of government,” introduces the phrase “regional councils of government.” This phrase is not defined anywhere in § 20 or in any other section of c. 34B. However, we can determine its meaning from all the subsections within the main section.^{28/}

This section sets forth the steps to create regional councils of government and their powers. Section 20(a) states that municipalities “within or contiguous to an abolished county or to be abolished county” may create a “regional council of government.” We note that in § 20 the Legislature again uses the term, “abolished county,” which, as explained above, does not include Franklin County, but, rather, refers only to the counties identified in c. 34B, § 1.

Thus, the phrases “regional council of government” or “council of government” have meanings within, and defined by, § 20 of c. 34B, rather than by some other law. It must have been clear to the Legislature that the Franklin Council was not created pursuant to § 20 because the creation of Franklin Council predated § 20 by approximately two years.

Notably, when the Legislature intended to apply § 20 to a council of governments that had been created prior to the enactment of § 20, it made that clear. Section 20(b) states, “Notwithstanding subsection (a), the following provisions shall apply to Hampshire county.” This subsection goes on to ratify, validate, and confirm all actions that the Hampshire Council took prior to July 1, 1999, which effectively applies all of § 20’s provisions to the Hampshire Council.

There is no counterpart subsection in § 20 that ratifies, validates, and confirms the actions of the Franklin Council. Again, we must assume that the Legislature had a reason to expressly include Hampshire within the § 20(b) ratification language but not include Franklin. “It is a familiar principle of statutory interpretation that express mention of one matter excludes other similar matters not mentioned.”^{29/} Although the phrase “regional council of government” in § 20 has a generic quality, we take “its meaning from the setting in which it is employed.”^{30/}

Accordingly, when we read § 20(1), “The provisions of chapter 268A and 268B that are applicable to a county agency and county employees shall apply to a regional council of government and its employees,” we conclude that “regional council of government” refers to a regional council of government established pursuant to § 20, rather than to all regional councils of government however established. Section 20 is expressly made applicable to the Hampshire Council, which was in existence at the time of § 20’s enactment, but § 20 is not expressly made applicable to the Franklin Council, which

was also in existence at the same time. Thus, we narrowly read this subsection to refer to the subject matter covered by the full section.

If the Legislature intended to treat the Franklin Council the same as the Hampshire Council, it could have explicitly done so. We are guided by rules of statutory interpretation that we cannot add words that the Legislature did not include “either by inadvertent omission or by design.”^{31/} Further, the phrase “regional council of government” is in close association with the Hampshire Council.^{32/} Considering all of these circumstances, we conclude that G. L. c. 34B, § 20(1) does not make the Franklin Council a “county agency” for purposes of G. L. cc. 268A and 268B.

As in *EC-COI-99-5*, in absence of “county” government, we are left with two alternatives under c. 268A. The Franklin Council must either be a “state agency” or a “municipal agency.” Based on our analysis in *EC-COI-99-5*, we conclude that the Franklin Council is a “municipal agency”, and members or employees of the Franklin Council are “municipal employees” as defined in G. L. c. 268A. The Franklin Council serves the municipal level of government and is ultimately accountable to the municipalities, rather than to state employees and/or state agencies.^{33/}

DATE AUTHORIZED: May 11, 2006

^{1/} The 1998 Act is entitled, “AN ACT ABOLISHING THE COUNTY GOVERNMENTS OF HAMPSHIRE, ESSEX, AND BERKSHIRE COUNTIES, AND TRANSFERRING ESSENTIAL COUNTY FUNCTIONS TO THE COMMONWEALTH.”

^{2/} See e.g., *EC-COI-94-9*; *EC-COI-92-40*; *EC-COI-92-27*; *EC-COI-92-26*.

^{3/} As inserted by St. 1999, c. 127, § 53. Chapter 127 of the Acts of 1999 is “An Act Making Appropriations for the Fiscal Year 2000”

^{4/} G. L. c. 34B, § 1.

^{5/} Entitled, “AN ACT RELATIVE TO THE REORGANIZATION OF FRANKLIN COUNTY.”

^{6/} St. 1996, c. 151, § 567(R).

^{7/} St. 1963, c. 425; G. L. c. 40B, §§ 5, 5A, 5B, and 14.

^{8/} St. 1996, c. 151, § 567(H) (G. L. c. 41, §§ 52 and 56 concern the approval of payment bills or pay rolls and the warrants for bills).

^{9/} Id.

^{10/} St. 1996, c. 151, § 567(S).

^{11/} St. 1996, c. 151, § 567(U).

^{12/} Id. at § 567(V).

^{13/} See e.g., G. L. c. 34B, § 4, 12.

^{14/} G. L. c. 34B, § 4.

^{15/} *Id.*, § 20(g) (*emphasis added*).

^{16/} *Id.*, § 20(l).

^{17/} It is also notable that G. L. c. 34B was inserted into the General Laws under St. 1999, c. 127, § 53. Chapter 127 of the Acts of 1999 is the state budget for Fiscal Year 2000. Section 53 was a rider added to the state budget. Chapter 127 was approved by the Governor on November 16, 1999. On September 15, 1999, the Ethics Commission authorized *EC-COI-99-5* and issued that opinion shortly thereafter. Thus, soon after the Ethics Commission's public statement that the Hampshire Council is a "municipal agency" under c. 268A, the Legislature enacted G. L. c. 34B, § 20(l), which expressly makes a regional council of government a "county agency" for purposes of G. L. cc. 268A and 268B.

^{18/} "Public office means any position for which one is nominated a state primary or chosen at a state election . . ." G. L. c. 268B, § 1(p).

^{19/} "Public official means anyone who holds a public office, as defined by clause (p) of [§ 1]." *Id.*, § 1(q).

^{20/} "Public employee means any person who hold a major policymaking position in a governmental body; provided, however, that any person who receives no compensation other than reimbursements for expenses, or any person serving on a governmental body that has no authority to expend public funds other than to approve reimbursements for expenses shall not be considered a public employee for the purposes of [G. L. c. 268B]." *Id.*, § 1(o).

^{21/} "Major policy making position means: the executive or administrative head or heads of a governmental body . . . any person whose salary equals or exceeds that of a state employee classified in step one of job group XXV of the general salary schedule contained in section forty-six of chapter thirty and who reports directly to said executive or administrative head; the head of each division, bureau, or other major administrative unit within such governmental body; and persons exercising similar authority." *Id.*, § 1(l).

^{22/} *Emphasis added*.

^{23/} *Emphasis added*.

^{24/} G. L. c. 268B, § 5(c) (*emphasis added*). "However, . . . no public employee shall be required to file a statement of financial interests for the year in which he ceased to be a public employee if he served less than thirty days in such year." *Id.* Further, we note, that any regional council of government that is established pursuant to G. L. c. 34B, § 20, which includes "abolished counties" as defined in G. L. c. 34B, § 1 (Middlesex, Hampden, Worcester, Hampshire, Essex, and Berkshire), is also subject to G. L. c. 268A and c. 268B, as a result of G. L. c. 34B, § 20(l).

^{25/} *Green v. Wyman-Gordon Co.*, 422 Mass. 551, 554 (1996); Singer, *Sutherland Statutory Construction*, § 51.02 (p. 176) (6th ed. 2002).

^{26/} *In the Matter of the Liquidation of American Mutual Liability Ins. Co.*, 440 Mass. 796, 803 (2004); *Selectmen of Topsfield v. State Racing Commission*, 324 Mass. 309, 313 (1949).

^{27/} The Legislature must have known, in enacting c. 34B in 1999, not only that Franklin County had been dissolved as of 1996-1997, but also that the Franklin Council had been established well before it considered, in 1999, the legislation that became c. 34B.

^{28/} For example, it is significant that § 20(g) specifies, "a regional council of government established pursuant to this section may administer and provide regional services to cities and towns and may

delegate such authority to subregional groups of such cities and towns. Regional councils of government may enter into cooperative agreements with regional planning commissions or may merge with such commissions to provide regional services." (*emphasis added*). Thus, we interpret the phrase "pursuant to this section" to refer to all of § 20 because § 20(g) only confers certain powers to a council of governments. *Acting Superintendent of Bournemouth Hospital v. Baker*, 431 Mass. 101, 104-105 (2000).

^{29/} *Spence, Bryson, Inc. v. China Products Co.*, 308 Mass. 539, 542 (1960).

^{30/} *Quincy City Hospital v. Rate Setting Commission.*, 406 Mass. 431, 443 (1990).

^{31/} *Fafard v. Lincoln Pharmacy of Milford, Inc.*, 439 Mass 512, 515 (2003). *See also Dube v. Contributory Retirement Appeal Board*, 50 Mass. App. Ct. 21, 24 (2000) ("we will not add to a statute a word that the Legislature had the option to, but chose not to include").

^{32/} *First Eastern Bank, N.A. v. Jones*, 413 Mass. 654, 660-661 (1992) (the term "trustee" is most closely with probate law in the context of G. L. c. 203, § 14A, thus § 14A does not include trustees of a Massachusetts business trust) ("The literal meaning of a general term in an enactment must be limited so as not to include matters that, although within the letter of the enactment, do not fairly come within its spirit and intent." *Kenney v. Building Comm'r of Melrose*, 315 Mass. 291, 295 (1943), quoted in *First Eastern Bank*).

^{33/} *EC-COI-03-4*.

CONFLICT OF INTEREST OPINION EC-COI-06-3*

QUESTION

Is an appointed, unpaid member of a state board who also serves as a full-time, paid municipal employee barred by the conflict of interest law, G. L. c. 268A, § 6, from participating as a state board member in particular matters in which he knows his employing municipality has a financial interest?

ANSWER

No. The financial interest of the state board member's employing municipality in a particular matter will not, in and of itself, bar him from participating as a state board member in the particular matters because a municipality is not a business organization within the meaning of G. L. c. 268A.

FACTS

You serve as a gubernatorial-appointed member of the Statewide Emergency Telecommunications Board (“Board”). You are not compensated as a Board member. In addition, you are the appointed, full-time, salaried Chief of Police of the Town of Milford (“Town”), a municipality of the Commonwealth.

The Board, established by statute in late 1991,^{1/} is responsible for coordinating and effecting the implementation of enhanced-911 service (“E-911”) and wireless E-911 service statewide in the Commonwealth and administering such service according to rules and regulations promulgated by the Board.^{2/} Every municipality in the Commonwealth is required to participate in the statewide E-911 service system by “establish[ing], staff[ing], and operat[ing] . . . a public safety answering point^{3/} on a twenty-four hour a day, seven days a week basis, in a manner and according to a schedule to be approved by the [Board].”^{4/}

The Board’s specific responsibilities include establishing “technical and operational standards . . . for the establishment of public safety answering points which utilize [E-911] network features,” with which municipalities must comply, and inspecting “each public safety answering point that utilizes [E-911] network features” to determine if it meets the established standards and other requirements.^{5/} The Board also has the responsibility to determine the number of public safety answering points that will be situated within municipalities throughout the Commonwealth in accordance with “a formula that takes into account cost, efficiency and the public safety needs of cities and towns.”^{6/} According to you, “[i]n addition to approving the budget for the operations of the [Board’s] department personnel and expenses, the Board determines the need for system equipment, training, and other operational needs which may be utilized by the end users (cities and towns, or the Massachusetts State Police).” These Board determinations, made according to the formula, establish the allotment of equipment, training and services provided to each municipality. The Board also has the responsibility to decide the distribution of certain grant funds to municipalities for training and other E-911-related purposes.

In fulfilling its above-described responsibilities, the Board is “authorized to enter into contracts and agreements with, and accept gifts, grants, contributions, and bequests of funds from, any department, agency, or subdivision of federal, state, county, or municipal government and any individual, foundation, corporation, association, or public authority for the purpose of providing or receiving services, facilities or staff assistance in connection with its work.”^{7/} Funds received by the Board are deposited with the Office of the State Treasurer and may be expended by the Board according to law.^{8/}

DISCUSSION

As a member of the Board you are a state employee^{9/} within the meaning of the conflict of interest law and, as such, subject to the provisions of G. L. c. 268A applicable to state employees.^{10/} As the Town’s Chief of Police, you are a municipal employee^{11/} of the Town and, as such, subject to the provisions of the conflict of interest law, G. L. c. 268A, applicable to municipal employees.

As a Board member, your duties, as described above, would normally involve your participation in Board determinations and other particular matters^{12/} in which the Town has a financial interest. For example, the Town would have a financial interest in the Board’s determination of the number of public safety answering points to be located in the Town or in the Board’s decisions of whether and to what extent to grant funds to train the staff of any such facility in Town.

Under prior conflict of interest law opinions, both by the Commission and by the Attorney General prior to the Commission’s establishment, your participation as a Board member and state employee in a matter in which your employing municipality has a financial interest raises an issue under G. L. c. 268A, § 6, which, in relevant part, prohibits a state employee from participating^{13/} in a particular matter in which, to his knowledge, he, a member of his immediate family or “a business organization in which he is serving as officer, director, trustee, partner or employee” has a financial interest. Under the Attorney General’s and our prior opinions, a municipality is a “business organization” within the meaning of § 6 and, accordingly, § 6 would prohibit your participation as Board member in any Board determination or other particular matter in which the Town has a financial interest.^{14/}

In response to your request for a formal Commission opinion, we have reconsidered our long-standing conclusion that municipalities are business organizations for G. L. c. 268A purposes. As a result, as explained below, we conclude that municipalities are not business organizations for purposes of the conflict of interest law.

Origin of the Business Organization Status of Cities and Towns

Between 1962, when G. L. c. 268A was enacted, and the establishment of the Commission in 1978, the Attorney General was charged with the responsibility of issuing opinions interpreting the conflict of interest law.^{15/} The statute which established the Commission provided that all conflict of interest law opinions issued by the Attorney General before November 1, 1978, “shall remain valid and shall be binding on the state ethics commission until and unless reversed or modified by the state ethics

commission.”^{16/} Since its establishment in 1978,^{17/} the Commission has been charged with the responsibility of issuing opinions interpreting the requirements of G. L. c. 268A.^{18/}

In 1963, the first year in which the Attorney General provided conflict of interest law opinions, Attorney General Brooke opined in Conflict Opinion No. 19 that a town, as a municipal corporation, is not a business organization within the meaning of G. L. c. 268A, § 19 (the municipal counterpart to § 6). In another 1963 opinion, Conflict Opinion No. 30, the Attorney General opined that the term “business organization” in § 6 “exclude[s] the business of a public agency such as [a state commission and a state authority].”

In 1974, however, in Conflict Opinion No. 613, Attorney General Quinn, without referring to Conflict Opinion Nos. 19 or 30 or citing any authority, concluded that a town “and its various departments and the divisions thereof are organizations for conducting business” and that, thus, § 6 would bar a state board member who was also a town employee from participating in a decision by the board whether to fund a program of a division of a department of the town. The 1974 opinion offered no further explanation for its effective conclusion that municipalities are business organizations for G. L. c. 268A purposes.

In a 1980 opinion,^{19/} the Commission cited Conflict Opinion No. 613 as authority for the conclusion that “municipal agencies and corporations are business organizations for purposes of section 6.” The Commission cited no other authority and provided no statutory analysis or other reasoning to support its conclusion.

Since 1980, the Commission has consistently adhered to the view that municipalities are business organizations within the meaning of G. L. c. 268A.^{20/} In most of its opinions, the Commission has cited only Conflict Opinion No. 613 and/or earlier Commission opinions citing that opinion.^{21/} In some opinions, the Commission has simply stated the conclusion without authority.^{22/}

Other than citing earlier opinions, the Commission has provided only slight explanation for its conclusion that municipalities are business organizations within the meaning of G. L. c. 268A. In 1992, the Commission indicated in dicta that municipalities are business organizations because they are “bodies corporate” (established “for the purpose of engaging in municipal business”)^{23/} in contrast with the Commonwealth which is a “body politic”^{24/} or the federal government which is an “organization,”^{25/} but not a business organization.^{26/} Counties, which are “bodies politic and corporate,”^{27/} are apparently business organizations.^{28/}

This explanation, however, appears to be based

on the mistaken assumption that all corporations are business organizations and that, thus, all “bodies corporate,” including municipalities, are inherently business organizations simply because they are corporations. The explanation also does not address, let alone resolve, the question of whether there is any reason to consider municipal corporations and their agencies, and not state or federal agencies (even those organized as corporations), to be business organizations for the purposes of G. L. c. 268A.

“Business Organization” Reconsidered

When construing statutory language, we are guided by the canon that

[t]he 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 from the ordinary meaning of the words in a statute considered in the context of the objectives which the law seeks to fulfill. Whenever possible, we give meaning to each word in legislation; no word in a statute should be considered superfluous.^{29/}

In the broadest sense of the term, municipalities, counties, the Commonwealth and the federal government are all “business organizations.” That is, each level of government is an “organization”^{30/} and each conducts “business,”^{31/} *i.e.*, the business of, respectively, municipal, county, state and federal government.^{32/} In this very broad, generic sense of an entity formed for a serious purpose, all levels of government would equally appear to be business organizations.^{33/} This very broad reading of the term “business organization” is not, however, the ordinary meaning of the term in common and approved usage and is unnecessary to fulfill the objectives of G. L. c. 268A. Furthermore, this reading of the term “business organization” construes the word “business” so broadly and inclusively as to be almost meaningless.

As set forth above, the Commission has, subsequent to its earliest opinions, limited G. L. c. 268A business organization status to municipalities and counties (and their respective agencies) and excluded the Commonwealth and the federal government (and their respective agencies) from the category.^{34/} In doing so, the Commission has implicitly recognized that the broadest reading of the term “business organization,” described above, is over-inclusive (*i.e.*, as applied to the state and the federal government) and that the term is properly more narrowly construed in the context of G. L. c. 268A. Having reconsidered the issue, we now conclude that municipalities are no more business organizations for G. L. c. 268A purposes than are the Commonwealth or the federal government.

While it is true that municipalities are “bodies corporate”^{35/} and thus corporations,^{36/} whereas the Commonwealth is a “body politic,”^{37/} that fact does not mean that cities and towns are business organizations and the Commonwealth and its agencies are not. Except in the broadest sense (which, as discussed above, would include the Commonwealth and its agencies), not all corporations (municipal or otherwise) are business organizations.^{38/} To assume that they are is to ignore essential distinctions between municipal corporations and business corporations and, more fundamentally, between business and government.

A business organization may take the form of a corporation.^{39/} But not all corporations are business corporations or business organizations.^{40/} Thus, by contrast, a “municipal corporation” is a “city, town, or other local political entity formed by charter from the state and having the autonomous authority to administer the state’s local laws.”^{41/} A municipality is, in short, a “political unit . . . incorporated for local self-government.”^{42/}

Massachusetts cities and towns are political subdivisions of the Commonwealth, incorporated for the purpose of local self-government, and are as such, under the state constitution, “instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men.”^{43/} Thus, the cities and towns of the Commonwealth, although organizationally “bodies corporate” and municipal corporations, are, as a matter of both common usage and the state constitutional principle, neither business corporations nor business organizations. Instead, municipalities are, like the counties, the Commonwealth and the federal government, political or governmental organizations. Municipalities are public instrumentalities by which the public-at-large within their geographical boundaries govern themselves for the common good, and are not privately-created entities controlled by shareholders or other owners, or privately-chosen officers or directors, to pursue private profit or other non-governmental interests and purposes.^{44/}

The fact that municipalities are organized as corporations (*i.e.*, bodies corporate) is not a valid a reason for treating them differently under G. L. c. 268A than state or federal governmental organizations. Incorporation is not unique to municipalities and their agencies. Many state agencies are by statute “bodies politic and corporate.”^{45/} Yet, as set forth above, after initially reaching the opposite conclusion, the Commission has determined that state “bodies politic and corporate” are not business organizations for G. L. c. 268A purposes. In addition, although municipalities themselves are “bodies corporate” under G. L. c. 40, § 1, rather than “politic and corporate,” many municipal agencies are by statute bodies “politic and corporate,” including all housing authorities,^{46/} redevelopment authorities,^{47/} municipal lighting plant

cooperatives,^{48/} water and sewer commissions established under G. L. c. 40N, § 4, and regional school districts established under G. L. c. 71, § 15.

There is no reason for municipal agencies which are “bodies politic and corporate” to be treated as business organizations for G. L. c. 268A purposes where state agencies which are “bodies politic and corporate” are not. Similarly, the absence of the term “politic” from G. L. c. 40, § 1, is not a sufficient basis for treating cities and towns differently under G. L. c. 268A than state agencies which are “bodies politic and corporate,” particularly given that municipalities are political subdivisions of the Commonwealth organized by the people for the purposes of local self-government. Plainly, the Town, although a “body corporate,” is not more like a business organization than state “bodies politic and corporate” such as the Massachusetts Bay Transportation Authority, the Massachusetts Port Authority or the Massachusetts Turnpike Authority; indeed the opposite is true.

In sum, the fact that municipalities are established as “bodies corporate” under G. L. c. 40, § 1 is not a valid or sufficient basis for concluding that cities and towns are business organizations for G. L. c. 268A purposes.

Finally, nothing in the legislative history of G. L. c. 268A indicates any intent to include cities and towns within the category of “business organization.” Indeed, the legislative history appears to indicate a contrary intent.

The Final Report of the Special Commission Established to Make an Investigation of an Act Establishing a Code of Ethics to Guide Employees and Officials of the Commonwealth in Their Performance of Their Duties appears to indicate that drafters of the conflict of interest law did not view the term “business organization” as inclusive of municipalities.^{49/} The Final Report states, in relevant part,

It is the Commission’s decision not to include in the criminal section related subject matters such as nepotism, campaign contributions, indirect influence and *relationships among public officials in different levels of government*. . . . on the matter of *the dealings of a state official with municipalities or counties*, for example, it is the opinion of the Commission that further studies will be needed to determine whether legislation in this area is necessary, once the legislation proposed by the Commission has been in operation for a reasonable period of time.^{50/}

Professor Robert Braucher, who was a member of the Special Commission, cited this portion of the Final Report in support of his conclusion that the prohibition of G. L. c. 268A, § 19 (the municipal counterpart to § 6), “probably does not apply to either actual or prospective employment

by a governmental agency.”^{51/}

In addition, commentary written shortly following the enactment of G. L. c. 268A indicates that the purpose of §§ 6, 13^{52/} and 19 of the statute is to deal with conflicts between public and private interests rather than between competing public interests. Thus, Professor Buss begins his article analyzing G. L. c. 268A with the statement, “To say that a public employee has a conflict of interest is merely to say that his private affairs and his public obligations have become incompatible to some degree.”^{53/} Professor Buss further states, “The objective of conflict-of-interest legislation is primarily to eliminate in advance undesirable pressures on a public employee resulting from potentially conflicting pulls of private and public forces . . .”^{54/}

The Effect of the Town Not Being a Business Organization

Given that the Town is not a business organization within the meaning of § 6, the section will not prohibit you from participating as a Board member in particular matters before the Board simply because of the *Town’s* financial interest in the matters. That does not mean, however, that your ability to participate as a Board member in matters affecting the Town will be unrestricted by the conflict of interest law. To the contrary, you will be subject to the following restrictions.

First, you should keep in mind that some Board matters affecting the Town may also affect your own financial interests and those of persons and entities with whom you may be closely connected. You will remain subject to § 6 prohibitions as to matters in which you, your immediate family members, partner(s), or any “business organization” in which you are serving as an officer, director, trustee, partner or employee, or any person or “organization” (including governmental organizations) with whom you are negotiating or have any arrangement concerning prospective employment, have/has a financial interest.^{55/} Further, if, pursuant to a written determination by your state appointing authority (the Governor) under § 6, you are authorized to participate as a Board member in such a particular matter, you must act fairly and impartially and not use your official position to secure an unwarranted privilege or exemption for yourself or anyone else.^{56/}

Second, you will be required to disclose in writing to your state appointing authority the fact of your employment with the Town and the relevant circumstances of your participation as a Board in matters affecting the financial or other significant interests of the Town^{57/} and to act fairly and impartially in all such matters.^{58/}

Third, as a municipal employee of the Town, you are generally prohibited from acting as the Board’s or the

Commonwealth’s agent^{59/} in any matter in which the Town is a party or has a direct and substantial interest.^{60/}

Finally, the Governor, as the appointing authority for your Board position, is not precluded by this opinion, or by G. L. c. 268A generally, from imposing additional restrictions on your participation as a Board member in matters affecting the interests of the Town, including prohibiting your participation in those matters.^{61/}

CONCLUSION

Based on our reconsideration of the meaning of the term “business organization” in G. L. c. 268A, §§ 6, 13 and 19, we conclude that neither the plain meaning of the term nor the legislative history and intent of the statute require or support the inclusion of municipalities within the scope of the term for the purposes of the statute. We reach the same conclusion with regard to counties. Accordingly, we will no longer treat municipalities or counties as business organizations for conflict of interest law purposes.^{62/}

DATE AUTHORIZED: June 8, 2006

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

^{1/} St. 1991, c. 412, § 5; G. L. c. 6A, § 18B.

^{2/} G. L. c. 6A, § 18B(b).

^{3/} According to the Board’s website, a “public safety answering point” is an E-911 communications center and there are approximately 270 public safety answering points in the Commonwealth, some of which are regionally-based to answer calls for multiple communities.

^{4/} G. L. c. 6A, § 18D(a).

^{5/} G. L. c. 6A, § 18B(b).

^{6/} *Id.*

^{7/} G. L. c. 6A, § 18B(f).

^{8/} *Id.*

^{9/} “State employee” means a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council. G. L. c. 268A, § 1(q).

^{10/} Because Board members are uncompensated, you are a special state employee. G. L. c. 268A, § 1(o).

^{11/} “Municipal employee” means 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).

^{12/} “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).

^{13/} “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).

^{14/} This prohibition would not apply, however, if you first received from your state appointing authority (the Governor), after your written disclosure of the Town’s financial interest in a particular matter before you as a Board member, his written determination as provided for in § 6, that the Town’s financial interest in the matter is not so substantial as to be deemed likely to affect the integrity of your services as a Board member. You have recently made such a § 6 disclosure to the Governor concerning E-911 training grants to municipalities.

^{15/} St.1962, c. 779, § 1. The Attorney General last issued conflict of interest law opinions on October 31, 1978.

^{16/} St.1978, c. 210, § 24.

^{17/} The Commission’s first meeting was on October 20, 1978.

^{18/} G. L. c. 268A, § 10; G. L. c. 268B, § 3(g). The Commission issued its first conflict of interest law opinion (*EC-COI-78-1*) on December 18, 1978.

^{19/} *EC-COI-80-111*.

^{20/} The Commission has not been as consistent with the status of the Commonwealth and its agencies. The Commission initially concluded that the Commonwealth itself, *EC-COI-82-1*, *82-13*, and a state agency organized as a “body politic and corporate” (a regional transportation authority), *EC-COI-81-119*, were business organizations. Subsequently, the Commission reversed its position. In a footnote to a 1992 opinion, citing *EC-COI-92-11*, *92-3 n.3*, *85-67*, and Attorney General Conflict Opinion No. 30 and overstating the clarity of the precedent, the Commission stated, “the Commission and the Attorney General have repeatedly held that neither the state nor any state agency is a ‘business organization.’” *EC-COI-92-25 n.1*.

^{21/} See, e.g., *EC-COI-92-25* (citing *EC-COI-92-8*, *89-2*, and *88-4*); *EC-COI-92-8* (citing *EC-COI-92-3*, *90-8*, *90-4*, *89-2*, *85-67*, *84-120*, *82-25*, *81-62*, and *81-56*); *EC-COI-90-8* (citing *EC-COI-88-*); *EC-COI-89-2* (citing Attorney General Conflict Opinion No. 613 and *EC-COI-80-111*); *EC-COI-84-77* (citing *EC-COI-81-56*); *EC-COI-81-56* (citing Attorney General Conflict Opinion No. 613); *EC-COI-80-111* (citing Attorney General Conflict Opinion No. 613).

^{22/} See, e.g., *EC-COI-84-120*.

^{23/} *EC-COI-92-11*.

^{24/} *Id.*

^{25/} *EC-COI-92-3*.

^{26/} *EC-COI-92-11* cites *EC-COI-92-3* as authority for the proposition that, “governmental entities, such as the federal government, which are not organized as “bodies corporate” may not be considered business organizations,” although the earlier opinion, which concerned the meaning of the term “organization” (and not “business organization”) did not reach that conclusion and, in fact, expressly deferred deciding the significance of municipalities being “bodies corporate” and the

Commonwealth being a “body politic.” *EC-COI-92-3 n.3*.

^{27/} G. L. c. 34, § 1.

^{28/} The Commission’s position as to the business organization status of counties is somewhat unclear due to the lack of recent opinions. Early Commission opinions concluded that counties and county agencies are business organizations. See, e.g., *EC-COI-81-119*; *81-150*; *82-143 n.11* (“‘business organization’ includes both profit and non-profit organizations, municipal and county governments and agencies, and other governmental entities”). Dicta in *EC-COI-92-3 n.3* (“Although this Commission has held in previous opinions that municipalities and municipal agencies are ‘business organizations’ within the meaning of §6, [citations omitted], other governmental agencies apparently are not considered ‘business organizations.’”), combined with the absence of subsequent Commission opinions dealing with the issue, however, has cast some doubt on the business organization status of counties and county agencies.

^{29/} See, e.g., *EC-COI-92-11* (quoting, with citations omitted, *Int’l Organization of Masters, etc. v. Woods Hole, Martha’s Vineyard & Nantucket Steamship Authority*, 392 Mass. 811, 813 (1984).

^{30/} “Organization” means “something that has been organized or made into an ordered whole” or “a number of persons or groups having specific responsibilities and united for a particular purpose.” *The American Heritage Dictionary* (2nd College Ed. 1985) at 876. See *Commission Advisory No. 90-01: Negotiation for Prospective Employment* (“The term ‘organization’ includes corporations, business trusts, estates, partnerships, associations, two or more persons having a joint or common interest, and any other legal or commercial entity, as well as federal, state or local governmental agencies and subdivisions.”)

^{31/} “Business” means, in its broadest sense, “serious work or endeavor.” *The American Heritage Dictionary* (2nd College Ed. 1985) at 220.

^{32/} Attorney General Conflict of Interest Opinion No. 613 concluded that municipalities are business organizations based on this broad reading of the statutory language.

^{33/} Thus, as set forth above, the Commission’s early opinions concluded that the Commonwealth, the counties and municipalities are all business organizations.

^{34/} See *EC-COI-92-3 n.3*; *EC-COI-92-25 n.1*.

^{35/} G. L. c. 40, § 1.

^{36/} A “body corporate” is a corporation. *Webster’s Third New International Dictionary* (1993) at 246.

^{37/} *Constitution of the Commonwealth of Massachusetts, Preamble; Part 2, The Frame of Government*. A “body politic” is “the whole people organized and united under a single political authority.” *Webster’s Third New International Dictionary* (1993) at 246.

^{38/} The converse is true as well: not all business organizations are corporations.

^{39/} A business organization may also take other forms, such as, for example, a partnership or trust.

^{40/} A “business corporation” is commonly defined as a “corporation formed to engage in commercial activity for profit.” *Black’s Law Dictionary* 341 (7th ed. 1999) at 341.

^{41/} *Id.* at 1037.

^{42/} *The American Heritage Dictionary* (2nd College Ed. 1985) at 822.

^{43/} *Constitution of the Commonwealth of Massachusetts, Part I, Article VII.*

^{44/} Cities and towns, as municipal corporations, are established, empowered and governed by different statutes (primarily G. L. c. 39 through c. 49) than are other types of corporations (G. L. c. 155 through c. 182).

^{45/} Such state agencies include, but not limited to: charter schools (G. L. c. 71, § 89(j)); the Massachusetts Technology Park Corporation (G. L. c. 40J, § 3); the Massachusetts Development Finance Agency (G. L. c. 23G, § 2(a)); the Community Economic Development Assistance Corporation (G. L. c. 40H, § 3(a)); the Massachusetts Technology Development Corporation (G. L. c. 40G, § 2); the Massachusetts Centers for Excellence Corporation (G. L. c. 40J, § 12); the Massachusetts College Student Loan Authority (G. L. c. 15C, § 4(a)); the School Building Authority (G. L. c. 70B, § 1A); the Massachusetts Bay Transportation Authority (G. L. c. 161A, § 2); the Massachusetts Port Authority (G. L. c. 91 App., § 1-2); and the Massachusetts Turnpike Authority (G. L. c. 81A, § 1).

^{46/} G. L. c. 121B, § 3.

^{47/} *Id.*, § 4.

^{48/} G. L. c. 164, § 47C(b).

^{49/} See Mass. House No. 3650 of 1962.

^{50/} *Id.* at 9 (*emphasis added*).

^{51/} Robert Braucher, Conflict of Interest in Massachusetts, in Perspectives of Law: Essays for Austin Wakeman Scott (Pound, Griswold & Sutherland 1964) at 24.

^{52/} Section 13 is the county counterpart to §§ 6 and 19.

^{53/} William G. Buss, *The Massachusetts Conflict-of-Interest Statute: An Analysis*, 45 B.U.L. Rev. 299 (1965).

^{54/} *Id.* at 301.

^{55/} *Commission Advisory No. 90-01: Negotiation for Prospective Employment.*

^{56/} G. L. c. 268A, § 23(b)(2). Section 23(b)(2) provides, in relevant part, that no public employee may, knowingly or with reason to know, use his official position to secure unwarranted privileges or exemptions of substantial value for himself or others.

^{57/} G. L. c. 268A, § 23(b)(3). Section 23(b)(3) prohibits a public employee from, knowingly or with reason to know, engaging in conduct which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person or entity can improperly influence him 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, or position of any person. To dispel the “appearance of a conflict,” § 23(b)(3) requires that, prior to participation, the public employee file a full written disclosure of all of the relevant facts with his appointing authority. Unlike a disclosure under § 6, a § 23(b)(3) disclosure does not require any action by the appointing authority. Furthermore, if the relevant facts have already been disclosed under § 6, an additional disclosure under § 23(b)(3) is not required.

^{58/} G. L. c. 268A, § 23(b)(2).

^{59/} “[T]he distinguishing factor of acting as agent within the meaning of the conflict law is ‘acting on behalf of’ some person or entity, a factor present in acting as spokesperson, negotiating, signing documents and submitting applications.” *In Re Sullivan*, 1987 SEC 312, 314-15. See

In Re Reynolds, 1989 SEC 423, 427; *Commonwealth v. Newman*, 32 Mass. App. Ct. 148, 150 (1992). By contrast, merely discussing or voting as a Board member on a matter is not an act of agency.

^{60/} G. L. c. 268A, § 17. Under § 17(a) and (c), a municipal employee generally may not, directly or indirectly, receive compensation from or act as agent or attorney (even if unpaid) for anyone other than the municipality in connection with any particular matter in which the municipality is a party or has a direct and substantial interest. Conversely, under § 4(a) and (c), as a special state employee due to your Board membership, you are generally prohibited from acting as agent for or being compensated by anyone (including the Town) other than the Commonwealth in a matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest and in which you have at any time participated, or for which within one year you have had official responsibility, as a state employee.

^{61/} Section 23(e) of G. L. c. 268A provides, in relevant part, “Nothing in this section shall preclude any such constitutional officer . . . from establishing and enforcing additional standards of conduct.”

^{62/} We do not address, and this opinion should not be read to preclude, the possibility of an entity created by a level of government (municipal, county, state or federal) which may itself be a business organization within the meaning of G. L. c. 268A.

CONFLICT OF INTEREST OPINION EC-COI-06-4

QUESTION

Does the conflict of interest law, G. L. c. 268A, permit a private nonprofit organization to give and a state, county or municipal employee to accept an unsolicited award of substantial value in recognition of the public employee’s outstanding public service, leadership, dedication or potential?

ANSWER

Yes. The conflict of interest law permits the award to be given and accepted under the facts discussed below which establish that the award is not a gift in violation of G. L. c. 268A, § 3 or an unwarranted privilege in violation of § 23(b)(2) of the statute.

FACTS^{1/}

You represent a private non-profit philanthropic consulting firm (“the Firm”). The Firm runs a fellowship program (“the Fellowship”) which is an awards program that recognizes individuals who perform outstanding community service in Greater Boston. Each year six persons (“the Fellows”) are chosen for recognition and are awarded \$30,000 (\$10,000 per year for three years).

The Firm designed the Fellowship for an anonymous donor in order to achieve the donor's goal of recognizing individuals of unusual creativity, vision and initiative who are quietly making the community a better place. The Fellowship provides recognition and direct financial support to individuals of creativity, vision and leadership who work in community service in Greater Boston.

The individuals chosen as Fellowship recipients work for government, community organizations, or are outstanding volunteers. Diverse in race, class, occupation and age, their one common characteristic is leadership. The Fellowships are not awarded to elected public officials or to public employees who are in official positions to regulate or otherwise exercise their official powers over the Firm.

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Potential Fellows do not apply for the Fellowship. Instead, nominations for the Fellowship are made by a group of "spotters." Individuals representing diverse parts of the Boston community, the spotters are volunteers who serve for a two-year period. During that time, the spotters agree to identify individuals who, by virtue of their leadership and service in Boston neighborhoods, qualify for the Fellowship. The spotters' identities are not revealed to the individuals they nominate for the Fellowship. A small selection committee reviews the nominations and makes the final selection. The Firm's staff conducts a complete review and reference check for each finalist.

Nominees must be engaged in some form of community service. They may work for a government agency or a community organization, or they may be doing volunteer work.² The Fellowship recipients represent the best practitioners of their form of community service, those who perform their jobs with creativity and initiative, contributing to the community in ways that go beyond the scope of their specific job description. Their working lives represent extraordinary stories of courage, struggle and commitment. They are self-starters who are likely to make good use of flexible resources. Selecting a group of Fellows that represents the diversity of Boston is a prime consideration.

The Fellowship funds awarded are absolutely unrestricted. The recipients may use them to stabilize their personal finances, to take time off for special projects or a sabbatical. Some Fellows might choose to go back to school or obtain some skills training. Others might choose to use the funds as social venture capital to seed new projects. The Fellows are not required to continue in their present work.

No reports are required of the Fellows on their activities. Other than appearing at an initial presentation, the Fellows are not required to work together or to attend meetings. The Fellows are invited to share their

experiences and discuss their work over the course of the year, but such participation is not mandatory.

DISCUSSION

The Fellowship, including the \$30,000 award, is a gift. The provision of awards and other gifts of substantial value to and the acceptance and receipt of such gifts by Massachusetts state, county and municipal employees potentially raise issues under §§ 3(a) and (b) and 23(b)(2) of G. L. c. 268A.

Section 3(a), in relevant part, prohibits anyone from, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly giving, offering or promising any thing of substantial value to any state, county or municipal employee for or because of any official act performed or to be performed by the employee. Section 3(b), in relevant part, prohibits a state, county or municipal employee from, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, asking, demanding, exacting, soliciting, seeking, accepting, receiving or agreeing to receive anything of substantial value for himself. Section 23(b)(2), in relevant part, prohibits a state, county or municipal employee from, knowingly or with reason to know, using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated persons.

Accordingly, the conflict of interest law issues raised by the award of the Fellowship to a public employee are whether the Fellowship is being awarded and accepted for or because of the public employee's official acts or acts within his official responsibility, in violation of § 3, or whether the Fellowship is an unwarranted privilege being secured by the public employee through the use of his official position, in violation of § 23(b)(2).³

Section 3

A gift to a public employee implicates § 3 when there is "a link" between the gift and an official act.⁴ A gift of substantial value to a public employee violates the section when it is provided to the employee "as a reward for past action, or to influence [the employee] regarding a present action, or to induce [the employee] to undertake a future action."⁵ That is, a gift to a public employee violates § 3 where there is "linkage to a particular official act, not merely the fact that the official was in a position to take some undefined or generalized action...[that] could benefit the giver of the gratuity."⁶

Where, as in the case of the Fellowship, an award is given in *bona fide* recognition of a public employee's creativity, dedication, vision, record of community service, leadership or potential, generally, and not because of any

particular act by the recipient as a public employee, it is not given to reward, induce or influence any official act or act within the official responsibility of the public employee. In the case of such an award, there is no linkage between the gift and any particular official act performed or to be performed by the recipient. Such an award would, therefore, not be given or received for or because of the public employee's official act or acts within his official responsibility in violation of § 3. Accordingly, the award of the Fellowship to a Massachusetts public employee and the employee's receipt of the Fellowship would not violate § 3.

Section 23(b)(2)^{1/}

The receipt of a gift, such as an award, is a privilege within the meaning of § 23(b)(2). A gift to a public employee raises § 23(b)(2) concerns when it is, in whole or in part, motivated by or received because of the public employee's status or power in his official position. When a public employee, knowingly or with reason to know, seeks or accepts a gift provided to him because of his status as a public employee or because of the powers that he can exercise in his official position, he uses his official position to secure the privilege of the gift.^{2/} Where the gift is of substantial value and not properly available to similarly situated persons and, thus, unwarranted, the employee's acceptance of the gift violates § 23(b)(2).

In the case of the Fellowship, the above-stated facts establish that the \$30,000 award, in addition to not being given for or because of any official act performed or to be performed by the recipient public employee, is also not being given because of the recipient's official status or power as a public employee. First, the Fellowship is not limited to public employees, but is also awarded to persons providing community service in private organizations and as private individuals. Indeed, most Fellows are not public employees. In addition, the award is entirely "without strings" and the Fellows are not required to continue their present work; a public employee Fellowship recipient would not be obligated to remain in his official position. Furthermore, the Fellowship is not solicited or applied for by the public employee and the award is funded by an anonymous donor. Finally, the Fellowships are not awarded to public employees who are in positions to regulate or otherwise exercise their official powers over the awarding entity. The combination of these facts ensures that the Fellowships would not be awarded to or received by public employees due to or through the use of their official status or powers, but would instead be given in *bona fide* recognition of the public employees' outstanding public service, leadership, dedication or potential.

Accordingly, under the above-stated facts, a Massachusetts public employee's receipt of the Fellowship would not violate § 23(b)(2).^{2/} Under these circumstances,

an individual's status as a public employee will not disqualify him under G. L. c. 268A from eligibility to receive the recognition and cash award for his outstanding service to the community represented by the Fellowship.

CONCLUSION

For the above-stated reasons, we conclude that the conflict of interest law, G. L. c. 268A, permits a private nonprofit organization to give, and a Massachusetts state, county or municipal employee who does not regulate or otherwise exercise official power over the giver to accept, an unsolicited, "no strings attached" award of substantial value in *bona fide* recognition of the public employee's outstanding public service, leadership, dedication or potential.

DATE AUTHORIZED: November 8, 2006

^{1/} The facts are as stated in the letter requesting Commission advice on the Firm's behalf and on the Firm's website, as supplemented through telephone conversations.

^{2/} Between 1991 and 2006, the overwhelming majority of the Fellowship recipients were privately employed.

^{3/} Anything with a value of \$50 or more is of substantial value for G. L. c. 268A purposes. See *Life Insurance Association of Massachusetts, Inc. v. State Ethics Commission*, 431 Mass. 1002, 1003 (2000), citing *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976). Thus, the Fellowship award is of substantial value for G. L. c. 268A purposes.

^{4/} *Scaccia v. State Ethics Commission*, 431 Mass. 351, 355 (2000).

^{5/} *Id.* at 356.

^{6/} *Id.*

^{7/} Although the giver of a gift, including an award, to a public employee cannot violate § 23(b)(2), we are advising you on this issue because the giver of an award needs to know whether the award will place the recipient in jeopardy of violating the law.

^{8/} See *EC-COI- 87-7*; See also *Commission Advisory No. 04-02, Gifts and Gratuities*.

^{9/} The public employee would be required to make a public disclosure of his receipt of the Fellowship, including the award, pursuant to G. L. c. 268A, § 23(b)(3).

COMMISSION ADVISORY NO. 06-01

CONSULTANTS AND ATTORNEYS WHO PROVIDE SERVICES TO GOVERNMENT AGENCIES MAY BE PUBLIC EMPLOYEES SUBJECT TO THE CONFLICT OF INTEREST LAW

This advisory explains how the conflict of interest law, General Laws Chapter 268A, applies to consultants and attorneys who personally perform services for state, county and municipal government.

I. BACKGROUND

The definition of a public employee in the conflict of interest law is very broad. It includes:

a person performing services for or holding an office, position, employment or membership in a [state, county, 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.^{1/}

II. APPLYING THE PUBLIC EMPLOYEE DEFINITIONS^{2/}

Public employee status is most easily attributed where an individual (e.g., attorney or consultant) personally undertakes to perform and does personally perform services for a public agency. In such situations, more often than not, an individual is a public employee for the purposes of the conflict of interest law.

Example: An individual who is a full-time financial consultant to a state agency is a state employee.

Example: A private attorney who has been individually hired to serve as trial counsel for a municipality in litigation is a municipal employee.

Determining the public employee status of an employee or member of a corporation or other business organization, including a law firm, which contracts or agrees with a government agency to perform services is more complicated. Employees of a corporation or business organization do not become public employees simply because the corporation or business organization has a contract with a public entity. Nor is the corporation or business organization, e.g., a law firm, itself a municipal employee. In some instances when a private business contracts with a government agency, however, an employee, officer or partner of the business who actually performs services for the government agency will be a public employee for purposes of the conflict of interest laws. The Commission has developed and applies a multi-

factor analysis for determining whether a particular individual performing the services is a public employee. The factors considered by the Commission include, but are not limited to the following:

1. Whether the individual's services are expressly or impliedly contracted for. For example, if a contract requires the services of a particular individual in a corporation rather than leaving assignment of staff up to the corporation, the individual providing the services may be a public employee.
2. The type and size of the corporation. While an officer or employee of a small, closely held corporation is more likely to be deemed a public employee, even an employee of a large, publicly held corporation may be a public employee if the other factors here suggest that outcome.
3. The degree of specialized knowledge or expertise required of the service. The more specialized the services an individual provides to the public entity, the more it appears that the individual providing the services is a public employee.
4. The extent to which the individual personally performs services under the contract or controls and directs the terms of the contract or the services provided. Greater personal responsibility for services and greater control over the terms of the contract suggest that the individual may be deemed a public employee.
5. The extent to which the person has performed similar services to the public entity in the past. Repeated service by the same individual suggests that the individual is a public employee.

No one factor is dispositive; rather the Commission will balance all of the factors based on the totality of the circumstances.

Example: A real estate consultant will provide real estate redevelopment services under his corporation's contract with a city. The consultant personally had performed essentially the same services for the city for the prior three years; he plans to personally provide up to 90% of the services under the contract; the provided services are professional and highly technical; and the corporation is small and 100% owned by the consultant and his wife. Even though the contract does not require his individual services, he is a municipal employee.

Example: An employee of a large corporation (of which he is a less than 1% shareholder) serves

as the administrator of a county hospital pursuant to a management agreement between the county and the corporation. The county approved her initial and continuing appointment; she previously had served in the administrator position as a regular county employee; the county contemplates her continuing to serve as administrator; and her services are specialized and significant. She is a county employee for G. L. c. 268A purposes.

Example: University employees who provide services under the university's consulting contract with a municipal school committee are not, as a result, municipal employees under the following circumstances. Under the contract the university is to conduct hearings, set compensation for school employees, recruit, hire, appoint, evaluate, promote, assign, fire, suspend and dismiss school employees and consultants, including the school superintendent, and conduct collective bargaining with unions serving the university. Thus, the contract requires specialized knowledge regarding personnel management in a school setting, and one factor of the multi-factor analysis is met. Otherwise, the multi-factor analysis is not satisfied. The contract does not identify any individual employee of the university who must provide services. Instead, the university may choose its staff as it sees fit to perform the work required by the contract. Consequently, while performing duties under the contract, university employees are not required to comply with the conflict of interest law. Under the multi-factor analysis, any individual university employee does not become a municipal employee by performing services under the contract.

Example: A contract between a large corporation and the department of public works authorizes the DPW to approve some of the corporation's supervisory personnel before they can work on the contract. The employees whom the DPW approves are state employees. Other employees who work on the contract, and who are assigned by the corporation and do not need to be approved by the DPW, are not state employees because the contract does not specify or otherwise "target" any particular corporation employee.

Due to the broad definition of public employee in G.L. c. 268A and the application of the multi-factor analysis, otherwise private attorneys who personally provide legal services to a public entity are public employees under the conflict of interest law, and subject to its restrictions.^{3/}

Example: A medium-sized law firm provides legal services to a state agency. The law firm is hired because of the experience and specialization of

one of its attorneys, who provides most of the hours billed by her firm to the state agency. This particular attorney is a state employee subject to the restrictions of the conflict of interest law.

Note that a consultant may be able to work on more than one project and/or for more than one agency, if the consultant has a single contract which by its scope allows such an arrangement.

Example: A town hires a special counsel to represent it in litigation against the planning board. The town may, by amending the special counsel's contract, also hire the same counsel to represent it on other unrelated litigation involving the recreation department.

For further advice on determining if a consultant or attorney is a public employee and on applying the factors listed above, please contact the Ethics Commission.

III. CONSEQUENCES OF PUBLIC EMPLOYEE STATUS FOR CONSULTANTS AND ATTORNEYS

A consultant or attorney who becomes a public employee by personally providing professional services to a public entity is subject to all of the restrictions of the conflict of interest law concerning bribes, gifts and gratuities, self-dealing and nepotism, the standards of conduct and post-employment. A partner of such a public employee also may be subject to restrictions.^{4/} For additional information about these restrictions, see the Commission's website at www.mass.gov/ethics.

In terms of the impact on the private practice of a consultant or attorney, the most important consequences of public employee status come through the application of §§ 4 and 7 (state), §§ 17 and 20 (municipal) and §§ 11 and 14 (county).^{5/} These sections restrict the consultant's or attorney's ability both to represent ("act as agent or attorney for") and be compensated by anyone other than the public entity in any matter involving the public entity (§§ 4, 17 and 11)^{6/} and to have a financial interest in more than one contract at a time with the public entity (§§ 7, 20 and 14). In addition, the consultant's partners are restricted from acting as agent or attorney for anyone other than the public entity in any matter involving the public entity in which he participates or has participated or has official responsibility as an employee of the public entity under §§ 5(d) (state), 12(d) (county) and 18(d) (municipal). These restrictions do not apply to the consultant's employees or associates with whom he is not in partnership.

A. "Regular" Public Employees

1. Working for private parties

For a so-called "regular" public employee, i.e., one who does not qualify as a "special" public employee

as discussed below, these restrictions greatly curtail the extent to which an individual can work or be compensated as a consultant or attorney outside of his or her employment by a public entity. For example, a regular municipal employee is subject to § 17 restrictions on providing services to private parties with regard to any particular matter in which the same city or town - not just his own department — is a party or has a direct and substantial interest.^{7/}

Example: An attorney in part-time private practice who is compensated for more than 800 hours during the preceding 365 days for services to the town is a regular municipal employee and thus could not represent a private client before the town planning board (or any other town board) or in litigation in which the town was a party. The attorney cannot be compensated by the private client for any legal services even if someone else made the presentation to a town board.

Sections 4 and 11 likewise restrict state and county employees, respectively, from doing work for, or receiving pay from, private parties.

2. Working for multiple agencies

The purpose of § 20 is to prevent public employees from using their position to obtain contractual benefits from the government, and to avoid the public perception that they have an “inside track” on such opportunities. Under § 20, a “regular” town employee may not have a contract with the same town agency by which he is employed. He generally would have to comply with the many restrictions of § 20(b) to maintain an interest in a contract with a town agency other than the one by which he is employed.^{8/} To contract to privately provide part-time (500 or fewer hours per year) services to another town agency, for example, a regular town employee would have to comply with disclosure requirements and obtain approval from the board of selectmen.

Example: An engineer who is hired by the school committee to assist in renovations of the high school can contract with the town library to prepare drawings only if she files a statement disclosing her interest in the contract with the town clerk, the contract requires less than 500 hours of work per year, the director of the library files a statement with the town clerk certifying that no employee of the library is available to perform those services as part of their regular duties, and the board of selectmen approve.

Similar restrictions apply to “regular” state employees under § 7.^{9/} The restrictions of § 14 applicable to “regular” county employees are substantially different.^{10/}

B. “Special” Public Employees

The conflict of interest law seeks to balance the need of government to attract qualified public employees with the need to protect the integrity of government. In order to achieve that balance, the law places less strenuous restrictions on employees who work less than full-time for public entities and who, thus, may be designated “special” public employees. Special public employees include employees who hold positions for which no compensation is provided and employees whom the voting body for the public entity has classified as special employees because their positions allow them to hold other jobs during normal working hours or because they work a limited number of hours for the public entity.^{11/} In order to be a “special” employee, state and county employees must meet one of these criteria; municipal employees must, in addition, be designated as “special” municipal employees by selectmen, the city council or aldermen. In a municipality with a population of more than 10,000, selectmen may not be special municipal employees; if the population is 10,000 or fewer, selectmen are automatically special municipal employees.

1. Working for private parties

The restrictions imposed by c. 268A on private professional activity by public employees are greatly reduced where the public employee has “special [public] employee” status. For example, with regard to providing private services, a special municipal employee is subject to § 17 restrictions only with regard to any particular matter in which he participated at any time as a municipal employee, or which is, or within one year has been, a subject of his official responsibility,^{12/} or which is pending in his own agency.

Example: An architect who is a member of a city historical commission, and who in that capacity is a special municipal employee, may not accept compensation from a private client who brings a matter before the commission, may not appear before the commission on behalf of the client, and may not prepare or sign documents that the client will submit to the commission. The architect, however, may appear before or submit plans to the zoning board of appeals or planning board on a project not subject to commission review.

Example: A private attorney who is a member of a school committee, and is a special municipal employee, cannot represent clients before the school committee but may represent clients before the planning board, building inspector and the board of health.

If he serves as a public employee on sixty days or fewer^{13/} during a 365-day period, a special employee

even can act as an agent or attorney for, and receive compensation from, a private party in a matter pending before his own agency, provided that he has not participated in the matter and it is not, and in the previous year was not, a subject of his official responsibility.

Example: A call firefighter works for a town fire department for fewer than 60 days in a 365-day period, and is designated as a special municipal employee. As a professional engineer, he could design fire protection systems for the town and submit plans with regard to a particular matter requiring a permit from the town fire department so long as he does not participate in or have official responsibility for approving or signing off on the permit as a call firefighter.

Example: A part-time assistant town counsel who is a “special” (and an attorney in private practice), who has responsibility only for the specific matters assigned to her, and who provides legal services to the town on sixty or fewer days within a 365-day period, could represent private clients in matters involving the town that were not assigned to her and in which she did not participate as assistant town counsel even where the matter was being handled by other attorneys in the town counsel’s office.

The restrictions of §§ 4 and 11 are similarly relaxed for special state employees and special county employees respectively.

2. Working for the same agency or multiple agencies

Special employee status also makes it significantly easier for public employees to have more than one contract with different agencies within the same public entity. Thus, simply by filing a disclosure with the town clerk under § 20(c), a special municipal employee may contract to provide professional services to a municipal agency other than his own if he does not participate in its activities or have official responsibility for them.

Example: A private consultant who is a member of the conservation commission, and is a special municipal employee, can provide consulting services to other municipal boards if she does not participate in their activities or have official responsibility for them as a commission member, following submission of a disclosure of her financial interest in the contract pursuant to § 20(c).

Example: A member of the housing authority who is a special municipal employee and has a private engineering consulting practice could provide contract services to the conservation commission

without violating § 20 by simply filing a disclosure with the town clerk.

A special municipal employee may even have a financial interest in a contract with his own agency if he discloses his interest in the contract and also obtains approval from the selectmen, city council or board of aldermen under § 20(d).

Example: A physician who consults with the city’s board of health on an HIV/AIDS project, and whose position has been classified as that of a special municipal employee by the city council, may also consult with a medical research group who has contracted with the board of health to study the West Nile virus, provided that he files a statement with the city clerk disclosing his interest in the contract and the city council approves.

Section 7(d) and (e) set forth analogous procedures for special state employees, with disclosure instead to the Commission and approval instead by the governor. For special county employees, however, there is no provision permitting employment with their own county agency. Section 14(c) only permits a special county employee to contract with a contracting agency if he does not participate in or have official responsibility for its activities and if he files a disclosure with the Commission and receives the approval of the county commissioners.

In summary, special public employee status makes it possible for public employees who are professionals to privately practice their profession within their employing public entity’s jurisdiction, even with respect to matters involving or of interest to their employing public entity, with certain reasonable and limited restrictions (as described above). This includes attorneys in private practice who are public employees only by virtue of their personally providing services to a public entity. By imposing on special public employees only these limited restrictions, G. L. c. 268A protects the public interest in avoiding conflicts of interest without unduly discouraging public service by privately practicing professionals.

IV. CONCLUSION

Generally, individuals who directly contract with public entities to personally perform services are G.L. c. 268A public employees. By contrast, most employees of entities with public contracts are not G. L. c. 268A public employees. In most cases, the public agency is seeking the entity’s services (provided by whichever of its employees the entity chooses) and not the services of any particular employee or officer of the entity. In other cases, however, the opposite is true. The multi-factor analysis attempts to identify these other cases.

In addition to whether the individual’s services are expressly or impliedly called for under the agreement,

the smaller the entity in question (and the higher in the entity's organizational chart the individual), the more specialized the services, the more the individual personally participates in providing the services and the more extensive the individual's history of providing the services to the agency, the more the balance is weighed in favor of concluding that the individual is a public employee for G. L. c. 268A.

A consultant or attorney may be a public employee because a public entity either contracts with him individually or contracts with a corporation or commercial entity which he owns or runs or in which he serves as an employee, if the circumstances are such that the factors set forth in Section II, above, weigh in favor of concluding that the individual is a public employee. In either case, the consequence is that a public employee must comply with the provisions of G.L. c. 268A. For those individuals who meet the requirements to be "special" public employees, the conflict of interest law allows greater leeway to serve private clients, work for multiple public agencies, or work on different projects for the same agency.

* * *

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)
One Ashburton Place, Room 619
Boston, MA 02108
(617) 371-9500

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¹ G.L. c. 268A, §§ 1(d), 1(g) and 1(q).

² Specific statutes related to individual municipalities and local municipal ordinances also may govern who is a public employee. Consult your city solicitor or town counsel for additional information.

³ Attorneys should note that the Massachusetts Rules of Professional Conduct may prohibit representation of a particular client because of adverse or competing interests, or because of a perceived conflict of interest. The conflict of interest law, which focuses on the conduct of government employees, and so includes attorneys who are government employees, imposes additional requirements. Even if they work in a non-legal profession as public employees, attorneys must comply with the conflict of interest laws in accepting work from other government agencies or private legal work outside their public employment.

⁴ The term "partner" is not specifically defined in G.L. c. 268A. However, the Commission has construed the term in several opinions. See EC-COI-87-34; 87-29; 86-03; 85-62; 84-78. The term "partner" is not restricted to those who enter formal partnership agreements. Thus, where business ties are indeterminate, the Commission has held that a partner is any person who joins with another, formally or informally, in a common business venture, and that the substance of the relationship

is what matters, not merely the terms the parties use to describe the relationship.¹¹ EC-COI-84-78. For example, the Commission concluded in EC-COI-93-24, that members of a professional corporation are not "partners" for purposes of the conflict of interest statute.

⁵ Additional exemptions may also be available. For example, a consultant who is a municipal employee may also apply on behalf of a private client for a building, electrical, wiring, plumbing, gas fitting or septic system permit unless he is employed by or provides services to the permit-granting agency or an agency that regulates the activities of the permit-granting agency. Consult your city solicitor, town counsel or the State Ethics Commission for additional information.

⁶ Note that a consultant who, as a public employee, is prohibited from acting as an agent on behalf of a private client before a government board may, behind the scenes, provide advice, provided he is uncompensated. In contrast, an attorney may not provide pro bono counsel even behind the scenes because he would still be acting as an attorney.

⁷ Note that G.L. c. 268A, §17 generally permits a municipal attorney to represent both the municipality and a municipal employee in defense of a civil rights action where the complaint alleges liability in both the employee's individual capacity and official capacity. See Commission Advisory No. 84-03: Municipal Lawyers Representing Both a Municipal Employee and a Municipality in the Same Suit. Restrictions under the Rules of Professional Conduct may apply.

⁸ Section § 20(b) permits a "regular" municipal employee to have a financial interest in a contract with a city or town if he is not employed by the agency which has the contract, is not employed by an agency which regulates the activities of the contracting agency, and does not participate in or have official responsibility for any of the activities of the contracting agency. In addition, the contract must be made after public notice or, where applicable, through competitive bidding. The state employee also must file a disclosure of his or his immediate family's financial interest in the contract with the city or town clerk. If he is contracting with an agency to provide personal services, then, in addition to the requirements above, the services must be provided outside the normal working hours of the municipal employee, the services must not be required as part of his regular duties and he must not be compensated for them for more than 500 hours in a calendar year, and the head of the contracting agency must file a certification with the city or town clerk stating that no employee of the agency is available to perform those services as part of their regular duties.

⁹ The requirements of § 7(b) and § 20(b) are the same, except that under § 7(b), the employee's disclosure and the certification by the head of the agency must be filed with State Ethics Commission instead of the city or town clerk.

¹⁰ Unlike § 7(b) and § 20(b), the exemption available for regular county employees under § 14(b) does not require any disclosure to be filed, and applies only to a contract made through competitive bidding in which the direct or indirect interest of the employee and his immediate family together amount to less than ten percent of the total proprietary interests in the corporation or other commercial entity with which the contract is made. Of the three exemptions, § 14(b) is the only one to include a maximum allowable interest. In addition, eligibility for the exemption for county employees is different. All three exemptions require that the employee not participate in or have official responsibility for any of the activities of the contracting agency. Under § 14(b), an exemption is available only if a "regular" county employee does not participate in or have official responsibility for any of the activities of the contracting agency and the contract is made through competitive bidding. In addition, the employee's direct and indirect interests in the corporation or other commercial entity with which the contract is made, and the interest of his immediate family, may not in

the aggregate amount to ten percent of the total proprietary interests of the corporation or commercial entity.

¹¹“Special state employee” a state employee: (1) who is performing services or holding an office, position, employment or membership for which no compensation is provided, or (2) who is not an elected official and (a) occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment, or (b) 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. 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. G.L. c. 268A, § 1(o).

“Special county employee”, a county employee who is performing services or holding an office, position, employment or membership for which no compensation is provided; or who is not an elected official and (1) occupies a position which, by its classification in the county agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the State Ethics Commission and the office of the county commissioners prior to the commencement of any personal or private employment, or (2) in fact does not earn compensation as a county employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special county 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. G. L. c. 268A, § 1(m).

“Special municipal employee,” a municipal employee who is not a mayor, a member of the board of aldermen, a member of a city council, or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of aldermen if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of this chapter; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a “special municipal employee” unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be “municipal employees” and shall be subject to all the provisions of this chapter with respect thereto without exception. G.L. c. 268A, § 1(n).

¹²“Official responsibility” means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, s.1(j).

¹³The term “serves” means substantive, rather than ministerial, services performed on any portion of a calendar day. EC-COI-98-6. When more than one employee of a law firm or a consulting firm is a special public employee, the 60-day restriction will apply to each of them individually.

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Summaries of Enforcement Actions Calendar Year 2006

In the Matter of Robert C. Tinkham, Jr. - The Commission concluded public proceedings against Carver Board of Health (BOH) Agent Robert C. Tinkham, Jr. by approving a disposition agreement in which Tinkham admitted to violating the state's conflict of interest law, G.L. c. 268A, by overseeing testing of, inspecting and approving installation of new septic systems at a campground owned by his parents. Tinkham paid a civil penalty of \$3,000. According to the Disposition Agreement, in 2002, Pinewood Way Camping Area, a South Carver campground owned and operated by Tinkham's parents and as to which Tinkham serves as a corporate director, was required to upgrade its septic systems in accordance with Title 5 of the state environmental code. In November 2002, Tinkham as health agent witnessed five soil percolation tests for five new septic systems. In April 2003, Tinkham, acting on behalf of the BOH, inspected the installed systems and authorized their completion. In addition, Tinkham submitted five sewerage system inspection reports to the BOH and signed five certificates of compliance. The BOH had instructed Tinkham in 1995 that any inspections he performed at the campground would be done with a BOH member present. A BOH member was not present during Tinkham's actions inspecting and approving installation of the septic systems. Section 19 prohibits a municipal employee from officially participating in matters in which to his knowledge he, his immediate family or a business in which he is serving as a director has a financial interest. By participating in these matters, Tinkham violated G.L. c. 268A, § 19.

In the Matter of Kelly Giampa - The Commission fined former Springfield Parking Authority (the Authority) Operations and Facilities Manager Kelly Giampa \$3,000 for soliciting bribes for herself and a friend in early September 2003 from a contractor seeking work from the Authority. According to a Disposition Agreement, Edward Rossi, whose wife worked at the Authority, expressed interest in bidding on a contract to remove and replace a retaining wall at an Authority parking lot. After Authority Executive Director Clement Chelli questioned whether the contract could be awarded to the spouse of an Authority employee, Giampa told Rossi that she would make sure Rossi got the contract if Rossi gave her \$1,000. Giampa also proposed that Rossi give her friend \$1,000 in return for her friend's name being used on the contract instead of Rossi's. Rossi declined Giampa's suggestion and subsequently submitted a bid, dated September 16, 2003, for \$21,476, which was the lowest bid received. When the Authority learned that Giampa had allegedly solicited money from Rossi in relation to his bid, the Authority canceled the bids and ordered an investigation. Giampa was suspended from her position on September 23, 2003 and resigned in October 2003. Section 2 of the conflict of interest law prohibits a municipal employee

from corruptly soliciting or seeking anything of value for herself or any other person in return for being influenced in her performance of any official act.

In the Matter of Douglas Deschenes - Westford Affordable Housing Committee member Douglas C. Deschenes admitted violating the state's conflict of interest law and agreed to pay a civil penalty of \$5,000. Deschenes also agreed to forfeit \$3,862, the compensation he had received for work done in relation to matters involving the AHC. According to a Disposition Agreement, Deschenes, an attorney, violated G.L. c. 268A, § 17(a) and (c) by representing clients for compensation on 11 different plans before the AHC. Deschenes did not participate as an AHC member in matters involving his clients.

In the Matter of Therese A. Hamel - The Commission fined former Chicopee Assistant Treasurer Therese A. Hamel \$5,000 for violating section 23(b)(2) of the state's conflict of interest law by repeatedly allowing herself, family, friends and co-workers to cash checks at the Treasurer's Office without her office immediately depositing them and to take cash from the Treasurer's Office, leaving IOU's. According to the Disposition Agreement, Hamel allowed friends and family to cash personal checks then held the checks for significant periods of time without depositing them for payment. She also allowed herself, friends, co-workers and family to take cash of up to \$1,000. After the State Police investigated Hamel's conduct, she repaid the City \$4,400 for monies she and others had borrowed. In March 2005, an independent auditor's report criticized the actions but found no cash shortages. Hamel resigned under pressure and repaid the City \$110 in interest on the \$4,400 that had been improperly borrowed. By using the Treasurer's Office as a private bank for herself, family, friends, and co-workers, Hamel obtained for herself and others the unwarranted privilege of personal banking services.

In the Matter of Angelo R. Buonopane - The Commission fined former Massachusetts Labor Director Angelo R. Buonopane a total of \$28,000 for violating the section 23(b)(2) of the state's conflict of interest law by taking approximately \$18,000 in unauthorized vacation/personal time compensation. Buonopane paid a \$10,000 civil penalty and \$18,000 as a civil forfeiture, the value of the unearned vacation/personal time compensation he received. According to the Disposition Agreement, Buonopane was entitled to four weeks vacation and three personal days annually. During his tenure as Labor Director, he submitted timesheets which resulted in his receiving approximately eight additional weeks of leave time in excess of what was properly available to him. Buonopane resigned from his position in April 2005 when allegations about his excessive leave time became public. By taking \$18,000 in compensation for vacation and personal time, Buonopane used his position to get an unwarranted

privilege.

In the Matter of Michael Bencal - Salem City Councilor Michael Bencal paid a civil penalty of \$2,000 for violating section 23(b)(2) the state's conflict of interest law by improperly soliciting campaign contributions for the mayoral campaign of Salem City Councilor Kevin Harvey. According to the Disposition Agreement, Bencal contacted Salem Parking Director James Hacker in March 2004. Bencal told Hacker that Harvey, if he became mayor, would reappoint Hacker as parking director if Hacker raised \$4,000 for Harvey's mayoral campaign. In Salem, the mayor appoints the parking director subject to City Council approval. After Hacker said he was unable to meet with Bencal and Harvey the following weekend, Bencal said he would arrange a meeting and call Hacker back. Harvey did not win the election. By soliciting \$4,000 in contributions for Harvey's mayoral campaign from Hacker where Bencal had the ability to impact Hacker's position as parking director then and in the future, Bencal used his city councilor position to get an unwarranted privilege, i.e., soliciting contributions in exchange for favorable treatment for Hacker concerning his parking director position.

In the Matter of Andrew Hamilton - The Commission fined former Wendell Board of Health member Andrew Hamilton \$2,000 for violating the state's conflict of interest law, M.G.L. c. 268A, by using his position to sell a water filtration system valued at \$1,112, to a resident after water from her new well failed to meet certain requirements. According to the Disposition Agreement, Hamilton as a BOH member met with Reverend Adele Smith-Penniman, who was converting a weekend home to a year-round dwelling, and informed her that her well water's iron and manganese levels, which were tested by an independent laboratory, were too high. Hamilton then told Smith-Penniman that he was going to "change hats" and speak to her in his private capacity. He then sold her a water filtration system. Smith-Penniman felt pressure to purchase the system because Hamilton was on the BOH and because the BOH signs off on building permits. After Smith-Penniman purchased the water filtration system, she did not install it. Usage of the well worked out the contaminants. By soliciting someone who was subject to a stop work order by the BOH, and by making his solicitation in the course of an official discussion where he addressed the work order issue, Hamilton used his BOH position to influence Smith-Penniman to purchase a water filtration system. As part of the agreement, Hamilton agreed to refund \$1,112 to Smith-Penniman in exchange for return of the water filtration unit.

In the Matter of David M. Lunny - Mendon-Upton Regional School District employee David M. Lunny paid a civil penalty of \$2,500 for violating the state's conflict of interest law, M.G.L. c. 268A, by improperly soliciting services from employees of Mount Vernon Group, a private

architectural firm, which served as the architect for the construction of the Memorial Elementary School in Upton. Lunny paid a \$2,000 civil penalty and a \$500 civil forfeiture, reflecting the value of the drafting services he received. According to the Disposition Agreement, Lunny was hired by the school district in September 2002 as an owner's representative of the school project, responsible for reporting back to the school building committee on the progress of the project, including assessing how the architect was performing its responsibilities. While at the job site, Lunny asked Greg McIntosh, a principal of Mount Vernon Group, to review documents for a proposed garage/office Lunny planned to build at his house and to produce computer-aided drawings of the proposed structure. McIntosh worked occasionally on Lunny's project until March 2003 when he told Lunny he had no more time to spend on it. Mount Vernon Group employee Tim Sampson, the project manager, agreed to take over the project as a favor to McIntosh but told Lunny he expected to be paid for his work. In April 2003, Sampson gave Lunny the work he had produced. Lunny never paid Sampson or McIntosh for the work they had done, which they estimated was worth \$500.

In the Matter of Peter Pender - The Commission fined former Clinton Building Inspector Peter Pender \$2,000 for violating §19 of the state's conflict of interest law, G.L. c. 268A, by reviewing construction plans and issuing a building permit for property owned by Pender and his wife. In October 2004, Pender's wife submitted to him a building permit application and associated construction plans for property owned by both of them. Pender reviewed the plans to determine that the estimated construction costs were reasonable, calculated the building permit fee to be \$672 based on the estimated \$84,000 in construction costs, reviewed the plans for code compliance and issued a building permit.

In the Matter of Michael Rostkowski - The Commission fined former Massachusetts Department of Environmental Protection (DEP) Bureau of Waste Management Analyst Michael Rostkowski \$10,000 for violating §5(a) of the state's conflict of interest law, M.G.L. c. 268A, by receiving compensation from Mass Environmental Associates (MEA) in connection with a Wilmington landfill project in which Rostkowski participated while he was a DEP analyst. The owner of the Maple Meadow Landfill located in Wilmington and DEP entered into an agreement regarding the closing of the landfill. MEA was hired by the landfill owners to conduct the closure. As a DEP employee, Rostkowski assessed the landfill and recommended enforcement/investigative actions. Rostkowski left DEP in February 2001 and worked for MEA until April 2004. While working for MEA, Rostkowski monitored MEA employees and equipment at the landfill and made recommendations regarding storm water control measures.

In the Matter of Joseph Flaherty - The Commission fined Mendon Parks Commissioner Joseph Flaherty \$1,000 for violating the state's conflict of interest law, M.G.L. c. 268A, by using his position to enable his son to attend the Parks Department's summer youth camp as a junior counselor. Flaherty served on the Parks Commission from 2000 to 2004, then was re-elected in May 2005. The Mendon Parks Department provides a summer camp for residents 12 years old and younger at a cost of \$150 per week. Junior counselors, ages 13 to 15, attend camp unpaid, receive free lunch every day and gain valuable experience that could lead to a paid senior counselor position in the future. In early 2005, the Mendon Parks Commission limited the number of junior counselors to 10. Flaherty was not a member of the Commission when this decision was made. Flaherty's 15-year-old son, who had served as a junior counselor in 2003 and 2004, was one of 25 applicants for the 10 junior counselor openings. He was not selected. Once Flaherty was re-elected to the Parks Commission, he expressed his concerns about the number of junior counselors and the hiring process. The Parks Commission, at a meeting at which Flaherty did not attend, voted to keep the number of junior counselors at 10. On Monday, July 11, 2005, Flaherty brought his son to the camp and told the newly appointed camp director that his son was there to be a junior counselor that week and for two additional weeks. Flaherty's son attended the camp as a junior counselor for at least 10 days during these three weeks. By bringing his son to camp and telling the director his son was there as a junior counselor, Flaherty violated § 23(b)(2).

In the Matter of Peter Arlos - The Commission approved a disposition agreement in which former Berkshire County Treasurer Peter Arlos admitted violating G.L. c. 268A, § 13 and agreed to pay a \$1,000 fine and to forfeit \$1,200 in compensation for participating in a matter in which he had a financial interest. The disposition agreement concluded public proceedings against Arlos. In June 2000, Arlos, as treasurer/custodian of the County Retirement Board by virtue of his position as County Treasurer, voted, in a 3-2 vote, to approve a three percent wage increase for himself. As a result of the raise, he received an additional \$1,200 in compensation. Arlos believed that the County Retirement Board was not a county agency, thus his actions as a member of the County Retirement Board were not governed by G.L. c. 268A. The Commission found, however, that the County Retirement Board was a county agency and its members are subject to c. 268A. By participating in voting to approve a wage increase, Arlos violated G.L. c. 268A, § 13.

In the Matter of John DeWald - The Commission issued a disposition agreement in which Rockland Finance Committee member John DeWald admitted violating the state's conflict of interest law. DeWald used his position to attempt to persuade a town attorney to settle a default foreclosure of property. DeWald agreed to pay a civil

penalty of \$2,000. DeWald, an attorney, violated G.L. c. 268A, § 17(c) and 23(b)(2) when he contacted Rockland tax title attorney Laura Powers at the request of attorney Sandy Lederman. Lederman, who is a friend of DeWald, represented Ken Crosby whose eight-acre parcel was taken through default foreclosure by the town. According to the Disposition Agreement, in a phone call in January 2005, DeWald introduced himself as the chairman of the Finance Committee and tried to convince Powers to settle the case for back taxes and attorney fees. Powers, who felt pressured by DeWald's call, declined to do so, stating that the town wanted to keep the land.

In the Matter of Robert Nelson - The Commission fined former Dunstable Selectman Robert Nelson \$2,000 for violating the state's conflict of interest law, G.L. c. 268A, by participating as a selectman in an affordable housing project on land he was selling to the developer. According to the Disposition Agreement, Nelson had a purchase and sales agreement with Dracut-based developer Frank Gorman to sell to Gorman 3.5 acres of land in Dunstable on which Gorman planned to construct a 30-unit affordable housing apartment building under G.L. c. 40B, the state's low and moderate income housing law. The sale was contingent on Gorman obtaining a permit for the project. Nelson abstained at selectmen's meetings but participated in discussing the project with other town officials via email. By recommending that the town's affordable housing quotas not include accessory apartments, that the fire department's involvement was not necessary as part of the selectmen's review and that the Zoning Board of Appeals, rather than selectmen, had responsibility to review the proposal to ensure adherence to state and federal codes as well as by suggesting a specific attorney with 40B experience represent the town's interests concerning the project, Nelson violated § 19.

In the Matter of Harry K. Harutunian - The Commission fined Former North Andover Superintendent Harry K. Harutunian \$6,000 for violating the state's conflict of interest law, M.G.L. c. 268A, by improperly creating a part-time custodial job for the son of his girlfriend, directing school custodians to transport the son to and from work and covering up his actions to create the job. According to the Disposition Agreement, in fall 2005, a school department employee became Harutunian's girlfriend. Her son attended North Andover High School. Harutunian created a position for his girlfriend's son as a part-time, afterschool janitor at the middle school. The position paid \$10.50 per hour; the son earned a total of \$540 during the 2005- 2006 school year. Harutunian instructed custodians to pick up the son at the high school, transport him to the middle school to work and drop him at his home after work. In addition, Harutunian instructed a career counselor at the high school to fabricate and backdate a memo requesting that Harutunian find his girlfriend's son

a job. By creating the job, directing school department employees to provide transportation and by covering up his involvement in the creation and hiring of his girlfriend's son, Harutunian used his superintendent position to get his girlfriend's son an unwarranted privilege of substantial value in violation of section 23(b)(2).

In the Matter of Harry Gannon - Former Maynard Town Accountant Harry Gannon paid a total of \$25,000, a \$5,000 civil penalty and a \$20,000 civil forfeiture, to the Commission for violating section 20 of the state's conflict of interest law by simultaneously serving as the Executive Director of the Maynard Retirement Board. According to the Disposition Agreement, in 1999 Gannon, serving ex officio as town accountant, participated in the Retirement Board's actions to create and fund the executive director position. Gannon was appointed executive director of the Maynard Retirement Board in 2000 at a salary of \$12,000 per year. Gannon, who became Maynard's town accountant in 1985, previously administered the program as part of his duties as town accountant and received an extra \$3,000 annually for the services he provided. Gannon served as both the paid town accountant and the paid retirement board executive director from September 2000 until December 31, 2002 when he retired as town accountant. He continues to serve as executive director of the Retirement Board. Gannon's paid appointment as executive director of the retirement board while he was already serving as the town accountant gave him an ongoing prohibited financial interest in a contract made by the town.

In the Matter of Thomas E. Cislak - The Commission issued a disposition agreement in which Ludlow Department of Public Works board member Thomas E. Cislak admitted violating the state's conflict of interest law and agreed to pay a fine of \$5,400, made up of a \$3,000 civil penalty and a \$2,400 civil forfeiture. According to the Disposition Agreement, Cislak violated G.L. c. 268A, § 17(a) by doing paving work requiring a DPW permit. Cislak's average profit for such work was \$400 per project. By receiving compensation from his clients for paving work that required DPW permits, Cislak received compensation in connection with matters in which Ludlow had an interest.

In the Matter of John Jenkins - The Commission fined retired West Barnstable Fire Department Chief John Jenkins \$2,000 for participating as fire chief in the bid process for a fire truck refurbishment when he was also a sales representative for Pierce Manufacturing, a Wisconsin-based fire equipment company. According to a Disposition Agreement, in 2004 and 2005, Jenkins participated in drawing up the preliminary bid documents to refurbish a 1985 engine-tanker and recommended that the prudential committee accept the low bid. The local representative for Pierce Manufacturing, Minuteman Fire and Rescue

Apparatus (Minuteman) of Walpole, Massachusetts, was awarded the contract. Jenkins also acted as fire department liaison with Minuteman throughout the bid and subsequent refurbishment process. Jenkins, who retired from the fire department in March 2005, two months before the refurbished truck was returned to service, did not earn a commission from Minuteman Fire and Rescue Apparatus or Pierce Manufacturing. By participating as fire chief in the bid and refurbishment process while he was also a sales representative for Pierce Manufacturing, Jenkins violated §23(b)(3). Jenkins could have avoided violating §23(b)(3) by making an advance written disclosure of his relationship with Pierce Manufacturing to his appointing authority, the prudential committee. Jenkins did not make such a disclosure.

In the Matter of William Sullivan - The Commission issued a disposition agreement in which former Oak Bluffs Zoning Board of Appeals (ZBA) member William Sullivan admitted violating the state's conflict of interest law by representing clients on six occasions before the ZBA and agreed to pay a civil penalty of \$3,000. Sullivan also agreed to forfeit \$600, the compensation he had received for work done in relation to matters involving the ZBA. According to the Disposition Agreement, Sullivan, a residential designer, violated G.L. c. 268A, § 17(a) and (c) by representing clients for compensation on six special permits before the ZBA. Sullivan's actions included answering questions, presenting his plan designs and advocating the granting of special permits.

In the Matter of Paul Zakrzewski - The Commission issued a disposition agreement in which Abington Assessor Paul Zakrzewski admitted violating the state's conflict of interest law, G.L. c. 268A by participating in matters involving his partner, Roger Woods, also of Abington, and paid a civil penalty of \$1,000. According to the Disposition Agreement, Zakrzewski, an elected Assessor, voted to approve four abatement applications filed by Woods. The abatements resulted in first-year tax savings to Woods of over \$5,600. At the time of each of these votes, Zakrzewski and Woods were real estate partners, although they were not partners in the properties that were subjects of the abatement applications and Zakrzewski himself had no interest in any of these applications. By participating in the abatement applications of his partner, Zakrzewski violated section 19.

In the Matter of Marc Becker - The Commission approved a disposition agreement in which Webster Planning Board Chairman Marc Becker admitted violating the state's conflict of interest law, G.L. c. 268A, by endorsing "Approval Not Required" plans (ANRs) for two properties for which he served as the listing real estate broker. Becker paid a civil penalty of \$4,000. In 2003, Becker listed the first property for sale. In October 2003, he participated as a Planning Board member in endorsing

an ANR plan dividing the property into two lots, which provided Becker with flexibility in marketing the property as either a single lot or two lots. When the property sold in August 2004, as a single lot, Becker received a \$9,000 commission. In 2002, while he was the listing agent, Becker participated as a Planning Board member in endorsing an ANR plan dividing the second property into five lots. When the property sold in October 2002, Becker received a \$4,890 commission. By participating in the approval of ANRs at the time he was a listing agent for the property and therefore had a financial interest in the matters, Becker violated G.L. c. 268A, § 19.

In the Matter of Edward Higgins, Jr. - The Commission fined Lynn Fire Chief Edward Higgins, Jr. \$3,000 for violating the state's conflict of interest law, G.L. c. 268A, by promoting, supervising and approving overtime for Deborah Darsney. Higgins and Darsney lived together as boyfriend and girlfriend beginning prior to Higgins' appointment to chief in 2003. They married in November 2005. In 2003, Higgins reorganized the administrative office, assigning Darsney, who was then system accountant, additional duties and responsibilities. Darsney reported to Higgins on some matters and Higgins at times assigned and approved Darsney's overtime. In June 2005, Higgins promoted Darsney. By promoting, supervising and approving overtime for Darsney, a person with whom he was living, Higgins violated § 23(b)(3). Shortly after Higgins and Darsney married, Higgins disclosed the marriage to the personnel director and informed the director that he assigned all personnel matters and supervision of Darsney to the deputy chief. The deputy chief approved Darsney's requests for time off; Higgins continued to daily supervise Darsney. On five occasions, Higgins approved overtime for Darsney. By supervising and approving overtime for his spouse, Higgins violated § 19.

In the Matter of Scott Trant - The Commission fined Somerville Police Officer Scott Trant \$10,600, consisting of a \$10,000 civil penalty and a \$600 reimbursement, for violating the state's conflict of interest law, G.L. c. 268A, by attempting to purchase property from a person seeking police assistance in connection with the property. On February 9, 2005, an Everett woman visited the Somerville Police Department and sought assistance from Trant, who was on duty, regarding her ex-husband. The ex-husband was living in an illegal apartment in the basement of a dilapidated property owned in trust by the woman and her two children. The property had been cited for code violations. The woman told Trant that she had considered selling the property and had rejected an offer of \$100,000. According to the woman, Trant offered to purchase the house, for approximately \$200,000. The house was assessed at \$438,700. On February 9 and 10, 2005, Trant as a police officer attempted to phone ISD to gain more information about the city's action involving the house; contacted the psychiatric unit of Cambridge Hospital for

“information about getting someone committed;” went to 21 Vernon Street to conduct a “welfare check;” and reported to Cambridge Hospital on the ex-husband's condition. On February 11, 2006, the ex-husband was involuntarily committed to a psychiatric facility. On February 14, 2005, Trant as a police officer discussed the ex-husband with caseworkers at Cambridge Hospital and the Department of Mental Health. On February 23, 2005, Trant again offered by phone to purchase the house for \$200,000. He had an attorney draw up a standard purchase-and-sale agreement and gave the agreement to the woman, who signed it. The Somerville Police Department began investigating Trant's conduct regarding this matter. After the woman's attorney told Trant she now believed she could get \$400,000 for the property, he increased his offer to \$300,000. Ultimately, the property transaction did not occur; nonetheless, Trant requested \$600 from the woman to pay for his legal fees. The woman gave Trant the money. In September 2006, Trant was terminated for conduct unbecoming a police officer; he appealed his termination. By using his position as a police officer to attempt to purchase property at a reduced price and in a quicker time frame, Trant violated § 23(b)(2) of the law.

In the Matter of Brian Moore

In the Matter of Peter Murphy

In the matter of Gary Van Tassel - The Commission issued a disposition agreement in which Brian Moore, owner and manager of Kappy's Liquors of Springfield admitted violating the conflict of interest law by giving gift certificates enclosed in holiday cards totaling approximately \$200 to each Springfield Liquor License Commissioner (Commissioner) each December from 1999 to 2003. Moore paid a \$10,000 civil penalty. In addition, two former Commissioners, Peter Murphy and Gary Van Tassel, were fined \$1,000 and \$500 respectively for receiving the gift certificates and thus creating an appearance of conflict of interest. Moore gave the gift certificates with the intention that the Commissioners would “come into his store and see that he ran a clean operation.” In late November or early December each year, the Commissioners reviewed and approved Kappy's liquor license renewal. By giving gifts to Commissioners to influence their official acts, Moore provided them with illegal gratuities in violation of § 3. In two separate Disposition Agreements, Murphy and Van Tassel admitted violating G.L. c. 268A, § 23(b)(3). Murphy received gift certificates in 2002 and 2003 and gave them to a charity and to a family member who gave them to a friend and a babysitter. Van Tassel received gift certificates in 2003 and gave them to his wife who gave them to a colleague. The Commissioners could have avoided violating §23(b)(3) by returning the certificates or by making an advance written disclosure of their receipt of the gift certificates prior to voting to renew Kappy's license. They did not make such disclosures.

In the Matter of Cheryl Stanley - The Commission fined former Springfield Liquor License Commissioner Cheryl Stanley \$2,000 for receiving gift certificates from Brian Moore, owner and manager of Kappy's Liquors of Springfield. In a Disposition Agreement, Stanley admitted violating G.L. c. 268A, § 23(b)(3). Stanley received gift certificates enclosed in holiday cards each year from 1999 through 2003 and gave the gift certificates away. Stanley could have avoided violating §23(b)(3) by returning the certificates or by making an advance written disclosure of her receipt of the gift certificates prior to voting to renew Kappy's license. She did not make such disclosures.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION
SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 05-0005

IN THE MATTER
OF
ROBERT C. TINKHAM Jr.
DISPOSITION AGREEMENT

The State Ethics Commission and Robert C. Tinkham Jr. 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 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 Tinkham. The Commission has concluded its inquiry and, on June 2, 2005, found reasonable cause to believe that Tinkham violated G.L. c. 268A.

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

Findings of Fact

1. Tinkham has been the full-time Carver health agent since August 1994, appointed by the Carver Board of Health ("BOH").
2. Tinkham's parents own and operate the Pinewood Way Camping Area ("the campground") in South Carver, Mass. The campground business is incorporated as the Pinewood Way Camping Area, Inc., of which Tinkham's mother and brother are corporate officers and directors, and Tinkham himself is a corporate director.
3. The campground contains approximately 46 acres of land with 80 campsites.
4. When the BOH appointed him as health agent in 1994, Tinkham informed the BOH that he was then managing his family's campground.
5. In or about March 1995, Tinkham informed the BOH that he would no longer manage the campground, but that his family would continue to own and operate it. Tinkham and the BOH agreed that any inspections that Tinkham performed at the campground would be done with a BOH member present.
6. Thereafter, the BOH chair accompanied

Tinkham on his annual inspections of the campground.

7. In or about 2002, the campground was required to upgrade its septic systems pursuant to Title 5 of the state environmental code, 310 CMR 15.000.

8. Title 5 of requires that a qualified soil evaluator conduct soil percolation tests "in the presence of an authorized representative of the approving authority" before applying for a permit to install or upgrade a septic system. Absent a successful percolation test, the BOH (the approving authority) cannot issue a permit for a new septic system.

9. The campground hired an engineer to design the new septic systems.

10. On November 30, 2002, the engineer conducted five soil percolation tests at the campground.

11. In his capacity as the health agent, Tinkham witnessed the five soil percolation tests on behalf of the BOH to make sure that the tests were correctly performed. Tinkham was not accompanied by a BOH member.

12. In January 2003, the engineer applied to the BOH for permits to install five new septic systems at the campground. Included with the applications were the engineer's soil suitability reports, which noted that Tinkham had witnessed the tests as the health agent acting on behalf of the BOH.

13. The BOH approved the applications and issued the permits.

14. Subsequently, the hired installer began the system upgrade work pursuant to the permits.

15. Title 5 also requires that, "Subsurface components of a system shall not be backfilled or otherwise concealed from view until a final inspection has been conducted by the approving authority and permission has been granted by the approving authority to backfill the system."

16. On April 16, 2003, prior to the installer's backfilling the campground's five newly installed septic systems, Tinkham inspected the installation work and authorized its completion in his capacity as health agent acting on behalf of the BOH. Tinkham was not accompanied by a member of the BOH when he performed the inspections.

17. Thereafter, Tinkham, in his capacity as health agent acting on behalf of the BOH, submitted five Sewerage System Inspection Reports to the BOH, signifying that he had inspected the new systems and authorized completion of the work.

18. Tinkham also signed the five certificates of compliance as the “Inspector,” signifying that the new systems had been installed in compliance with Title 5 of the state environmental code.

Conclusions of Law

19. As the Carver health agent, Tinkham was a municipal employee within the meaning of G.L. c. 268A.

20. Section 19 of G.L. c. 268A prohibits a municipal employee from participating as such an employee in a particular matter in which, to his knowledge, he, his immediate family or a business organization in which he is serving as a director has a financial interest.

21. The applications for BOH permits regarding the installation of new septic systems at the campground, and the determinations regarding the installation, inspection and approval of those new systems, were particular matters.^{1/}

22. Tinkham participated^{2/} as the health agent in those particular matters by witnessing the five soil percolation tests, inspecting the five newly installed septic systems, authorizing completion of the work, and signing the five certificates of compliance.

23. As the campground owners, Tinkham’s parents, his immediate family,^{3/} had financial interests in those particular matters.

24. In addition, the campground corporation, which was a business organization in which Tinkham served as a director, had financial interests in those particular matters.

25. When he participated in the particular matters, Tinkham knew that his parents and the campground corporation had financial interests in the particular matters.^{4/}

26. Therefore, by acting as described above, Tinkham violated § 19.

27. The Commission is not aware of any evidence indicating that Tinkham was improperly influenced in witnessing the soil percolation tests or inspecting the septic systems, or that he misrepresented information in his reports. Nevertheless, Tinkham’s violations are serious where they involve public health issues. Moreover, where his own family’s money was at stake, Tinkham could have been tempted to act improperly, even though there is no evidence that he did. Finally, the Commission notes that the BOH had instructed Tinkham to have a BOH member present when performing annual inspections at the campground, but Tinkham failed to do so during the above-noted tests and inspections.^{5/}

Resolution

In view of the foregoing violations of G.L. c. 268A by Tinkham, 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 Tinkham:

- (1) that Tinkham pay to the Commission the sum of three thousand dollars, (\$3,000.00) as a civil penalty for repeatedly violating G. L. c. 268A § 19; and
- (2) that Tinkham 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: January 4, 2006

^{1/} “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).

^{2/} “Participate,” participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, § 1(j).

^{3/} “Immediate family” means the employee and his spouse, and their parents, children, brothers and sisters.

^{4/} For example, had Tinkham determined that the septic systems did not comply with the state environmental code, his parents and/or the campground corporation would have had to expend additional money to bring the septic systems into compliance. In the alternative, had Tinkham determined that the septic systems did comply when they in fact did not, his parents and/or the campground would have avoided having to spend money to bring the septic systems into compliance.

^{5/} The conflict-of-interest law recognizes that it may be necessary or appropriate for municipal employees, on occasion, to participate in matters that affect their immediate family’s financial interests. The law, however, places strict written disclosure and determination requirements on a municipal employee and his appointing authority, thereby ensuring that any such participation is allowed only if, in the appointing authority’s view, it is consistent with the public interest. See G.L. c. 268A, § 19(b)(1). Tinkham never sought the BOH’s approval and, given the BOH’s requirement that he be accompanied by a BOH member when conducting inspections at the campground, it is the Commission’s view that such approval would not likely have been granted. Tinkham believes that the BOH would have granted him the approval.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 06-0001

IN THE MATTER
OF
KELLY GIAMPA

DISPOSITION AGREEMENT

The State Ethics Commission and Kelly Giampa 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 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 Giampa. The Commission has concluded its inquiry and, on September 21, 2005, found reasonable cause to believe that Giampa violated G.L. c. 268A.

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

Findings of Fact

1. In early 2003, Giampa was appointed as the Springfield Parking Authority ("the Authority") operations and facilities manager.

2. In summer 2003, the Authority decided to obtain bids for the removal and replacement of a retaining wall at an Authority parking lot.

3. Giampa was responsible for soliciting telephone bids from masonry and construction contractors to do the work.

4. Edward Rossi, whose wife worked at the Authority, found out about the job and decided to bid on it.

5. The Authority's acting executive director, Clement Chelli, questioned whether the contract could be awarded to Rossi, the husband of an Authority employee, because of possible conflict-of-interest concerns.

6. Giampa was aware of Chelli's concern and, in response to it, told Rossi's wife, "I want [Rossi] to do the job. He can do it under my friend's contract number and he can give me \$1,000 and I'll get him the job."

7. During a cookout at Rossi's house in early September 2003, Rossi and Giampa discussed Rossi's

bidding on the contract.

8. Giampa told Rossi that Chelli was not going to allow him to get the contract. Giampa then told Rossi that if he gave her \$1,000 and her friend \$1,000, she would make sure that Rossi got the contract, and they would use the friend's name on the contract so that Chelli wouldn't know that Rossi was working on the contract.

9. Rossi declined Giampa's suggestion.

10. Rossi submitted his bid of \$21,476, dated September 16, 2003, and it was the lowest bid that the Authority received.

11. When the Authority learned that Giampa had allegedly solicited money from Rossi in relation to his bid, the Authority canceled the bids and ordered an investigation.

12. Giampa was suspended from her position on September 23, 2003 and tendered her resignation on October 17, 2003.

Conclusions of Law

13. As the Authority operations and facilities manager, Giampa was a municipal employee as that term is defined in G.L. c. 268A, § 1(g), and therefore subject to the conflict-of-interest law.

14. Section 2(b) of G.L. c. 268A, in relevant part, prohibits a municipal employee from directly or indirectly corruptly asking, demanding, exacting, soliciting, seeking, accepting, receiving or agreeing to receive anything of value for herself or for any other person or entity, in return for being influenced in her performance of any official act or any act within her official responsibility.

15. As noted above, Giampa told Rossi's wife that she would get Rossi the job if Rossi gave Giampa \$1,000, and she asked Rossi to pay her \$1,000 and her friend \$1,000 in return for making sure that Rossi got the job.

16. Giampa asked for the money with the corrupt intent of being influenced in her performance of official acts regarding the awarding of the contract.

17. Thus, by corruptly soliciting money from Rossi for herself and/or for her friend in return for getting Rossi the job, Giampa violated § 2(b).

Resolution

In view of the foregoing violations of G.L. c. 268A by Giampa, 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 Giampa:

- (1) that Giampa pay to the Commission the sum of \$3,000 as a civil penalty for violating G.L. c. 268A; and
- (2) that Giampa 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: January 17, 2006

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 06-0002**

**IN THE MATTER
OF
DOUGLAS C. DESCHENES**

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Douglas C. Deschenes 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 July 26, 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 Deschenes. The Commission has concluded its inquiry and, on February 9, 2006, found reasonable cause to believe that Deschenes violated G.L. c. 268A.

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

Findings of Fact

1. Douglas Deschenes is an attorney. From May 2002 until May 2005, Deschenes served as an appointed member of the Westford Affordable Housing Committee ("the AHC"). The AHC's purpose is to promote low and moderate income housing in Westford.

2. In Westford, anyone who wants to build an

affordable housing project may present a concept plan for that development to the Board of Selectmen (BOS). If so presented to it, the BOS asks the developer to present the concept plan to the AHC. Although not required, the AHC occasionally makes advisory recommendations to the Zoning Board of Appeals (ZBA) about each plan. Finally, the plan goes through the ZBA hearing process, which approves or denies a permit for that project.

3. During his tenure on the AHC, Deschenes represented clients on 11 different plans before the AHC. Deschenes represented these clients by presenting their concept plans for affordable housing projects and by answering questions about those projects. Deschenes received \$3,862 from those clients for preparing and presenting these plans.

4. Deschenes did not participate as an AHC member in matters involving his clients.

Conclusions of Law

5. Section 17(a) of G.L. c. 268A prohibits a municipal employee, otherwise than as provided by law for the proper discharge of official duties, from directly or indirectly receiving or requesting compensation from anyone other than the municipality in relation to a particular matter^{1/} in which the municipality has a direct and substantial interest.

6. Section 17(c) of G.L. c. 268A prohibits a municipal employee, otherwise than in the proper discharge of official duties, from acting as attorney for anyone other than the municipality in relation to a particular matter in which the town has a direct and substantial interest.

7. As an AHC member, Deschenes was a municipal employee as that term is defined in G.L. c. 268A, § 1(g), and therefore subject to the conflict-of-interest law.

8. The AHC's decisions concerning recommendations on affordable housing projects that came before it were particular matters.

9. The town had a direct and substantial interest in these decisions because they could influence the ZBA permit decision.

10. By presenting his clients' affordable housing plans before the AHC, Deschenes acted as an attorney. Deschenes' actions in so appearing were in relation to the AHC's preliminary decisions concerning potential advisory recommendations to the ZBA on his clients' affordable housing projects. Deschenes' actions in presenting his clients' affordable housing plans before the AHC were not within the proper discharge of official duties as an AHC member.

11. The \$3,862 in compensation Deschenes received for preparing and presenting these plans to the AHC was in relation to the AHC's decisions regarding his clients' projects. Deschenes was not authorized by law to receive compensation in relation to these AHC particular matters.

12. Thus, Deschenes received compensation from and acted as attorney for a private party other than the town, in relation to the AHC's decisions concerning recommendations on his clients' affordable housing projects, particular matters in which the town had a direct and substantial interest. By so doing, Deschenes violated § 17(a) and (c).

Resolution

In view of the foregoing violation of G.L. c. 268A by Deschenes, 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 Deschenes:

- (1) that Deschenes pay to the Commission the sum of \$5,000.00 as a civil penalty for violating G.L. c. 268A, §17(a) and (c);
- (2) that Deschenes pay to the Commission the sum of \$3,862 as a civil forfeiture of the compensation that he received for work done in relation to matters involving the AHC; and
- (3) 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: February 22, 2006

^{1/} "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, § 1(k).

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION
SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 06-0003**

**IN THE MATTER
OF
THERESE A. HAMEL**

DISPOSITION AGREEMENT

The State Ethics Commission and Therese A. Hamel 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 July 26, 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 Hamel. The Commission concluded its inquiry and, on February 9, 2006, found reasonable cause to believe that Hamel violated G.L. c. 268A.

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

Findings of Fact

1. From February 1985 until March 2005, Hamel was the Chicopee assistant treasurer.
2. As such, Hamel served as the Treasurer's Office supervisor.
3. During her tenure as assistant treasurer, Hamel allowed friends and family to cash personal checks at the Treasurer's Office. Hamel then held these checks for significant periods of time without depositing them for payment. Hamel also allowed herself, friends, coworkers and family to take cash from the Treasurer's Office, leaving IOU's of up to \$1,000.
4. In December 2004, the State Police investigated Hamel's conduct.
5. In January 2005, Hamel repaid the City \$4,400 for monies she, her family, friends and co-workers had borrowed.
6. On March 15, 2005, an independent auditor's report as to Hamel's conduct found no cash shortages but criticized the actions at the Treasurer's Office.^{1/}
7. On March 16, 2005, Hamel resigned under pressure.

8. On April 5, 2005, Hamel repaid the City \$110 in interest (based on a 5% annual interest rate for six months) on the \$4,400 that had been improperly borrowed.^{2/}

Conclusions of Law

9. As the Chicopee assistant treasurer, Hamel was an appointed municipal employee within the meaning of G.L. c. 268A.

10. General Laws, c. 268A, General laws, c. 268A, § 23(b)(2) prohibits a municipal employee from knowingly, or with reason to know, using her official position to secure for herself or others unwarranted privileges which are of substantial value and not properly available to similarly situated individuals.

11. As noted above, Hamel as assistant treasurer repeatedly allowed herself, family, friends and coworkers to cash checks at the Treasurer's Office without her office immediately depositing them and to take cash from the Treasurer's Office, leaving IOU's of up to \$1,000.

12. These check cashings and cash advances were unwarranted privileges not properly available to similarly situated individuals as personal banking services are not provided by the Treasurer's Office to the public.

13. These privileges were of substantial value because significant government funds were used to cash private checks without those checks being deposited for payment for extended periods of time, and the cash loans of up to \$1,000 were given on an IOU without the payment of interest.

14. By, as assistant treasurer, allowing such personal banking services to be conducted at the Treasurer's Office, Hamel used her official position to secure these unwarranted privileges for herself, family, friends and coworkers.

15. Thus, by allowing such personal banking services to be conducted at the Treasurer's Office, Hamel knowingly or with reason to know used her position as assistant treasurer to secure unwarranted privileges of substantial value that were not properly available to similarly situated individuals in violation of § 23(b)(2).

Resolution

In view of the foregoing violations of G.L. c. 268A by Hamel, 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 Hamel:

(1) that Hamel pay to the Commission the sum of

\$5,000 as a civil penalty for repeatedly violating G.L. c. 268A as noted above; and

(2) that Hamel 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 28, 2006

^{1/} All held checks had been deposited, all IOU's cleared up, and any outstanding monies due had been paid. The audit recommended that the City no longer allow check cashing by employees; no IOU's be allowed; and that the City initiate the computerization of the Treasurer's Office with timely reports to the city auditor.

^{2/} The use of the Treasurer's Office for personal banking services was part of an ongoing practice; however, records demonstrate that these loans were repaid within six months. There is insufficient evidence demonstrating that there was ever an attempt to permanently deny the City of any funds.

COMMONWEALTH OF MASSACHUSETTS STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 06-0004

IN THE MATTER
OF
ANGELO R. BUONOPANE

DISPOSITION AGREEMENT

The State Ethics Commission and Angelo R. Buonopane 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 May 5, 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 Buonopane. The Commission concluded its inquiry and, on February 9, 2006, found reasonable cause to believe that Buonopane violated G.L. c. 268A.

The Commission and Buonopane now agree to

the following findings of fact and conclusions of law.

Findings of Fact

1. In January 2004, the Governor appointed Buonopane as the Massachusetts Labor Director. Buonopane served as Labor Director until April 16, 2005.

2. As Labor Director, Buonopane was subject to "The Red Book," which is the personnel manual for state employees that lists the terms and conditions of employment. Pursuant to the Red Book, Buonopane as Labor Director was entitled to four weeks vacation and three personal days annually, plus any accrued time from the past.

3. During his tenure as Labor Director, Buonopane, however, submitted timesheets which resulted in his receiving approximately eight additional weeks vacation/personal time in which he had reason to know was in excess of what was properly available to him.

4. Buonopane was paid approximately \$18,000 for this excess vacation/personal time.

Conclusions of Law

5. General laws, c. 268A, § 23(b)(2) prohibits a municipal employee from knowingly, or with reason to know, using his official position to secure for himself or others unwarranted privileges which are of substantial value and not properly available to similarly situated individuals.

6. As the Labor Director, Buonopane was a state employee within the meaning of G.L. c. 268A.

7. Buonopane's taking of approximately \$18,000 in unauthorized vacation/personal time compensation was a privilege of substantial value.

8. Buonopane used his Labor Director position to obtain this unauthorized vacation/personal time compensation.

9. Buonopane's taking approximately \$18,000 in vacation/personal time compensation was unwarranted because it exceeded what he was authorized to take.

10. This unwarranted privilege was not otherwise properly available to similarly situated state employees.

11. Therefore, by with reason to know using his position as Labor Director to secure for himself unwarranted privileges of substantial value not properly available to similarly situated individuals, Buonopane repeatedly violated §23(b)(2).^{1/}

Resolution

In view of the foregoing violations of G.L. c. 268A by Buonopane, 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 Buonopane:

- (1) that Buonopane pay to the Commission the sum of \$10,000 as a civil penalty for violating G.L. c. 268A as noted above;
- (2) that Buonopane reimburse the Commonwealth of Massachusetts the sum of \$18,000 as a civil forfeiture for the unearned vacation/personal time compensation that he took; and
- (3) that Buonopane 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 20, 2006

^{1/}The Commission recognizes that Buonopane was told by Labor Department personnel subordinates that he had "unlimited" vacation/personal time. The Commission does not view this as mitigating because: (1) no appointed executive branch state employee has unlimited vacation/personal time; (2) Buonopane had reason to know this; and (3) even if he thought he had an undefined amount of vacation/personal time, the time he actually took was excessive under any reasonable view.

COMMONWEALTH OF MASSACHUSETTS STATE ETHICS COMMISSION

**SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 06-0005**

**IN THE MATTER
OF
MICHAEL BENCAL**

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Michael Bencal 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 3, 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 Bencal. The Commission concluded its inquiry and, on September 21, 2005, found reasonable cause to believe that Bencal violated G.L. c. 268A.

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

Findings of Fact

1. At all times relevant, Bencal was a Salem ward city councilor.

2. At all times relevant, James Hacker was the Salem parking director.

3. The mayor appoints the parking director for a two-year term, subject to confirmation by the city council. Reappointments are also subject to city council confirmation. Then-Mayor Stanley Usovicz appointed Hacker to a two-year term in January 2004. As a department head, Hacker may be called before the city council to address various issues including policy and personnel. The city council also sets the parking director's budget and acts on the parking director's proposals to raise or lower fees at city parking facilities. The city council also votes on whether to terminate the parking director, if such action is initiated by the mayor.

4. At all times relevant, Kevin Harvey was a Salem city councilor at-large.

5. On or about March 22, 2004, Hacker received a telephone call at home from Bencal. During that conversation, Bencal told Hacker that he would neither run for mayor nor support current Mayor Usovicz's bid for re-election. Rather than run for mayor himself, Bencal stated he intended to run for councilor-at-large and to support Harvey in the 2005 mayoral election. According to Hacker, Bencal indicated that Harvey would reappoint Hacker as parking director if Hacker raised \$4,000 for Harvey's mayoral campaign. Bencal then suggested that Hacker meet with Bencal and Harvey that weekend to discuss the matter in more detail but Hacker told Bencal he had plans and was unable to get together. Bencal said he would arrange a meeting and would call Hacker back.

Law

6. Section 23(b)(2) of G.L. c. 268A prohibits a public employee from knowingly or with reason to know, using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals.

7. As a city councilor, Bencal was a municipal

employee as that term is defined in G.L. c. 268A, § 1(g), and therefore subject to the conflict-of-interest law.

8. By soliciting \$4,000 in contributions for Harvey's mayoral campaign from Hacker where he (Bencal) had the ability to impact Hacker's position as parking director then and in the future, Bencal used his city councilor position.

9. A campaign contribution is a privilege. A contribution to Harvey's mayoral campaign would be a privilege for Harvey as his mayoral campaign would receive it. A contribution to Harvey's mayoral campaign would also be a privilege for Bencal as his bringing in such contributions would put Bencal, who was planning on running for councilor-at-large, in a favorable light with Harvey.

10. Because the contributions sought were in excess of \$50, the privilege was of substantial value.

11. Such contributions would have been unwarranted as they were solicited in exchange for favorable treatment for Hacker concerning his parking director position.

12. Such contributions (by or from appointed municipal officials in exchange for favorable treatment concerning their positions) were not otherwise properly available to similarly situated individuals.

13. Therefore, by soliciting \$4,000 in contributions for Harvey's mayoral campaign from Hacker as described above, Bencal knowingly or with reason to know used or attempted to use his city councilor position to secure for Harvey and/or himself unwarranted privileges of substantial value that were not properly available to similarly situated individuals, violating § 23(b)(2).

Resolution

In view of the foregoing violation of G.L. c. 268A by Bencal, 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 Bencal:

(1) that Bencal pay to the Commission the sum of \$2,000.00 as a civil penalty for 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 21, 2006

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 06-0006**

**IN THE MATTER
OF
ANDREW HAMILTON**

DISPOSITION AGREEMENT

The State Ethics Commission and Andrew Hamilton 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 14, 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 Hamilton. The Commission concluded its inquiry and, on March 9, 2006, found reasonable cause to believe that Hamilton violated G.L. c. 268A.

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

Findings of Fact

1. From 2002 through June 2004, Hamilton was an elected Wendell Board of Health ("BOH") member. During the relevant time, Hamilton served as the BOH chairman.

2. In his private capacity, Hamilton sells water filtration systems.

3. The BOH has authority over potable water supplies. The BOH will only sign-off on a building permit application if the well water sample does not exceed the maximum recommended levels for certain chemicals in the well water. If the BOH finds that a water sample does not meet the acceptable levels, it can issue a conditional permit ordering the property owner to correct the problem.

4. In Spring 2003, Reverend Adele Smith-Penniman had construction done on her weekend home in Wendell to convert it into a year-round dwelling. Smith-Penniman had a new septic system and well installed on her property. Water samples from the well were submitted to an independent lab, which then forwarded its findings to the BOH.

5. In June 2003, Hamilton as a BOH member spoke with Smith-Penniman and informed her that her

well water's iron and manganese levels were too high. Hamilton told Smith-Penniman that the work being done on her home had to stop until the water issue was addressed. Hamilton then told Smith-Penniman that he was going to "change hats" and speak with her in his private capacity. Hamilton then informed Smith-Penniman that he sold water filtration systems that could correct her water problem.

6. A couple days later, Hamilton sold Smith-Penniman a water filtration system for \$1,112. Smith-Penniman felt pressure to purchase the water filtration system because Hamilton was on the BOH and because the BOH signs-off on building permits.

7. Smith-Penniman accepted delivery of the water filtration system but did not install it. The BOH conditionally signed-off on Smith-Penniman's building permit. Usage of the well worked out the contaminants.

8. Hamilton agrees to return to Smith-Penniman the money she paid for the water filtration system in exchange for return of the unit to him.

Conclusions of Law

9. General laws, c. 268A, § 23(b)(2) prohibits a municipal employee from knowingly, or with reason to know, using his official position to secure for himself or others unwarranted privileges which are of substantial value and not properly available to similarly situated individuals.

10. As the Wendell BOH chairman, Hamilton was a municipal employee within the meaning of G.L. c. 268A.

11. Hamilton knew he was using or attempting to use his BOH position to influence Smith-Penniman to purchase his water filtration system. This is because (1) he solicited someone who was subject to significant pending action by his board – a stop work order; (2) and as a board member he was in a position to affect the board's actions regarding that matter; and (3) he made his solicitation in the course of an official discussion where he addressed the work order issue.

12. The privilege was securing for himself the sale of the water filtration system.

13. The privilege was unwarranted because Hamilton obtained the sale by using the influence and power of his BOH position to obtain a personal benefit for himself and his business.

14. The privilege was of substantial value as the sale was worth more than \$50 to Hamilton.

15. This unwarranted privilege was not otherwise

properly available to similarly situated people because public officials may not use their public positions to obtain private business.

16. Therefore, by knowingly using his position as a BOH member in securing for himself an unwarranted privilege of substantial value not properly available to similarly situated individuals, Hamilton violated §23(b)(2).

Resolution

In view of the foregoing violations of G.L. c. 268A by Hamilton, 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 Hamilton:

- (1) that Hamilton pay to the Commission the sum of \$2,000 as a civil penalty for violating G.L. c. 268A as noted above;
- (2) that Hamilton pay Smith-Penniman the sum of \$1,112 for the water filtration system she purchased from him;^{1/} and
- (3) that Hamilton 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 22, 2006

^{1/} Smith-Penniman has agreed to return the water filtration system to Hamilton.

COMMONWEALTH OF MASSACHUSETTS STATE ETHICS COMMISSION

**SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 06-0007**

**IN THE MATTER
OF
DAVID M. LUNNY**

DISPOSITION AGREEMENT

The State Ethics Commission and David M. Lunny 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 Lunny. The Commission has concluded its inquiry and, on September 21, 2005, found reasonable cause to believe that Lunny violated G.L. c. 268A.

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

Findings of Fact

1. On or about September 8, 2002, Lunny executed and contracted with the Mendon-Upton Regional School District to serve as an "owner's representative" on the construction of the Memorial Elementary School in Upton ("the school project").

2. The Mount Vernon Group, a private architectural firm, served as the school project architect. Mount Vernon Group employee Tim Sampson was the daily on-site project manager, and Mount Vernon Group principal Greg McIntosh was at the site once or twice per week to check on the project's progress and coordinate with Sampson.

3. As an owner's representative, Lunny served as the on-site eyes and ears of the school building committee, reporting back to it on the progress of the project and any other issues that he thought he should bring to the committee's attention. These reports could include an assessment as to how the school project architect, the Mount Vernon Group, was performing its responsibilities.

4. Lunny was not friendly with either McIntosh or Sampson, and Sampson found him particularly difficult to deal with regarding the school project.

5. Sometime in fall 2002, while on the job site, Lunny asked Sampson for private help on a project that Lunny was planning to build at his house. The structure was to be a free-standing, two-story garage/office. Sampson told Lunny that he would work on it for \$30/hour, which was his usual rate for freelance work. Lunny did not take Sampson up on that offer.

6. A few months later, Lunny approached McIntosh in the school project onsite field office just after a site meeting. Lunny showed McIntosh some photographs and plans that Lunny had created for his proposed garage/office structure. They discussed the project for a few minutes, and Lunny then asked McIntosh if he would review the documents and produce computer-aided drawings that reflected what they had talked about. They did not discuss payment.

7. McIntosh took Lunny's documents home and worked on them occasionally over the course of several months, creating schematics and drawings for the garage that Lunny planned to build. They conferred several times over the course of those months.

8. In or about March 2003, McIntosh told Lunny that he did not have any more time to spend on Lunny's project, so he sent Lunny the work he had done so far.

9. Thereafter, Sampson agreed to take over Lunny's project as a favor to McIntosh, but Sampson told Lunny that he expected to be paid for his work.

10. In early April 2003, Sampson gave Lunny the work that he had produced. Thereafter, Sampson reminded Lunny once or twice that Lunny owed him money, but neither Sampson nor McIntosh ever sent Lunny a bill, and Lunny never paid Sampson or McIntosh for the work that they had done.

11. According to McIntosh and Sampson, Lunny received a total of about \$500 in services from them.

Conclusions of Law

12. As an owner's representative on the school project, Lunny was a municipal employee as that term is defined in G.L. c. 268A, § 1(g), and therefore subject to the conflict-of-interest law.

13. Section 23(b)(2) of G.L. c. 268A prohibits a municipal employee from, knowingly or with reason to know, using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions of substantial value not properly available to similarly situated individuals.

14. The services that Lunny received for his private project from McIntosh and Sampson were of

substantial value.

15. Lunny took advantage of his official position as the owner's representative on the school project working with McIntosh and Sampson to obtain their services on his private project and to decline to pay them for those services.

16. Lunny's receipt of those services without paying for them where payment was expected and/or after payment was sought was an unwarranted privilege or exemption of substantial value not properly available to similarly situated individuals.

17. Accordingly, Lunny violated § 23(b)(2) by knowingly or with reason to know using his official position to secure for himself an unwarranted privilege or exemption of substantial value that was not properly available to similarly situated individuals.

Resolution

In view of the foregoing violations of G.L. c. 268A by Lunny, 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 Lunny:

- (1) that Lunny pay to the Commission the sum of \$2,000 as a civil penalty for violating G.L. c. 268A;
- (2) that Lunny pay to the Commission the sum of \$500 in the nature of a civil forfeiture reflecting the value of the services that he received from McIntosh and Sampson; and
- (3) that Lunny 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 28, 2006

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 06-0008

IN THE MATTER
OF
PETER PENDER

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Peter Pender 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 16, 2006, 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 Pender. The Commission concluded its inquiry and, on June 8, 2006, found reasonable cause to believe that Pender violated G.L. c. 268A, §§19 and 23(b)(3).

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

Findings of Fact

1. In February 2002, Pender became the full-time Clinton building inspector. He remained building inspector until April 2006.

2. At all relevant times, Pender and his spouse owned 112 Boylston Street in Clinton.

3. On October 5, 2004, Pender's wife submitted a building permit application and associated construction plans for 112 Boylston Street in Clinton.

4. Pender reviewed the plans and the estimated \$84,000 construction cost cited in the building permit application to determine that the estimated cost was reasonable. Based upon that estimate, he calculated the building permit fee to be \$672. He also reviewed the plans for code compliance. There is no evidence that Pender improperly reviewed the estimated construction cost or improperly calculated the building permit fee.

5. On October 12, 2005, as building inspector, Pender signed a building permit for 112 Boylston Street in Clinton.

Conclusions of Law

6. Section 19 of G.L. c. 268A prohibits a municipal

employee from participating¹ as such an employee in a particular matter² in which, to his knowledge, he or an immediate family member³ has a financial interest.⁴

7. The decision whether to issue a building permit for 112 Boylston Street was a particular matter.

8. Pender participated personally and substantially in that matter by reviewing the application and associated plans, and issuing the building permit.

9. Pender's wife is an immediate family member as that term is defined in G.L. c. 268A, §1.

10. At the time he issued the permit, Pender and his wife had a financial interest in the building permit because the permit was for construction of their own home. Pender and his wife also had a financial interest in the \$672 building permit fee. Consequently, Pender knew he and his wife had a financial interest in the building permit when he participated in issuing the permit in October 2004.

11. Therefore, Pender violated § 19 by issuing a building permit for his own home.

Resolution

In view of the foregoing violation of G.L. c. 268A by Pender, 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 Pender:

(1) that Pender pay to the Commission the sum of \$2,000.00 as a civil penalty for violating G.L. c. 268A, §19;

(2) that Pender 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 13, 2006

^{1/} "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).

^{2/} "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).

^{3/} “Immediate family” means the employee and his spouse, and their parents, children, brothers and sisters. G.L. c. 268A, §1(e).

^{4/} “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*.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 06-0009**

**IN THE MATTER
OF
MICHAEL ROSTKOWSKI
DISPOSITION AGREEMENT**

The State Ethics Commission and Michael Rostkowski 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 April 7, 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 Rostkowski. The Commission concluded its inquiry and, on April 13, 2006, found reasonable cause to believe that Rostkowski violated G.L. c. 268A.

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

Findings of Fact

1. From November 1996 through February 2001, Rostkowski was a Department of Environmental Protection (“DEP”) Bureau of Waste Prevention Environmental Analyst.

2. The Maple Meadow Landfill (“the MM Landfill”) is located in Wilmington, Massachusetts.

3. During Rostkowski’s tenure at DEP, the owner and operator of the MM Landfill and the DEP entered into an Administrative Consent Order (“ACO”) that requires the owner/operator to comply with applicable landfill assessment and closures procedures.^{1/} In addition,

the MM Landfill operator/owner is required as part of the ACO to perform landfill closure and design and construction.

4. Mass Environmental Associates (“MEA”) is a landfill and contaminated soil management company. MEA contracted with the owners of the MM Landfill to conduct environmental investigations, and design and close the MM Landfill in accordance with the requirements of the ACO.

5. As a DEP employee, Rostkowski participated in assessing the MM Landfill site and recommending enforcement/investigative actions in connection with the ACO. Approximately twenty percent of Rostkowski’s time as a DEP employee was spent doing MM Landfill work.

6. Rostkowski became a former state employee when he left his DEP position in February 2001.

7. On March 1, 2001, Rostkowski began working for MEA.

8. Rostkowski visited the MM Landfill site daily for approximately six months of his MEA employment. Rostkowski monitored which MEA employees and equipment were at the MM Landfill. He also sporadically went to the MM Landfill and gave advice to the MEA laborers about storm water control measures. These actions involved the applicable landfill closure and design and construction requirements of the ACO.

9. Rostkowski did not appear on MEA’s behalf before the DEP.

10. Rostkowski left MEA in April 2004.

Conclusions of Law

11. Section 5 (a) of G.L. c. 268A prohibits a former state employee from knowingly acting as agent for or receiving compensation^{2/} directly or indirectly from anyone other than the commonwealth or a state agency, in connection with any particular matter^{3/} in which the commonwealth or a state agency is a party or has a direct and substantial interest, and in which matter he participated^{4/} as a state employee.

12. When Rostkowski left DEP, he became a former state employee.

13. The ACO was a particular matter in which the DEP was a party.

14. Rostkowski, while a DEP employee, participated in assessing the MM Landfill site and recommending enforcement/investigative actions in connection with the ACO.

15. Rostkowski received compensation from MEA beginning in March 2001, when he as an MEA employee, went to the MM Landfill on a daily basis for approximately six months. Rostkowski monitored which MEA employees and equipment were at the MM Landfill. He also sporadically went to the MM Landfill and gave advice to the MEA laborers about storm water control measures. The work Rostkowski performed for MEA concerning the MM Landfill was in connection with the ACO.

16. By receiving compensation from MEA for the work he did, as an MEA employee, concerning the MM Landfill ACO, Rostkowski received compensation from someone other than the state in connection with a particular matter in which the state was a party. By doing so, Rostkowski violated § 5(a).

Resolution

In view of the foregoing violations of G.L. c. 268A by Rostkowski, 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 Rostkowski:

- (1) that Rostkowski pay to the Commission the sum of \$10,000 as a civil penalty for repeatedly violating G.L. c. 268A as noted above; and
- (2) that Rostkowski 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 14, 2006

^{1/} 310 CMR §§ 19.140 -19.151.

^{2/} “Compensation” means 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).

^{3/} “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).

^{4/} “Participate” means 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). One does not need to be the final decision-maker to be deemed to have participated in a matter.

COMMONWEALTH OF MASSACHUSETTS STATE ETHICS COMMISSION

**SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 06-0010**

**IN THE MATTER
OF
JOSEPH FLAHERTY**

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Joseph Flaherty 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 16, 2006, 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 Flaherty. The Commission concluded its inquiry and, on May 11, 2006, found reasonable cause to believe that Flaherty violated G.L. c. 268A.

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

Findings of Fact

1. Flaherty was a Mendon Parks Commission (MPC) member from May 2000 to October 2004. Flaherty was re-elected to the MPC in May 2005 and is currently serving his term.

2. The MPC oversees the Recreation Department’s summer youth camp, including appointing the camp director. The MPC members delegate to the camp director the responsibility of appointing camp counselors.

3. At the time relevant to this matter, campers had to be 12 years old or younger. The cost of one week at camp was \$150. Junior counselors had to be age 13-15 and assisted the senior counselors. Junior counselors were unpaid, but attended camp free of charge and received free lunch every day and valuable experience that could lead to a paid senior counselor position in the future. Junior counselors were not required to commit to working the whole summer or to working full 1-week sessions.

4. Flaherty has a son who was 15 years old in 2005. Flaherty’s son was a junior counselor in summers 2003 and 2004. To get those positions, Flaherty’s son applied and was interviewed and then hired by the camp director. In 2003 and 2004, there were 20 or more junior counselors.

5. Prior to 2005, anyone who applied to be a junior counselor got the job. The MPC recognized that this situation was problematic and changed the junior counselor selection process for the 2005 season. The MPC decided to limit the number of junior counselors to 10 for summer 2005.^{1/} During spring 2005, the camp director position was vacant so the MPC delegated the authority to hire junior counselors to the MPC clerk/administrative secretary (MPC Clerk).

6. In spring 2005, about 25 candidates, including Flaherty's son, applied to be junior counselors for summer camp 2005. Candidates were interviewed by either the three senior counselors or the MPC Clerk. After all of the interviews were completed, the MPC Clerk met with the three interviewer senior counselors and selected 10 junior counselors for summer camp 2005. Flaherty's son was not selected.

7. Flaherty rejoined the MPC in early May 2005. Shortly thereafter, Flaherty asked the MPC Clerk about the junior counselor positions. The MPC Clerk told Flaherty that Flaherty's son had not been selected and that the MPC had limited the number of junior counselors to 10. The MPC Clerk stated that the MPC might need to hire more junior counselors if the number of campers increased, but they did not plan on that happening and she could not guarantee it. The MPC Clerk told Flaherty she would call him if anything changed.

8. At the June 2005 MPC meeting, Flaherty expressed his concerns about the number of junior counselors and the hiring process. At the next MPC meeting on July 5, 2005, which Flaherty did not attend, the MPC voted to keep the number of junior counselors at 10.

9. On Monday, July 11, 2005, Flaherty brought his son to the Recreation Department's camp. Flaherty told the newly appointed camp director that his son was there to be a junior counselor for that week and also for two additional weeks in the summer. Flaherty's son attended the camp as a junior counselor for at least 10 days of these three weeks.

10. Flaherty's son applied and was accepted to be a senior counselor at the 2006 camp.

Law

11. Section 23(b)(2) of G.L. c. 268A prohibits a public employee from knowingly or with reason to know, using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals.

12. As a MPC member, Flaherty was a municipal

employee as that term is defined in G.L. c. 268A, § 1(g), and therefore subject to the conflict-of-interest law.

13. Flaherty was able to have his son attend camp without paying by telling his subordinate, the camp director, that his son would be attending as a junior counselor. In doing so, Flaherty knew or had reason to know that he was using his MPC position when he told the camp director that his son was to attend the camp for free as a junior counselor.

14. Where Flaherty's son was too old to attend camp as a camper and was not selected as a junior counselor, his attendance at the camp was an unwarranted privilege.

15. The unwarranted privilege secured by Flaherty was of substantial value.^{2/}

16. Other parents would not have been able to receive similar benefits for their children. Thus, the privilege was not otherwise properly available to similarly situated individuals.

17. Therefore, by telling his subordinate that his son was attending camp as a junior counselor when his son had not been so selected, Flaherty knowingly or with reason to know used his MPC member position to secure for himself and/or his son unwarranted privileges of substantial value that were not properly available to similarly situated individuals, violating § 23(b) (2).

Resolution

In view of the foregoing violation of G.L. c. 268A by Flaherty, 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 Flaherty:

- (1) that Flaherty pay to the Commission the sum of \$1,000.00 as a civil penalty for 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: June 15, 2006

^{1/} Flaherty was not a MPC member when the decision was made to limit the number of junior counselors.

^{2/} The exact benefit to Flaherty and/or his son is unclear. The financial benefit to Flaherty and his son cannot be precisely quantified, but clearly exceeded the minimum for substantial value of \$50 or more.

Thus, Flaherty secured for his son a safe and pleasant place to stay during the day for at least 10 days and the opportunity to gain work experience as a junior counselor under the supervision of the camp director and the junior counselors. In addition, of course, Flaherty's son received free lunches.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. OMISSION ADJUDICATORY
DOCKET NO. 05-0004**

**IN THE MATTER
OF
PETER ARLOS**

DISPOSITION AGREEMENT

The State Ethics Commission and Peter Arlos 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 June 15, 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 Arlos. The Commission has concluded its inquiry and, on April 7, 2005, found reasonable cause to believe that Arlos violated G.L. c. 268A, §13.

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

Findings of Fact

1. Arlos was the elected Berkshire County treasurer from January 2, 1985 through December 31, 2002.

2. The Berkshire County treasurer served as the treasurer/custodian on the Berkshire County Retirement Board ("County Retirement Board").^{1/}

3. As County Retirement Board treasurer/custodian, Arlos had voting rights as a County Retirement Board member.

4. On June 21, 2000, at an open public meeting, the County Retirement Board approved by a 3-2 vote, a 3% increase of the wages for the treasurer-custodian. Arlos voted with the majority.

5. The 3% raise resulted in Arlos receiving a total

of \$1,200 in additional compensation during the period of FY01 through the end of FY03.

6. Arlos believed he was acting entirely as a Berkshire County Retirement Board member when he voted on June 21, 2000, and that § 13 of G.L. ch. 268A did not apply to Berkshire County Retirement Board members. He based his belief on the Supreme Judicial Court decision in *Massachusetts Bay Transportation Authority Retirement Board v. State Ethics Commission*, 414 Mass. 582 (1993), which found that the MBTA Retirement Board was outside the State Ethics Commission's jurisdiction. Arlos believed that the salary increase was not paid with public funds. The State Ethics Commission disagrees with Arlos' interpretation and finds that the Berkshire County Retirement Board was a county agency, its members subject to c. 268A and that Arlos's salary increase was paid with public monies.

7. Arlos cooperated fully with the Commission's investigation of this matter.

Conclusions of Law

8. Section 13 of G.L. c. 268A prohibits a county employee from participating^{2/} as such an employee in a particular matter^{3/} in which, to his knowledge, he has a financial interest.^{4/}

9. As the elected Berkshire County treasurer from January 2, 1985 through June 30, 2000, Arlos was a county employee within the meaning of G.L. c. 268A, § 1.

10. The June 21, 2000 decision by the County Retirement Board as to whether to increase Arlos' treasurer-custodian salary by 3% was a particular matter.

11. Arlos had a financial interest in having his treasurer-custodian salary increased by 3%.

12. Arlos was a county employee at the time he participated as a member of the Berkshire County Retirement Board in the particular matter of the June 21, 2000 vote.

13. Arlos knew of his financial interest in the particular matter when he participated in the vote to increase the treasurer-custodian's salary.

14. Accordingly, the State Ethics Commission finds that a Berkshire County Retirement Board member voting to increase his treasurer-custodian's salary by 3%, is a violation of § 13.

Resolution

In view of the foregoing violation of G.L. c. 268A

by Arlos, 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 Arlos:

- (1) that Arlos pay to the Commission the sum of \$1,000 as a civil penalty for violating G.L. c. 268A, § 13;
- (2) that Arlos pay to Public Employee Retirement Administration Commission (PERAC) the sum of \$1,200 as a civil forfeiture reflecting that portion of his compensation attributable to the § 13 violation; and
- (3) that Arlos 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 21, 2006

^{1/}G.L. c. 32, § 23(2).

^{2/}“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).

^{3/} “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).

^{4/}“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*.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION
SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 06-0012**

**IN THE MATTER
OF
JOHN DEWALD**

DISPOSITION AGREEMENT

The State Ethics Commission and John DeWald 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 April 13, 2006, 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 DeWald. The Commission has concluded its inquiry and, on June 9, 2006, found reasonable cause to believe that DeWald violated G.L. c. 268A, §§ 17 and 23(b) (2).

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

Findings of Fact

1. During the time relevant, DeWald was the appointed Rockland Finance Committee (“FinCom”) chairman. As such, DeWald was a municipal employee as that term is defined in G.L. c. 268A, § 1, and subject to the provisions of the conflict-of-interest law, G.L. c. 268A.

2. Sandy Lederman (“Lederman”) is an attorney with law offices in Brockton. DeWald is also an attorney with separate law offices in Brockton. DeWald and Lederman are friends.

3. Lederman represents Ken Crosby (“Crosby”), whose 8-acre parcel was taken through default foreclosure by the Town of Rockland for unpaid taxes.

4. Lederman filed a motion to remove the default (Town of Rockland v. Crosby) in an attempt to get Crosby’s property back from town ownership.

5. Rockland Tax Title Attorney Laura Powers (“Powers”) handled the Crosby case for the town.

6. The Board of Selectmen hired Powers. She reports to the Treasurer. Each year, the Treasurer’s Department has a certain amount of money in its budget for legal fees. The Treasurer’s Department accrued more

legal fees than what was budgeted because of the Crosby case. In order to pay those bills, the Treasurer has to take the bills before the FinCom. The FinCom reviews those bills and then votes whether to approve additional funds to pay the bills. Some of the legal bills are from Powers because of her work on the Crosby case.

7. Lederman called DeWald and asked DeWald to talk to Powers to see if she would be willing to resolve the default and settle the case. DeWald agreed to call Powers.

8. Lederman's motion to remove the default was scheduled for hearing on January 20, 2005 at 2:00 PM. A few hours before the hearing, DeWald telephoned Powers. DeWald introduced himself as the FinCom chairman. DeWald then tried to persuade Powers to settle the case for back taxes and attorney fees. Powers declined stating that the town wanted to keep the land. DeWald continued to plead his case and tried to convince Powers to settle the case. Powers felt pressured by DeWald's call but declined DeWald's offer.

9. The Crosby case is still pending.

10. DeWald maintains that he did not intend to pressure Powers into settling the Crosby case. Rather, in his experience as FinCom chairman, he has urged Rockland to pursue delinquent tax title takings. DeWald has also encouraged the town to settle disputes expeditiously to avoid higher legal expenses. DeWald believed that settlement of the Crosby case was favorable to both Lederman and the town. Regardless of whether settlement of the Crosby case is in the best interest of the town, DeWald acknowledges that no request of settlement by him should have been made under the circumstances.

Conclusions of Law

11. Section 17(c) prohibits a municipal employee from, otherwise than in the proper discharge of his official duties, acting as agent for anyone other than the same municipality in connection with a particular matter in which the municipality is a party or has a direct and substantial interest.

12. The Crosby case was a particular matter in which the town was a party and had direct and substantial interests.

13. On behalf of and at the request of Lederman, DeWald intervened with the town attorney concerning the Crosby case by advocating that the town settle the matter as described above. Thus, DeWald acted as an agent for Lederman in connection with the Crosby case particular matter.

14. DeWald's actions were not in the proper discharge of his official duties.

15. By acting as an agent for someone other than the town in connection with the Crosby case particular matter, DeWald violated § 17(c).

16. Section 23(b)(2) of G.L. c. 268A prohibits a public employee from knowingly or with reason to know, using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals.

17. DeWald knew or had reason to know he was using or attempting to use his FinCom Chairman position to influence Powers regarding the Crosby case because: 1) when he called Powers, DeWald identified himself as the FinCom chairman; 2) as FinCom Chairman, DeWald had the ability to vote on whether to approve funds to pay legal bills regarding the Crosby case, which included legal bills from Powers; and 3) Powers felt pressured by DeWald's call.

18. The privilege was to secure a settlement of the Crosby case on terms favorable to his friend Lederman.

19. The privilege was unwarranted because DeWald attempted to obtain the settlement on terms favorable to his friend by using the influence and power of his FinCom chairman position for a private purpose rather than on the merits of the case.

20. The settlement at issue in the Crosby case was of substantial value.

21. Other attorneys who were not friends with DeWald would not have been able to have the FinCom chairman intervene on their behalf. Thus, the privilege was not otherwise properly available to similarly situated individuals.

22. Therefore, by knowingly using his position as a FinCom chairman position in attempting to secure for his friend an unwarranted privilege of substantial value not properly available to similarly situated individuals, DeWald violated §23(b)(2).

Resolution

In view of the foregoing violations of G.L. c. 268A by DeWald, 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 DeWald:

- (1) that DeWald pay to the Commission the sum of \$2,000 as a civil penalty for violating G.L. c. 268A, §§ 17(c) and 23(b)(2);
- (2) that DeWald 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: July 26, 2006

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**
**SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 06-0013**
**IN THE MATTER
OF
ROBERT NELSON**
DISPOSITION AGREEMENT

The State Ethics Commission and Robert Nelson 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 May 11, 2006, 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 Nelson. The Commission has concluded its inquiry and, on July 25, 2006, found reasonable cause to believe that Nelson violated G.L. c. 268A.

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

Findings of Fact

1. During the time relevant, Nelson was a member of the Dunstable Board of Selectmen ("BOS"). The BOS is a three member board.

2. Nelson had a purchase and sales agreement with Dracut-based developer Frank Gorman to sell to Gorman 3.5 acres of land in Dunstable on which Gorman planned to construct a 30-unit affordable housing apartment building under c. 40B guidelines (the "Gorman project"). The sale was contingent on Gorman obtaining a Chapter 40B comprehensive permit from the town.

3. Chapter 40B is a state statute enacted to

encourage the construction of affordable housing in all the cities and towns throughout the Commonwealth by reducing restrictions created by local approval processes. The state standard is for communities to provide a minimum of 10% of their housing inventory as affordable. In communities that do not meet that minimum, a developer may, if the project is rejected by the local board of appeals, appeal to the state Housing Appeals Committee, which can grant the permit. Communities exceeding the 10% threshold can accept 40B development proposals at their discretion.

A developer acting under 40B notifies the town that its proposed development qualifies under either a state/federal subsidy program or through a partnership with the town in a Local Initiative Program (LIP). An LIP is an affordable housing development that is endorsed by the local municipality. Typically these are developments where the developer has approached the local municipality in a cooperative manner to gain approval of an LIP designation. For the towns it requires a vote of approval by the selectmen and a submission by the selectmen of an LIP application to the state Department of Housing and Community Development. Upon submission of the LIP application by the selectmen, the developer then submits its formal 40B application to the local ZBA. If the ZBA were to reject the LIP, the developer can still appeal to the state Housing Appeals Committee, assuming the town does not meet the 10% affordable housing minimum.

4. The Town of Dunstable has not met the 10% affordable housing minimum.

5. Gorman opted to pursue the LIP approach for his project.

6. On July 26, 2004, the Gorman project was first presented to the BOS in the form of an LIP application.

7. Nelson abstained at BOS meetings from participating as a BOS member in matters regarding the Gorman project.

8. During the period of July 27, 2004 through August 4, 2004, however, Nelson participated as a selectman in discussing the project with other town officials via email.

9. In the email discussions involving the Gorman project, Nelson made the following recommendations: (1) that the 40B quotas not include accessory apartments; (2) that the fire department need not be involved at the concept phase but rather at the subsequent ZBA review; (3) that the ZBA (rather than the BOS) has the responsibility to review the proposal to ensure adherence to state and federal codes; and (4) suggested that a specific attorney with 40B experience represent the town's interests concerning the Gorman project.

10. On August 5, 2004, the BOS, after a review of the Gorman project with representatives of other town boards, voted 2-0-1 (with Nelson abstaining) to endorse the project.

Conclusions of Law

11. As a Dunstable selectman, Nelson was a municipal employee within the meaning of G.L. c. 268A.

12. Section 19 of G.L. c. 268A prohibits a municipal employee from participating as such an employee in a particular matter in which, to his knowledge, he has a financial interest.

13. The BOS decision whether to endorse the Gorman project as an LIP was a particular matter.^{1/}

14. Nelson participated^{2/} as a selectman in this particular matter by making the above described recommendations via emails regarding the Gorman project. These recommendations had the potential to significantly impact the BOS's decision whether to approve the Gorman project as an LIP. Nelson was the owner of the property that was to be used in the Gorman project. Where the sale of Nelson's property was contingent on the Gorman project receiving a 40B comprehensive permit, and Gorman opted to pursue the LIP approach for his project which required BOS endorsement, Nelson had a financial interest in the BOS endorsement decision.

15. When he so participated in the particular matter, Nelson knew that he had a financial interest in the endorsement decision.

16. Therefore, by acting as described above, Nelson violated § 19.

Resolution

In view of the foregoing violations of G.L. c. 268A by Nelson, 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 Nelson:

- (1) that Nelson pay to the Commission the sum of two thousand dollars (\$2,000.00) as a civil penalty for repeatedly violating G. L. c. 268A § 19; and
- (2) that Nelson 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: July 27, 2006

^{1/} "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).

^{2/} "Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, § 1(j).

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 06-0016**

**IN THE MATTER
OF
HARRY K. HARUTUNIAN**

DISPOSITION AGREEMENT

The State Ethics Commission and Harry K. Harutunian 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 June 8, 2006, 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 Harutunian. The Commission concluded its inquiry and, on September 13, 2006, found reasonable cause to believe that Harutunian violated G.L. c. 268A.

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

Findings of Fact

1. During the time relevant, Harutunian was the North Andover Public Schools superintendent.
2. In the fall of 2005, another school department employee became Harutunian's girlfriend. The employee's son attended the North Andover High School ("the High School").

3. In December 2005, Harutunian as superintendent created a position for his girlfriend's son as a part-time, after-school janitor at a middle school in North Andover.

4. At that time, Harutunian separately instructed custodians to pick up the son at the High School after school, take him to the middle school to work and drop him off at his home after work.

5. Also on a third occasion, in December 2005, Harutunian told a career counselor at the High School to write a memo to him backdated to November 21, 2005, requesting that Harutunian find his girlfriend's son a job. The career counselor expressed a concern that other students were in need of jobs as well. No other students, however, were given the opportunity to apply for the position Harutunian created for his girlfriend's son.

6. Harutunian's girlfriend's son was paid \$10.50/hour. The North Andover School District paid the son \$540 during the 2005-2006 school year.

Conclusions of Law

7. General laws, c. 268A, § 23(b)(2) prohibits a municipal employee from knowingly, or with reason to know, using his official position to secure for himself or others unwarranted privileges which are of substantial value and not properly available to similarly situated individuals.

8. As the North Andover Public Schools superintendent, Harutunian was a municipal employee within the meaning of G.L. c. 268A.

Position for Girlfriend's Son

9. Harutunian used his position to create a part-time school department position for his girlfriend's son.

10. The above-described custodian job was a privilege.

11. The privilege was unwarranted because Harutunian failed to follow proper hiring procedures, gave the job to the son of his girlfriend and did not provide other students with the opportunity to apply for the position.

12. The privilege was of substantial value as the earning potential to the son was more than \$50.

13. This unwarranted privilege was not otherwise properly available to similarly situated students.

14. Therefore, by knowingly using his position as the North Andover Public Schools Superintendent to secure for his girlfriend's son a school department position,

an unwarranted privilege of substantial value not properly available to similarly situated individuals, Harutunian violated §23(b)(2).

Work Transportation

15. Harutunian used his position to direct school custodians to transport his girlfriend's son to and from work while they were on school district time.

16. The above-described transportation service was a privilege.

17. The privilege was unwarranted because (1) the school custodians transported the son while on school district time; and (2) other school employees are not provided with such transportation.

18. The privilege was of substantial value because: (1) the school district lost more than \$50 in work time that the custodians spent transporting the son; and (2) the cost of the son obtaining transportation back and forth to work would have exceeded \$50.

19. This unwarranted privilege was not otherwise properly available to similarly situated school employees.

20. Therefore, by knowingly using his position as the North Andover Public Schools superintendent to instruct school custodians to transport his girlfriend's son to and from work while they were on school district time, an unwarranted privilege of substantial value not properly available to similarly situated individuals, Harutunian violated §23(b)(2).

Cover-up

21. Harutunian used his position to cover-up his having created a job for his girlfriend's son. Specifically, he used his position to (1) direct the school career counselor to create a false memo stating that it was her suggestion (rather than Harutunian's) to find a job for the son; and (2) direct the school career counselor to backdate that memo.

22. This cover-up was a privilege.

23. The privilege was unwarranted because public officials may not seek to hide their role in public decisions through false records.

24. The privilege was of substantial value because it concealed Harutunian's improper conduct in creating a job for his girlfriend's son.

25. This unwarranted privilege was not otherwise properly available to similarly situated school employees.

26. Therefore, by knowingly using his position as the North Andover Public Schools superintendent to cover-up his improperly creating a school department position for his girlfriend's son, an unwarranted privilege of substantial value not properly available to similarly situated individuals, Harutunian violated §23(b)(2).

Resolution

In view of the foregoing violations of G.L. c. 268A by Harutunian, 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 Harutunian:

- (1) that Harutunian pay to the Commission the sum of \$6,000 as a civil penalty for violating G.L. c. 268A as noted above; and
- (2) that Harutunian 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: September 14, 2006

COMMONWEALTH OF MASSACHUSETTS STATE ETHICS COMMISSION

**SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 06-0018**

**IN THE MATTER
OF
HARRY GANNON**

DISPOSITION AGREEMENT

The State Ethics Commission and Harry Gannon 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 July 25, 2006, 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 Gannon. The Commission has concluded its inquiry and, on September 13, 2006, found reasonable cause to believe that Gannon violated G.L. c. 268A.

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

Findings of Fact

1. In 1985, Gannon became the paid, appointed Maynard town accountant.

2. Prior to 1999, the town accountant administered the Maynard Retirement Board's ("Board") functions and received an extra \$3,000 annually for the services.

3. In 1999, the Board, with Gannon serving ex officio as town accountant, created and funded a new position of executive director of the retirement board.

4. Gannon participated in the Board's actions to create and fund the position. The salary was set at \$12,000 per year. When Gannon so participated he knew he would likely be appointed to fill this position.

5. The Board then voted, with Gannon abstaining, to appoint the town accountant (Gannon) as the executive director, a position he continues to serve in currently. In effect, this action by the Board resulted in an annual salary increase for Gannon of \$9,000.

6. Gannon then served as both the paid town accountant and paid retirement board executive director from September 2000 until December 31, 2002, when he retired as town accountant.

Conclusions of Law

7. As the Maynard town accountant, Gannon was a municipal employee as defined by G.L. c. 268A, § 1.

8. Except as otherwise permitted, § 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.

9. Gannon's paid appointment as executive director of the retirement board in September 2000, while he was already serving as the paid town accountant gave him an ongoing prohibited financial interest in a contract made by the town of Maynard in which the town was an interested party.

10. Gannon knew or had reason to know of his

financial interest in that contract.

11. Thus, by serving as the paid retirement board executive director while being the town accountant, Gannon repeatedly violated § 20.^{1/}

Resolution

In view of the foregoing violations of G.L. c. 268A by Gannon, 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 Gannon:

- (1) that Gannon pay to the Commission the sum of five thousand dollars (\$5,000.00) as a civil penalty for repeatedly violating G. L. c. 268A § 20;
- (2) that Gannon pay to the Commission the sum of twenty thousand dollars (\$20,000) as a civil forfeiture of the compensation that he received in violation of § 20; and
- (3) that Gannon 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 14, 2006

^{1/} The Commission's statute of limitations (930CMR 1.02 (10)) prevents the Commission from proceeding on Gannon's participation in 1999 in the creation of the retirement board executive director position.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION
SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 06-0019**

**IN THE MATTER
OF
THOMAS E. CISLAK**

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Thomas E. Cislak 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 16, 2006, 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 Cislak. The Commission has concluded its inquiry and, on July 25, 2006, found reasonable cause to believe that Cislak violated G.L. c. 268A.

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

Findings of Fact

1. From March 2005 until April 2006, Cislak served as a member of the Ludlow Department of Public Works (DPW) board.
2. Cislak and/or his family own and operate companies that do paving work.
3. The DPW issues permits for certain paving work.
4. On six occasions when Cislak served on the DPW board, he did paving work requiring a DPW permit. Cislak's average profit for such work was \$400 per project.

Conclusions of Law

5. Section 17(a) of G.L. c. 268A prohibits a municipal employee, otherwise than as provided by law for the proper discharge of official duties, from directly or indirectly receiving or requesting compensation from anyone other than the municipality in relation to a particular matter^{1/} in which the municipality has a direct and substantial interest.

6. As a DPW member, Cislak was a municipal employee as that term is defined in G.L. c. 268A, § 1(g),

and therefore subject to the conflict-of-interest law.

7. DPW permits for paving projects were particular matters.

8. The town had a direct and substantial interest in these decisions because the DPW issues such permits and has a direct and substantial interest in the condition of paving work done in town.

9. The compensation Cislak received for paving work requiring DPW permits was in relation to permits issued by the DPW. Cislak was not authorized by law to receive private compensation in relation to these DPW particular matters.

10. Thus, Cislak received compensation from a private party other than the town, in relation to projects requiring DPW permits, particular matters in which the town had a direct and substantial interest. By so doing, Cislak violated § 17(a).

Resolution

In view of the foregoing violation of G.L. c. 268A by Cislak, 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 Cislak:

- (1) that Cislak pay to the Commission the sum of \$3,000.00 as a civil penalty for violating G.L. c. 268A, §17(a);
- (2) that Cislak pay to the Commission the sum of \$2,400 as a civil forfeiture of the compensation that he received for work done in relation to matters involving the DPW; and
- (3) 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, 2006

^{1/} "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, § 1(k).

COMMONWEALTH OF MASSACHUSETTS STATE ETHICS COMMISSION

**SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 06-0020**

**IN THE MATTER
OF
JOHN JENKINS**

DISPOSITION AGREEMENT

The State Ethics Commission and John Jenkins 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 July 25, 2006, 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 Jenkins. The Commission has concluded its inquiry and, on September 13, 2006, found reasonable cause to believe that Jenkins violated G.L. c. 268A.

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

Findings of Fact

1. At the time relevant, Jenkins was the West Barnstable Fire Department chief.

2. During the time relevant, Jenkins also worked as a commissioned sales representative for Pierce Manufacturing (Pierce), a Wisconsin based fire equipment company. The local Pierce dealer is Minuteman Fire and Rescue Apparatus (Minuteman) located in Walpole, Massachusetts.

3. In 2004, the fire department needed to refurbish its 1985 Pierce Engine-Tanker 296 (ET-296). The refurbishment included replacing the tank and pump, along with body work and repainting. The preliminary bid documents for the ET-296 refurbishment were drawn up by Jenkins and a mechanic on March 29, 2004, and submitted to the fire department's prudential committee on April 14, 2004.

4. Four vendors requested copies of the refurbishment specifications. Two vendors subsequently submitted proposals at the November 22, 2004 bid opening, one of which was Minuteman/Pierce. Jenkins and other fire department personnel reviewed the two proposals. Minuteman/Pierce was the low bidder. In a November 29, 2004 memo, Jenkins recommended the prudential committee accept the Minuteman/Pierce bid.

5. The prudential committee selected Minuteman/Pierce to refurbish the ET-296 based on its lower bid and its ability to meet the fire department's specifications. The refurbishment contract was for \$153,000.

6. Throughout the bid and subsequent refurbishment process, Jenkins served as the primary fire department liaison with Minuteman/Pierce. Jenkins repeatedly communicated by telephone and in writing with Minuteman/Pierce personnel regarding the ET-296 refurbishment.

7. Jenkins retired from the fire department in March 2005.

8. The ET-296 was returned to service in May 2005. Minuteman/Pierce completed the work on time and within budget.

9. Jenkins did not earn a commission from Minuteman/Pierce when the prudential committee awarded the company the ET-296 refurbishment project.

10. The Commission received no evidence that Jenkins as fire chief showed favor or disfavor towards Minuteman/Pierce.

Conclusions of Law

11. As the West Barnstable Fire Department Chief, Jenkins was a municipal employee within the meaning of G.L. c. 268A.

12. 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 a conflict of interest.

13. Jenkins participated as fire chief in drawing up the preliminary bid documents for the ET-296 refurbishment, recommending that the prudential committee accept the Minuteman/Pierce bid and acting as the fire department liaison with Minuteman/Pierce throughout the bid and subsequent refurbishment process.

14. When he so participated in these matters while he was also a Minuteman/Pierce sales representative, Jenkins knew or had reason to know that he was creating an appearance of impropriety by performing his fire department duties regarding the ET-296 refurbishment

when Minuteman/Pierce was a likely bidder and subsequently was in fact awarded the contract.

15. Thus, Jenkins 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 Minuteman/Pierce could improperly influence or unduly enjoy Jenkins's favor in the performance of Jenkins's official duties relating to the ET-296 refurbishment because of the private business relationship between Jenkins and Minuteman/Pierce. Thus, Jenkins violated § 23(b)(3).

16. Jenkins did not file any written disclosure with his appointing authority to dispel this appearance of impropriety.

Resolution

In view of the foregoing violations of G.L. c. 268A by Jenkins, 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 Jenkins:

- (1) that Jenkins pay to the Commission the sum of \$2,000 as a civil penalty for violating § 23(b)(3) of G.L. c. 268A; and
- (2) that Jenkins 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 16, 2006

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 06-0021**

**IN THE MATTER
OF
WILLIAM SULLIVAN**

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and William Sullivan 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 11, 2006, 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 Sullivan. The Commission has concluded its inquiry and, on September 13, 2006, found reasonable cause to believe that Sullivan violated G.L. c. 268A.

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

Findings of Fact

1. William Sullivan is a residential designer. From July 2004 until June 2006, Sullivan served as an appointed full member of the Oak Bluffs Zoning Board of Appeals ("ZBA").

2. During his tenure on the ZBA, Sullivan submitted to the ZBA design plans for six of his clients seeking special permits. On these projects, Sullivan personally represented the clients before the ZBA. Sullivan's participation as his clients' representative in these hearings varied; in some cases his role was limited to answering questions and on other occasions he gave presentations on his plan designs and advocated the granting of special permits. Sullivan received approximately \$600 compensation from clients for his private time for presenting these plans to the ZBA for clients concerning their special permit applications.

Conclusions of Law

3. Section 17(a) of G.L. c. 268A prohibits a municipal employee, otherwise than as provided by law for the proper discharge of official duties, from directly or indirectly receiving or requesting compensation from anyone other than the municipality in relation to a particular matter¹ in which the municipality is a party or has a direct and substantial interest.

4. Section 17(c) of G.L. c. 268A prohibits a municipal employee, otherwise than in the proper discharge of official duties, from acting as agent for anyone other than the municipality in connection with a particular matter in which the town is a party or has a direct and substantial interest.

5. As a ZBA member, Sullivan was a municipal employee as that term is defined in G.L. c. 268A, § 1(g), and as such subject to the conflict-of-interest law.

6. The ZBA decisions whether to grant special permits were particular matters.

7. The town was a party and had a direct and substantial interest in such ZBA decisions.

8. By submitting and/or presenting his clients' design plans before the ZBA, Sullivan acted as their agent. Sullivan's actions in so doing were in connection with the ZBA decisions regarding special permits concerning his clients' projects and were not within the proper discharge of official duties as a ZBA member.

9. Sullivan received approximately \$600 compensation from his client for presenting these plans to the ZBA in relation to the ZBA's special permit decisions regarding his clients' projects. Sullivan was not authorized by law to receive such compensation in relation to these ZBA particular matters.

10. Thus, Sullivan received compensation from and acted as agent for parties other than the town in relation to the ZBA's special permit decisions concerning his clients' projects, particular matters in which the town was a party. By so doing, Sullivan repeatedly violated § 17(a) and (c).

Resolution

In view of the foregoing violation of G.L. c. 268A by Sullivan, 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 Sullivan:

- (1) that Sullivan pay to the Commission the sum of \$3,000.00 as a civil penalty for repeatedly violating G.L. c. 268A, §§ 17(a) and (c);
- (2) that Sullivan pay to the Commission the sum of \$600 as a civil forfeiture of the compensation that he received for representing clients before the ZBA; and
- (3) 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 20, 2006

^{1/} "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, § 1(k).

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 06-0022**

**IN THE MATTER
OF
PAUL ZAKRZEWSKI**

DISPOSITION AGREEMENT

The State Ethics Commission and Paul Zakrzewski 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 June 8, 2006, 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 Zakrzewski. The Commission has concluded its inquiry and, on October 11, 2006, found reasonable cause to believe that Zakrzewski violated G.L. c. 268A.

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

Findings of Fact

1. Zakrzewski is an elected member of the Abington Board of Assessors.
2. Zakrzewski has known developer Roger Woods since around 1999. The two have had numerous real estate partnerships since 2000.

3. From 2001 - 2005, Zakrzewski voted, along with the other two BOA members, to approve four abatement applications filed by Woods. The abatements resulted in first-year tax savings to Woods of over \$5,600.^{1/} Zakrzewski himself had no interest in any of these applications.

4. At the time of each of these votes, Zakrzewski and Woods were real estate partners, although they were not partners regarding the properties that were the subjects of the four abatement applications.

Conclusions of Law

5. As an Abington BOA member, Zakrzewski was a municipal employee within the meaning of G.L. c. 268A.

6. Section 19 of G.L. c. 268A in relevant part prohibits a municipal employee from participating as such an employee in a particular matter in which, to his knowledge, a partner has a financial interest.

7. The abatement applications filed by Woods were particular matters.^{2/}

8. Zakrzewski participated^{3/} as a BOA member, in those particular matters by voting to approve the abatement applications.

9. As the property owner, Woods, Zakrzewski's business partner, had financial interests in those particular matters.

10. When he participated in the particular matters, Zakrzewski knew that his partner Woods had financial interests in the particular matters.

11. Therefore, by acting as described above, Zakrzewski violated § 19. ^{4/}

Resolution

In view of the foregoing violations of G.L. c. 268A by Zakrzewski, 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 Zakrzewski:

- (1) that Zakrzewski pay to the Commission the sum of one thousand dollars, (\$1,000.00) as a civil penalty for repeatedly violating G. L. c. 268A § 19; and
- (2) that Zakrzewski 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 21, 2006

^{1/} Zakrzewski believed that the board was obligated to approve one of the abatement applications because the initial assessment had, in his opinion, erroneously treated the property as a subdivision. On a motion by Zakrzewski, the board unanimously voted to reduce the assessment by over \$3,300.

^{2/} “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).

^{3/} “Participate,” participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, § 1(j).

^{4/} After learning at a 2005 Ethics Commission seminar that he could not participate in matters concerning a partner’s financial interests, Zakrzewski has since abstained from such cases.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 06-0023**

**IN THE MATTER
OF
MARC BECKER**

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Marc Becker 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 16, 2006, 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 Becker. On July 25, 2006, the Commission amended its preliminary inquiry to include additional possible violations of the conflict of interest law, G.L. c.

268A, by Becker. The Commission concluded its inquiry and, on September 13, 2006, found reasonable cause to believe that Becker violated G.L. c. 268A, §§19 and 23(b)(3).

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

Findings of Fact

1. At all relevant times, Becker was the Town of Webster Planning Board chairman.

2. At all relevant times, Becker was a real estate broker with Sterling Realty in Webster, MA.

82 Lakeside Avenue Property

3. On or about October 2002, Becker listed property located at 82 Lakeside Avenue in an open listing. This property included a 3 bedroom/3 full bath house with a total of 159 feet of lake frontage, including a 54 foot buildable lot on the north side of the house. He remained the listing agent on the property at all relevant times.

4. In or about October 2002, Becker offered the property for sale at \$950,000. Becker entered an exclusive listing for the property in May 2003. In May 2003, the price was reduced to \$849,000 or \$695,000 without the additional lot (which was not yet approved for subdivision). In July 2003, the price of the property without the extra lot was reduced to \$649,000. In December 2003, the price was reduced to \$725,000, or \$579,900 without the extra lot.

5. On October 30, 2003, Becker participated as a Planning Board member in endorsing an ANR (“approval not required”) plan as a Planning Board member for 82 Lakeside Avenue, which had not yet sold. An ANR plan typically allows the applicant to obtain Planning Board approval for subdividing a property into two or more lots without having to meet the requirements of the subdivision control law, provided that each lot has the required minimum square footage and frontage on an existing way.

6. The ANR plan permitted the property to be subdivided so that a buildable lot, consisting of 54 feet of lake front property, could become a separate parcel from the larger lot, which included a house.

7. Prior to approving the ANR, the Planning Board ensured the ANR plan contained minimum frontage and square footage requirements. The property contained the required minimums. The Planning Board, with Becker participating, voted to endorse the ANR.

8. Thereafter, Becker continued to actively market the property as a real estate broker. The marketing

plan took advantage of the flexibility provided by the property's division into two lots. The 54 foot buildable lake frontage lot was offered as an incentive to a buyer interested in the larger parcel. Becker offered to sell the whole property for \$725,000, or the larger lot for \$579,000 and the smaller lot for \$225,000.

9. On August 30, 2004, 82 Lakeside Avenue was sold for \$660,000. The buyer opted to purchase the whole property and the owner ultimately recombined the lots. Becker received a \$9,000 commission on the sale.

Beach Street Property

10. At all relevant times, Becker was listing agent for property located at Beach Street/Lakeside Avenue/Mohawk Avenue ("Beach Street"). The property consisted of a 1.25 acre lot and a 5,000 square foot lot.

11. On September 19, 2002, Becker participated as a Planning Board member in endorsing an ANR plan to divide the property into five lots.

12. The ANR plan was submitted by a developer who had entered into a purchase and sales agreement on the property. The property's purchase and sales agreement made it a condition of sale that the property be divided and that the developer successfully obtain building permits for the lots.

13. Prior to endorsing the ANR, the Planning Board ensured the ANR plan contained minimum frontage and square footage requirements. The property contained the required minimums. The Planning Board, with Becker participating, voted to endorse the ANR.

14. On October 29, 2002, the property sold. Becker received a \$4890 commission on the sale.

15. Becker cooperated with the Commission in its investigation and, subsequent to the beginning of the investigation, attended a Conflict of Interest Training Seminar.

Conclusions of Law

16. Section 19 of G.L. c. 268A prohibits a municipal employee from participating^{1/} as such an employee in a particular matter^{2/} in which, to his knowledge, he has a financial interest.^{3/}

82 Lakeside Avenue Property

17. The decision to endorse the ANR for 82 Lakeside Avenue was a particular matter.

18. Becker participated personally and substantially in that matter by reviewing the ANR plan,

ensuring it contained minimum requirements, and voting to endorse the ANR.^{4/}

19. At the time he voted to endorse the ANR for 82 Lakeside Avenue, Becker had a financial interest in the Planning Board's decision to endorse the ANR plan. Becker had a financial interest in the decision because the ANR endorsement would likely impact when and how much he would receive in a commission as the listing agent. He could sell the lots together or separately, and use the smaller, lakeside lot as an incentive to a buyer interested in purchasing the larger parcel. This flexibility made the property's sale more likely and would reasonably and foreseeably permit Becker to obtain a commission sooner than he otherwise would have if the property had not been divided by the ANR plan.

20. Therefore, Becker violated § 19 by participating in endorsing the ANR on 82 Lakeside Avenue.

Beach Street Property

21. The decision to endorse the ANR for the property located at Beach Street was a particular matter.

22. Becker participated personally and substantially in that matter by reviewing the ANR plan, ensuring it contained minimum requirements, and voting to endorse the ANR.

23. At the time he voted to endorse the ANR for the property located at Beach Street, Becker had a financial interest in the ANR endorsement decision because, as listing agent, he would receive a commission from the property's sale and the pending sale of the property was contingent on the property being successfully divided. This division was accomplished by the ANR plan.

24. The property sold just over a month after Becker participated in endorsing the ANR. He received a \$4980 commission.

25. Therefore, Becker violated § 19 by participating in endorsing the ANR on property located at Beach Street.

Resolution

In view of the foregoing violation of G.L. c. 268A by Becker, 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 Becker:

- (1) that Becker pay to the Commission the sum of \$2,000.00 as a civil penalty for violating G.L. c. 268A, §19 as to property located at 82 Lakeside

Avenue;

- (2) that Becker pay to the Commission the sum of \$2,000.00 as a civil penalty for violating G.L. c. 268A, §19 as to property located at Beach Street;
- (3) that Becker 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 14, 2006

^{1/} “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).

^{2/} “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).

^{3/} “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*.

^{4/} Becker claims to have orally disclosed to the Planning Board that he was the listing agent on both this property and the Beach Street property prior to endorsing the ANR plans on both properties. Meeting minutes do not reflect such disclosures, nor does an oral disclosure cure a §19 violation. Section 19 requires public employees to abstain from participating in a matter in which they have a financial interest. Under §19(b)(1), an appointed public employee may participate in such a matter only after he discloses in writing the nature and circumstances of the particular matter and makes full disclosure of his financial interest and then receives a written determination from his appointing authority that his financial interest is not so substantial as to affect the integrity of his services to the municipality.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 06-0024**

**IN THE MATTER
OF
EDWARD HIGGINS, JR.**

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Edward Higgins, Jr., 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 April 13, 2006, 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 Higgins. The Commission concluded its inquiry and, on October 11, 2006, found reasonable cause to believe that Higgins violated G.L. c. 268A, §§19 and 23(b)(3).

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

Findings of Fact

1. In 2003, Higgins was appointed acting chief and then permanent chief of the Lynn Fire Department (“LFD”). As such, Higgins was, at all relevant times, a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. Prior to Higgins’s appointment to chief in 2003, he began living with his girlfriend, Deborah Darsney. He continued living with her after his appointment to chief.

3. Darsney began working for the LFD in 1993 as principal bookkeeper. In 1994, she was promoted to system accountant, the position she held when Higgins was appointed acting chief in 2003. As system accountant, her duties included payroll and some budgetary responsibilities, as well as some Information Technology (“IT”) duties.

4. Shortly after being appointed chief in 2003, and in response to the demand to dramatically decrease his department’s budget, Higgins laid off 36 firefighters, all of the 911 call takers and a clerk who worked for the EMT’s office. Higgins also reorganized the department’s administrative office staff. As part of that reorganization, Higgins assigned Darsney additional duties involving payroll, budgetary issues, accounts payable, and additional

(“IT”) responsibilities. Another member of the administrative staff assumed duties in the Fire Prevention Division.

5. In June 2005, after meetings with the Personnel Director, Higgins promoted Darsney to Network Systems Assistant Coordinator, raising her salary from \$677 per week to \$832 per week.

Darsney’s job duties remained the same as those she had held since the 2003 office reorganization. The other staff member with Fire Prevention was also formally promoted and received a salary increase.

6. Subsequent to the 2003 office reorganization, Darsney reported to Higgins as her direct supervisor on items involving disputes with the union and contract negotiations. She was directly supervised by the office administrative assistant for other duties, although Higgins did at times participate in her assigning and approving Darsney’s overtime. There is no evidence that Darsney received undue favoritism in the assignment or approval of overtime.

7. At the time she was promoted in 2005, Darsney held a Bachelor’s Degree, was a Certified Microsoft Systems Engineer, had training and certifications in database programming using Microsoft Access and Microsoft Excel, and had accounting experience. She was the only administrative staff member to hold all of these qualifications.

8. In November 2005, Higgins and Darsney married.

9. Shortly thereafter, upon learning about potential conflict issues that arise from supervising an immediate family member, Higgins disclosed in writing to the personnel director that he had married Darsney. He also informed the director that he assigned all personnel matters and supervision of Darsney to the deputy chief.

10. That day, Higgins delegated supervision of Darsney to the LFD deputy chief.

11. Thereafter, the LFD deputy chief approved Darsney’s requests for time off; however, Higgins continued to daily supervise Darsney as well as approve her overtime requests. Between December 2005 and on or about March 6, 2006, Higgins approved five overtime vouchers for Darsney, totaling \$2600. There is no evidence that Higgins provided Darsney with undue preference in assigning or approving overtime.

12. When advised that his letter to the personnel director did not satisfy the conflict statute, Higgins sought approval from the mayor to participate in matters affecting his wife’s financial interest in two separate letters to the mayor. On March 9, 2006, after receiving assistance from

the city solicitor, Higgins sent a letter to the Mayor. On March 20, 2006, Lynn Mayor Edward Clancy, Jr. approved a §19(b)(1) exemption^{1/} for Higgins to participate in matters affecting Darsney’s financial interest.

13. Mayor Clancy was aware that Higgins had a personal relationship with Darsney at the time he appointed Higgins to be chief in 2003. He was also aware that Higgins and Darsney worked closely on budgetary matters both before and after their marriage.

Conclusions of Law

Section 23(b)(3)

14. Section 23(b)(3) of G.L. c. 268A in relevant part prohibits a municipal official from, knowingly or with reason to know, acting in a manner which would cause a reasonable person, knowing all of the relevant facts, to conclude that anyone can improperly influence or unduly enjoy that person’s favor in the performance of his official duties. This section further provides that it shall be unreasonable to so conclude if the municipal official has disclosed in writing to his appointing authority the facts which would otherwise lead to such a conclusion.

15. By promoting, supervising, and approving overtime for Darsney, a person with whom he was living, Higgins knowingly or with reason to know acted in a manner which would cause a reasonable person with knowledge of the relevant facts to conclude that Darsney could unduly enjoy Higgins’s favor in the performance of his official duties.

16. Accordingly, Higgins violated §23(b)(3) of the conflict of interest law by promoting, supervising, and approving overtime for a person with whom he was living.

Section 19

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

18. Approving an employee’s overtime is a particular matter.

19. Between December 2005 and on or about March 6, 2006, Higgins approved five requests for overtime for his wife. He therefore participated in each of these particular matters.

20. As his wife, Deborah was an immediate family member as that term is defined by the conflict law.

21. These overtime requests totaled \$2600. Thus, Deborah had a financial interest in the overtime approvals.

22. Therefore, between December 2005 and on or about March 6, 2006, Higgins violated §19 on each of these five occasions where he approved Deborah's overtime, particular matters in which he knew she had a financial interest.

23. Additionally, although he appears to have been trying to comply with the conflict law, by delegating Deborah's supervision to the deputy chief, Higgins violated §19. Day-to-day supervision involves an on-going determination as to the acceptability of an employee's performance. This determination is a particular matter. By delegating this supervision, Higgins participated in the particular matter. A public official is prohibited not only from himself deciding personnel matters affecting his family members, but also from delegating that authority to a subordinate.^{5/}

24. Further, although he delegated supervision to the deputy chief, Higgins remained Deborah's day-to-day supervisor after they married. Active, day-to-day supervision constitutes personal and substantial participation.

25. By supervising his wife on a daily basis, Higgins participated in matters germane to her continued employment and/or personnel performance review. As such, he participated in particular matters in which he knew she had a financial interest.

26. Therefore, between December 2005 and March 20, 2006, Higgins violated §19 by supervising his wife on a daily basis.

27. Although Higgins made a written disclosure to the personnel office that he married Darsney, the conflict of interest law required that this disclosure be made to his appointing authority, Lynn Mayor Edward Clancy, Jr. Additionally, consistent with the requirements of §19(b)(1), Higgins was prohibited from participating in any supervisory action, including delegating such supervision, until such time as his appointing authority provided him a written determination that he could do so.

28. Higgins cooperated with the Commission in its investigation.

Resolution

In view of the foregoing violation of G.L. c. 268A by Higgins, 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 Higgins:

- (1) that Higgins pay to the Commission the sum of \$3,000.00 as a civil penalty for violating G.L. c. 268A, §§23(b)(3) and 19;

- (2) that Higgins 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 18, 2006

^{1/} Section 19(b)(1) provides, in relevant part, that it shall not be a violation of §19 if a municipal employee first advises his appointing authority of the nature and circumstances of the particular matter in which an immediate family member has a financial interest, and receives in advance a written determination 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.

^{2/} "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).

^{3/} "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).

^{4/} "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*.

^{5/} Higgins's appointing authority could have so delegated Deborah's supervision.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 06-0017**

**IN THE MATTER
OF
SCOTT TRANT**

DISPOSITION AGREEMENT

The State Ethics Commission and Scott Trant 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 June 8, 2006, 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 Trant. The Commission concluded its inquiry and, on July 25, 2006, found reasonable cause to believe that Trant violated G.L. c. 268A.

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

Findings of Fact

1. At all times relevant, Trant was a Somerville Police Department (SPD) officer.

2. On February 9, 2005, Trant was in uniform and assigned to the SPD station-desk post. An Everett resident ("Resident") came into the station seeking assistance regarding her Ex-husband ("Ex-husband"). Trant as the police officer on duty received and evaluated the information provided by the Resident.

3. The Resident told Trant that her Ex-husband was living in an illegal apartment in the basement of a three-story, two-family house at 21 Vernon Street in Somerville. The Resident also informed Trant that there were lawful tenants on the first floor of the property. The house was in dilapidated condition and had been cited for code violations. Essentially a squatter on the property, the Ex-husband had deeded the house, as part of a divorce settlement, to a trust. The beneficiaries of the trust were the Resident and her daughter and son.

4. As part of a January 2004 agreement with the Somerville Inspectional Services Division (ISD), the Resident agreed to have the Ex-husband removed from the property and to correct any code violations. (The Resident had previously obtained a restraining order against the Ex-husband.)

5. While at the station, the Resident told Trant of her Ex-husband's apparent refusal to leave 21 Vernon Street. The Resident told Trant about her Ex-husband's behavior and questionable mental state, his medications, some of his treatment history and numerous other details relative to the home and her Ex-husband's mental capacity. The Resident explained that her Ex-husband was not capable of living on his own and that he needed medical treatment. The Resident also told Trant that she had considered selling the 21 Vernon Street property, was represented by counsel for the sale of this property and had already rejected an offer of \$100,000. Trant in response told the Resident that he wanted to purchase the property. According to the Resident, Trant offered approximately \$200,000 to purchase 21 Vernon Street, a price significantly less than the assessed value. According to Trant, he did not make an offer of a specific amount at that time. According to Trant, he was unaware of the assessed value of the property at the time of the intake.

6. Somerville assessment records show that 21 Vernon Street had an assessed value of \$438,700 at the time.

7. Upon concluding his conversation with the Resident, Trant attempted to phone the ISD from the police station to gain more information about the City's action against the Resident. Then, at around 1:30 p.m. on that same day, February 9, 2005, Trant placed a call from the police station to the psychiatric unit of Cambridge Hospital and told the hospital operator that he was "calling for information about getting somebody committed." Trant ended up speaking for over twenty minutes with a staff psychologist and informed her of the Resident's concerns about her Ex-husband. The staff psychologist requested that Trant do a welfare check on the Ex-husband. Later that day, Trant, while on duty and in uniform, went to 21 Vernon Street in a police vehicle and checked on the well-being of the Ex-husband. Police refer to these visits as "welfare checks."

8. On February 10, 2005, Trant while on duty reported to Cambridge Hospital personnel about the welfare check. The staff psychologist was unavailable; therefore, Trant spoke to her associate. Trant relayed his assessment of the Ex-husband's condition. Trant was informed by Cambridge Hospital that based on these observations no action would be taken at this time regarding the Ex-husband.

9. On February 11, 2005, Cambridge Hospital sent an outreach team, which included a physician, to observe the Ex-husband. The Ex-husband was involuntarily committed to a psychiatric facility pursuant to G.L. c. 123, § 12.

10. The following Monday, February 14, 2005, Trant as a police officer received a phone call from a

case worker at Cambridge Hospital. She told him that the Ex-husband had been picked up over the weekend, and she wanted to know Trant's observations during the welfare check. Trant provided information to the Cambridge Hospital case worker. Trant also spoke with the Ex-husband's case worker at the department of mental health about a possible placement in supervised housing for the Ex-husband. The Ex-husband was released that Monday from Cambridge Hospital.

11. On February 23, 2005, Trant phoned the Resident at home and again offered \$200,000 for the house at 21 Vernon Street. At this time tenants were still residing in the first floor apartment and the Ex-husband was still residing in the illegal basement apartment of the property.

12. Trant had his attorney draw up a standard purchase-and-sale agreement for the purchase of 21 Vernon Street. Trant gave the purchase-and-sale agreement to the Resident at her home and the Resident signed it. The Resident was represented by counsel for the proposed purchase of the property but counsel was not present when the Resident signed the purchase-and-sale agreement.

13. At or about this time, the SPD opened a formal investigation into Trant's conduct regarding this matter.

14. Shortly thereafter, the Resident's attorney contacted Trant's attorney stating that the Resident now believed that she could get \$400,000 for the property. In response to the Resident's new counter-offer Trant increased his offer to purchase the property to \$300,000.

15. Ultimately, the property transaction did not occur. Trant requested the Resident pay \$600 for his (Trant's) legal fees. The Resident gave Trant the money.

Law

16. As a Somerville police officer, Trant was a municipal employee as defined by G.L. c. 268A, § 1(g).

17. Section 23(b)(2) of G.L. c. 268A prohibits a municipal employee from, knowingly or with reason to know, using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions of substantial value not properly available to similarly situated individuals.

18. The ability to purchase property faster and/or at a reduced price is a privilege.

19. The privilege was unwarranted as Trant attempted to facilitate his private purchase of 21 Vernon Street in a quicker time frame and/or at a reduced price by using or attempting to use his police powers and/or position as a police officer.

20. Trant used or attempted to use his police officer position to secure this privilege by taking the following actions as a police officer:

- (a) on February, 9, 2005, while on duty and in uniform discussing and making an offer to purchase 21 Vernon Street from the Resident that had come to the police department seeking police assistance;
- (b) by subsequently making additional attempts/offers to purchase the property from the Resident;
- (c) on February, 9, 2005, contacting the Cambridge Hospital regarding the possibility of having the Ex-husband who was living at 21 Vernon Street committed;
- (d) on February 9, 2005, conducting a welfare check at 21 Vernon Street concerning the Ex-husband;
- (e) on February 10, 2005, reporting to Cambridge Hospital personnel about the welfare check and providing his assessment of the Ex-husband's condition;
- (f) on February 14, 2005, reporting to Cambridge Hospital personnel observations of the Ex-husband he made during the welfare check; and
- (g) speaking with the Ex-husband's case worker at the department of mental health about possible placement in supervised housing for the Ex-husband.

21. The attempted purchase was of substantial value as Trant attempted to have it done in a shorter time period and/or at a price significantly below the fair market value.

22. This unwarranted privilege was not otherwise properly available to similarly situated people attempting to purchase property.

23. Therefore, Trant repeatedly violated § 23(b)(2), by as described above, knowingly or with reason to know, using or attempting to use his official police officer position to secure for himself unwarranted privileges of substantial value not properly available to similarly situated individuals.

Resolution

In view of the foregoing violations of G.L. c. 268A by Trant, 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 Trant:

- (1) that Trant pay to the Commission the sum of \$10,000 as a civil penalty for repeatedly violating G.L. c. 268A as noted above;
- (2) Trant 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;
- (3) Trant has volunteered to attend a State Ethics Commission seminar concerning G.L. c. 268A in order to better understand his duties and responsibilities under the statute as a police officer; and
- (4) Trant has volunteered to reimburse the Resident \$600 that she paid for his legal fees relevant to the above.

DATE: December 19, 2006

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 06-0025**

**IN THE MATTER
OF
BRIAN MOORE**

DISPOSITION AGREEMENT

The State Ethics Commission and Brian Moore 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 July 26, 2005, the Commission initiated a preliminary inquiry, pursuant to G.L. c. 268B, § 4(a), into possible violations of the conflict-of-interest law, G.L. c. 268A, by Moore. The Commission has concluded its inquiry and, on July 25, 2006, found reasonable cause to believe that Moore violated G.L. c. 268A.

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

Findings of Fact

1. The Springfield Liquor License Commission has the authority to issue liquor licenses, renew liquor licenses each year, and investigate any license holder for any alleged noncompliance with the liquor laws. If violations are found, the commission may impose sanctions including loss of license.

2. Among the liquor stores under the Liquor License Commission's jurisdiction is Kappy's Liquors in Springfield.

3. During the time relevant, Moore owned and managed Kappy's.

4. In December of each year from 1999 through 2003, Moore gave to each Springfield License Commissioner two gift certificates whose total value each year was about \$200.

5. Moore gave the gift certificates to the License Commissioners with the intention that the commissioners would come into his store and see that he ran a clean operation.

6. On at least one occasion prior to 2000, a License Commissioner returned the gift certificates unused to Kappy's with a letter declining the offer, noting that there might be an appearance problem, and asking that gift certificates not be sent to License Commissioners again. Despite this, Moore continued to send the gift certificates to the commissioners each year thereafter.

7. In or about late November or early December of each year, the License Commissioners reviewed and voted to approve Kappy's liquor license renewal. As part of this renewal process, the License Commissioners had a practice of distributing all the renewal applications among themselves such that each applicant's premises would be visited by one commissioner.

Conclusions of Law

8. Section 3(a) prohibits anyone, otherwise than as provided by law for the proper discharge of official duty, from directly or indirectly giving, offering or promising anything of substantial value to any municipal employee for or because of any official act performed or to be performed by such an employee.

9. The Springfield Liquor License Commissioners were municipal employees as that term is defined in G.L. c. 268A, § 1(g).

10. The gift certificates that Moore gave to each Liquor License Commissioner were worth over \$50 each year and were therefore items of substantial value.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 06-0026

IN THE MATTER
OF
PETER MURPHY

DISPOSITION AGREEMENT

11. In determining whether items of substantial value have been given or received in violation of § 3, “there must be proof of linkage to a particular official act, not merely the fact that the official was in a position to take some undefined or generalized action.” *Scaccia v. State Ethics Commission*, 431 Mass. 351, 356 (2000). The gratuity may be given as a reward for past action, to influence present action, or to induce future action. *Id.* If gratuities are given under such circumstances, then the Commission will conclude that gifts from a regulatee to a regulator are prohibited gratuities.

12. Moore stated that he gave the certificates because he wanted the commissioners to come into his store and see how he ran his business. As noted above, one commissioner would do this each year in connection with the renewal application. Such visits would be official acts by the commissioners. Therefore, Moore gave the gift certificates to the commissioners for or because of their official acts to be performed.

13. There was no legal authorization for Moore to give the gift certificates to the Liquor License Commissioners under these circumstances.

14. Accordingly, the gifts from Moore to the License Commissioners were prohibited gratuities.

15. Accordingly, Moore violated § 3(a).^{1/}

Resolution

In view of the foregoing violations of G.L. c. 268A by Moore, 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 Moore:

- (1) that Moore pay to the Commission the sum of \$10,000 as a civil penalty for violating G.L. c. 268A; and
- (2) that Moore 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 21, 2006

^{1/}The fact that Moore gave these certificates each year at about the time Kappy’s license was up for renewal is troublesome, even though the license renewal is automatic under G.L.c. 138, § 16(a) provided that the license is of the same type as the expiring license and covers the same licensed premises.

The State Ethics Commission and Peter 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 July 26, 2005, the Commission initiated a preliminary inquiry, pursuant to G.L. c. 268B, § 4(a), into possible violations of the conflict-of-interest law, G.L. c. 268A, by Murphy. The Commission has concluded its inquiry and, on July 25, 2006, found reasonable cause to believe that Murphy violated G.L. c. 268A.

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

Findings of Fact

1. Murphy served as a Springfield Liquor License Commissioner from early 2002 until December 2003.

2. The Liquor License Commission had the authority to issue liquor licenses, renew liquor licenses each year, and investigate any license holder for any alleged noncompliance with the liquor laws. If violations were found, the commission could impose sanctions including loss of license. Such matters were within the scope of Murphy’s official duties.

3. Among the liquor stores under the jurisdiction of the Liquor License Commission was Kappy’s Liquors.

4. In December 2002 and December 2003, Murphy received from Kappy’s gift certificates whose total value each year was about \$200.

5. Murphy did not directly benefit from the certificates. He never used them himself, nor did he return them unused to Kappy’s. Instead, according to Murphy, he gave them to third parties. More specifically:

- a. Murphy gave the December 2002 certificates to a charity.
- b. Murphy gave the December 2003 certificates to

a family member who gave them to a friend and the Murphy's babysitter.

6. Murphy never disclosed in writing to anyone that he had received gift certificates from Kappy's.

7. In or about late November or early December 2002 and 2003, the Liquor License Commission, with Murphy participating, reviewed and voted to approve Kappy's liquor license renewal.

8. In addition to renewing Kappy's license, the Liquor License Commission had the authority to investigate Kappy's for any alleged noncompliance with the liquor laws and, if violations were found, to impose sanctions including loss of license.

9. During Murphy's tenure on the Commission, Kappy's was never alleged to have engaged in any potential license violations.

Conclusions of Law

10. As a Springfield Liquor License Commissioner, Murphy was a municipal employee as that term is defined in G.L. c. 268A, § 1(g), and therefore subject to the conflict-of-interest law.

11. 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, 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. It shall be unreasonable to so conclude if such officer or 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.

12. In applying § 23(b)(3), the Ethics Commission will evaluate 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. *In re Flanagan*, 1996 SEC 757 (January 17, 1996 decision and order).

13. Murphy's receipt of the gift certificates from Kappy's at or around the time that a vote on Kappy's annual license renewal would normally occur created an appearance that the integrity of his official actions might be undermined. Thus, Murphy knowingly or with reason to know acted in a manner that would cause a reasonable person having knowledge of the relevant circumstances to conclude that Kappy's Liquors can improperly

influence or unduly enjoy Murphy's favor in the performance of his official duties, or that Murphy is likely to act or fail to act as a result of the undue influence of Kappy's.

14. Murphy never filed a disclosure to dispel this appearance problem.

15. Accordingly, Murphy violated § 23(b)(3).

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 \$1,000 as a civil penalty for violating 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: December 21, 2006

COMMONWEALTH OF MASSACHUSETTS STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 06-0027

IN THE MATTER
OF
GARY VAN TASSEL

DISPOSITION AGREEMENT

The State Ethics Commission and Gary Van Tassel 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 July 26, 2005, the Commission initiated a preliminary inquiry, pursuant to G.L. c. 268B, § 4(a), into

possible violations of the conflict-of-interest law, G.L. c. 268A, by Van Tassel. The Commission has concluded its inquiry and, on July 25, 2006, found reasonable cause to believe that Van Tassel violated G.L. c. 268A.

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

Findings of Fact

1. Van Tassel served as a Springfield Liquor License Commissioner from early 2003 until December 2003.

2. The Liquor License Commission had the authority to issue liquor licenses, renew liquor licenses each year, and investigate any license holder for any alleged noncompliance with the liquor laws. If violations were found, the commission could impose sanctions including loss of license. Such matters were within the scope of Van Tassel's official duties.

3. Among the liquor stores under the Liquor License Commission's jurisdiction was Kappy's Liquors.

4. In December 2003, Van Tassel received from Kappy's two gift certificates whose total value was about \$200.

5. Van Tassel did not directly benefit from the certificates. He never used them himself, nor did he return them unused to Kappy's. Instead, according to Van Tassel, believing the mailing received from Kappy's was direct mail, he gave the certificates to his wife who gave them to a colleague.

6. Van Tassel never disclosed in writing to anyone that he had received gift certificates from Kappy's.

7. In or about late November or early December 2003, the Liquor License Commission, with Van Tassel participating, reviewed and voted to approve Kappy's liquor license renewal.

8. In addition to renewing Kappy's license, the Liquor Commission had the authority to investigate Kappy's for any alleged noncompliance with the liquor laws and, if violations were found, to impose sanctions including loss of license. Van Tassel had official duties with respect to any such actions.

9. During Van Tassel's tenure on the Liquor Commission, Kappy's was never alleged to be in non-compliance with the liquor laws.

Conclusions of Law

10. As a Springfield Liquor License

Commissioner, Van Tassel was a municipal employee as that term is defined in G.L. c. 268A, § 1(g), and therefore subject to the conflict-of-interest law.

11. 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, 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. It shall be unreasonable to so conclude if such officer or 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.

12. In applying § 23(b)(3), the Ethics Commission will evaluate 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. *In re Flanagan*, 1996 SEC 757 (January 17, 1996 decision and order).

13. Van Tassel's receipt of the gift certificates from Kappy's at or around the time that a vote on Kappy's annual license renewal would normally occur, created an appearance that the integrity of his official actions might be undermined. Thus, Van Tassel knowingly or with reason to know acted in a manner that would cause a reasonable person having knowledge of the relevant circumstances to conclude that Kappy's Liquors can improperly influence or unduly enjoy Van Tassel's favor in the performance of his official duties, or that Van Tassel is likely to act or fail to act as a result of the undue influence of Kappy's.

14. Van Tassel never filed a disclosure to dispel this appearance problem.

15. Accordingly, Van Tassel violated § 23(b)(3).

Resolution

In view of the foregoing violations of G.L. c. 268A by Van Tassel, 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 Van Tassel:

(1) that Van Tassel pay to the Commission the sum of \$500 as a civil penalty for violating G.L. c. 268A; and

(2) that Van Tassel 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 21, 2006

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 06-0028**

**IN THE MATTER
OF
CHERYL STANLEY**

DISPOSITION AGREEMENT

The State Ethics Commission and Cheryl Stanley 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 July 26, 2005, the Commission initiated a preliminary inquiry, pursuant to G.L. c. 268B, § 4(a), into possible violations of the conflict-of-interest law, G.L. c. 268A, by Stanley. The Commission has concluded its inquiry and, on July 25, 2006, found reasonable cause to believe that Stanley violated G.L. c. 268A.

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

Findings of Fact

1. Stanley served as a Springfield Liquor License Commissioner from 1996 until May 2004.
2. The Liquor License Commission had the authority to issue liquor licenses, renew liquor licenses each year, and investigate any license holder for any alleged noncompliance with the liquor laws. If violations were found, the commission could impose sanctions including loss of license. Such matters were within the scope of Stanley's official duties.
3. Among the liquor stores under the Liquor License Commission's jurisdiction was Kappy's Liquors.

4. Each December, beginning in 1999 and continuing each year thereafter until she left the commission, Stanley received from Kappy's a holiday card which included one or two gift certificates whose total value each year was about \$200.

5. Stanley gave the gift certificates away. She never used them herself, nor did she return them unused to Kappy's.

6. Stanley never disclosed in writing to anyone that she had received gift certificates from Kappy's.

7. In or about late November or early December of each year that she served on the Liquor License Commission, the Commission, with Stanley participating, reviewed and voted to approve Kappy's liquor license renewal.

8. In addition to renewing Kappy's license each year, the Liquor License Commission had the authority to investigate Kappy's for any alleged noncompliance with the liquor laws and, if violations were found, to impose sanctions including loss of license. Stanley had official duties with respect to such actions.

Conclusions of Law

9. As a Springfield Liquor License Commissioner, Stanley was a municipal employee as that term is defined in G.L. c. 268A, § 1(g), and therefore subject to the conflict-of-interest law.

10. 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, 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. It shall be unreasonable to so conclude if such officer or 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.

11. In applying § 23(b)(3), the Ethics Commission will evaluate 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. *In re Flanagan*, 1996 SEC 757 (January 17, 1996 decision and order).

12. Stanley's receipt of the gift certificates from Kappy's at or around the time that she was poised to vote on Kappy's annual license renewal created an appearance

that the integrity of her official actions might be undermined. Thus, Stanley knowingly or with reason to know acted in a manner that would cause a reasonable person having knowledge of the relevant circumstances to conclude that Kappy's Liquors can improperly influence or unduly enjoy Stanley's favor in the performance of her official duties, or that Stanley is likely to act or fail to act as a result of the undue influence of Kappy's.

13. Stanley never filed a disclosure to dispel this conflict of interest.

14. Accordingly, Stanley violated § 23(b)(3).

Resolution

In view of the foregoing violations of G.L. c. 268A by Stanley, 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 Stanley:

- (1) that Stanley pay to the Commission the sum of \$2,000 as a civil penalty for violating G.L. c. 268A; and
- (2) that Stanley 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 21, 2006



E. George Daher, Chairman
Tracey Maclin, Vice-Chairman
Matthew N. Kane
Jeanne M. Kempthorne
David L. Veator