STATE ETHICS COMMISSION
ENFORCEMENT ACTIONS
1979 - 1982

Massachusetts State Ethics Commission

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PUBLISHED BY
THE MASSACHUSETTS STATE ETHICS COMMISSION
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1. All Commission Decisions and Orders issued through December 31, 1982

2. Selected Disposition Agreements and Compliance Letters issued through December 31, 1982.

3. Summaries of all Disposition Agreements issued through December 31, 1982.

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COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

Commission Adjudicatory
Docket No. 119

IN THE MATTER
OF
FREDERICK HANNA

DISPOSITION AGREEMENT

This Agreement is entered into between the State Ethics Commission ("Commission") and Frederick Hanna ("Mr. Hanna"), pursuant to Section 11 of the Commission's **Procedures Covering the Initiation and Conduct of Preliminary Inquiries and Investigations.**

On September 7, 1979, the Commission, pursuant to Section 4(a) of General Laws, Chapter 268B, initiated a Preliminary Inquiry into possible violations of the Conflict of Interest Law, General Laws Chapter 268A, involving Mr. Hanna, a State Inspector for the Massachusetts Department of Public Health, Division of Food and Drug. In particular, the Inquiry focused on Mr. Hanna's ownership of two private enterprises which did business with businesses regulated by the Division of Food and Drug.

The Commission has concluded its investigation into Mr. Hanna's involvement in the matters set forth herein and has made the following findings to which the parties hereto agree:

1. Frederick Hanna has been an employee of the Department of Public Health, Division of Food and Drug since 1964, and currently holds the position of Senior Food and Drug Inspector, assigned to the Seafood Inspection Section. Mr. Hanna has held this position since 1975, and is responsible for conducting and/or supervising all inspections of seafood, and wholesale and retail businesses dealing in seafood products, in the Greater Boston area.

2. Frederick Hanna and his spouse are the principal owners of General Foods and Baking Company, which was located in Quincy, Mass. from September 1976 through August 1978. During this period, the General Foods and Baking Company produced and marketed baked stuffed clams as its primary product. During this period, General Foods and Baking Company purchased raw seafood products from 4 seafood wholesalers in the Greater Boston area and after processing, sold its baked stuffed clam product to 8 seafood wholesalers and retailers in the Greater Boston area.

3. Between September 1976 and August 1978, Frederick Hanna, in his official capacity as a Senior Seafood Inspector for the Division of Food and Drug, personally conducted and/or supervised over 60 separate inspections of the 12 seafood wholesalers and retailers in the Greater Boston area, with which his company did business.

4. Mr. Hanna's participation as a state employee in the inspection of businesses from which General Foods and Baking Company purchased or to which it sold seafood products constituted civil violations of Section 6 of General Laws, Chapter 268A.

5. Mr. Hanna's conduct, in engaging in a private enterprise which produced and marketed products which he was responsible for inspecting, and which sold those products to businesses which he was responsible for inspecting and regulating, constituted a civil violation of Section 23(e) of General Laws Chapter 268A, in that it created a reasonable basis for the impression that businesses with which he did business in his private capacity could unduly enjoy his favor in the performance of his official duties.

6. In addition to their financial interest in General Foods and Baking, Frederick Hanna and his spouse are principal owners and operators of Hanna Construction Company of Dedham, MA. Since 1958, the Hanna Construction Company has been primarily engaged in the business of snow removal.

7. During the period from December 1974, through March 1979, the Hanna Construction Company contracted to plow parking lots of 4 large retail supermarket chain stores in the Greater Boston area. During the same period in which Mr. Hanna's construction company was providing snow removal services for these supermarkets, Mr. Hanna in his capacity as a Senior Seafood Inspector for the Division of Food and Drug, personally conducted and/or supervised over 20 separate inspections of the businesses with which his company did business.

8. Mr. Hanna's participation as a state employee in the inspections of businesses with which Hanna Construction Company had snow removal contracts constituted civil violations of Section 6 of General Laws Chapter 268A.

9. Mr. Hanna's conduct, in engaging in a private enterprise which contracted to provide

snow removal services for those businesses he is responsible for inspecting and regulating, constituted a civil violation of Section 23(e) of General Laws, Chapter 268A, in that it created a reasonable basis for the impression that businesses with which he did business in his private capacity could unduly enjoy his favor in the performance of his official duties.

10. During March of 1975, a Health Inspector for the City of Boston conducted a sanitary inspection of the Near East Baking Company of West Roxbury. The City Inspector reported that the bakery was in poor sanitary condition and recommended that the bakery be closed until all identified code violations were corrected.

11. On March 27, 1975, Mr. Hanna contacted the above mentioned Boston Health Inspector, advised him that he was a State Food and Drug Inspector, and further advised him that he had a financial interest in Near East Baking Company and demanded that the City Inspector change his inspection report to reflect more favorably the sanitary condition of the bakery. The City Inspector refused Mr. Hanna's request and no changes were made in the inspection report.

12. Mr. Hanna's conduct as set forth in paragraph 11 above, constituted a civil violation of Section 23(d) of General Laws, Chapter 268A, in that he attempted to use his official position as a State Food and Drug Inspector to secure an unwarranted privilege for himself and the Near East Baking Company.

The State Ethics 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 conditions hereby agreed to by Frederick Hanna:

1. That he voluntarily terminate his employment with the Department of Public Health, Division of Food and Drug within 90 days of the execution of this Agreement;

2. That he pay to the State Ethics Commission the amount of $6,500 as civil penalty for his conduct as outlined above pursuant to the terms and conditions agreed by the parties; and

3. That he waive all rights to contest the findings of fact, conclusions of law and terms and conditions imposed under this Agreement, in this or any related civil proceeding in which the State Ethics Commission is a party.

DATE: February 13, 1980

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss Commission Adjudicatory
Docket No. 108

IN THE MATTER
OF
JOHN R. BUCKLEY

Appearances:

Robert J. Cordy, Esq: Associate General Counsel, State Ethics Commission
Frank L. Bridges, Esq.: Counsel to the Respondent

Commissioners:

Vorenberg, Ch., Kistler, Brickman, Bernstein, McLaughlin

DECISION AND ORDER

I. Procedural History

On August 13, 1979, the Petitioner, the State Ethics Commission by its Associate General Counsel, filed an Order to Show Cause alleging that the Respondent, John R. Buckley, had violated section 5(g) of the Financial Disclosure Law, General Laws Chapter 268B, by intentionally omitting certain information from his Statement of Financial Interests (SFI) and failing to correct the deficiencies or file a complete SFI within 10 days of having received notice to do so from the Commission.[1]/ Mr. Buckley admits the allegations but denies that he violated the law. He contends, inter alia, that the Financial Disclosure Law, General Laws Chapter 268B, and the SFI's issued thereunder violate the right of privacy of the members of his immediate family in contravention of the state and federal constitutions and that the Commission has exceeded its authority by requiring disclosure on information not required by law to be revealed. He also contends that the Commission failed to conduct appropriate proceedings as required by section 4 of Chapter 268B prior to initiating

[1]/M.G.C. c. 268B, §5(g) provides, in pertinent part "Failure of a reporting person to file a Statement of Financial Interest within ten days after receiving notice to do so as provided in clause (f) of section 3 of this chapter, or the filing of an incomplete Statement of Financial Interests after receipt of such a notice, is a violation of this chapter and the Commission may initiate appropriate proceedings pursuant to the provisions of section 4 of this chapter."

this proceeding and therefore is without jurisdiction to hear and decide this matter.

The hearing was held on January 25, 1980 before James Vorenberg, Chairman of the Commission. See G.L. c. 268B, §4(c).[2]/ Post-hearing briefs were filed by Counsel. Each Commissioner received a copy of the transcript of the proceeding and the exhibits, together with a copy of the briefs. Oral argument before four members of the Commission occurred on March 24, 1980. In rendering this decision and order, each of the participating Commissioners has heard and/or read the evidence and arguments presented by the parties.

II. Findings of Fact

1. On April 30, 1979, Mr. Buckley filed his Statement of Financial Interests (SFI) with the State Ethics Commission.[3]

2. Section C. 1 of the Statement of Financial Interests for calendar year 1978 (SFI) requires disclosure of the business associations of the filer and the members of his immediate family, including the name of the person having the association and the position held by that person. Section C. 1 of the statement filed by Mr. Buckley contained the following statement:

> Information omitted; privilege based on privacy under applicable State and Federal Laws.
>
> None as to filer.

3. Section J. 1 of the SFI requires disclosure of real property located in Massachusetts with an assessed valuation in excess of $1,000 in which the filer or a member of his immediate family held a direct or indirect financial interest, including the identity of the person holding the interest; section K. 1 requires disclosure of certain liabilities in excess of $1,000 owed by the filer or a family member, including the identity of the debtor. Sections J. 1 and K. 1. of the SFI filed by Mr. Buckley contained the statement:

> Information omitted; privilege based on privacy under applicable State and Federal Laws.

Mr. Buckley also stated that members of his family had declined to disclose to him information required in Section C.1, J.1 and K.1.

4. On June 27, 1979, the Executive Director of the Commission sent Mr. Buckley a Notice of Delinquency which advised him that his SFI was deficient because he had not fully answered questions C.1, J.1 and K.1. The notice further advised Mr. Buckley that unless he amended his Statement to conform to the requirements of the law within 10 days, he would be in violation of the law and subject to adjudicatory proceedings and penalties including a civil fine of up to $1,000.

5. Mr. Buckley did not amend his Statement or file a new Statement within 10 days. Rather, on July 10, 1979, he sent a letter to the Executive Director advising him that he had chosen not to amend his Statement. He also informed the Executive Director that he had retained an attorney to represent him and he requested a hearing "to respond to the Notice of Delinquency sent by the State Ethics Commission."

6. On August 7, 1979, these facts were presented to the Ethics Commission in Executive Session. On that date, the Commission voted to commence a preliminary inquiry. The Commission reviewed the staff's report and recommendation. Since the facts in the matter were not disputed and the only issues presented were ones of law, the Commission, on the same date, also found reasonable cause to believe that a violation of section 5(g) of Chapter 268B had occurred and authorized the General Counsel to initiate an adjudicatory proceeding against Mr. Buckley.

7. On August 13, 1979, the Commission filed the Order to Show Cause which charged Mr. Buckley with having violated section 5(g) of Chapter 268B by filing a deficient SFI and failing to correct his SFI within 10 days of having received notice to do so. On this same date, the Commission sent notice to Mr. Buckley of the Commission's action, and notified the Attorney General that it had initiated a preliminary inquiry in this matter.

8. Mr. Buckley is married and, during calendar year 1978, was the father of 4 dependent children. Mr. Buckley testified that during 1978 his sole employment was as Secretary of Administration and Finance for the Commonwealth; he

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[2]/G.L. c. 268B, §4(c) (¶3) provides: "Any member of the commission may administer oaths and any member of the commission may hear testimony or receive other evidence in any proceeding before the commission."

[3]/The State Ethics Commission, created in 1978, is authorized and required to implement and enforce the provisions of the Financial Disclosure Law, Chapter 268B of the General Laws of Massachusetts, which is applicable to certain state and county officials. In furtherance of this objective, the Commission is required to prepare and publish forms to be used by all persons required to file a Statement of Financial Interests.

did not own, by himself, any real property in Massachusetts with an assessed valuation in excess of $1,000 nor did he owe, by himself, any liabilities in excess of $1,000 required to be reported on the SFI.

9. At the time he prepared his SFI, Mr. Buckley was aware that some of his children had been employed during 1978 and, although he was aware of the names of some but not all of the businesses by which they had been employed, he intentionally omitted disclosing in section C.1 all information within his knowledge regarding their business associations.

10. At the time he prepared his statement, Mr. Buckley was aware that in 1978 he had a financial interest, jointly or otherwise, with a member of his immediate family in real property located in Massachusetts with an assessed value in excess of $1,000 and that he had a reportable liability in excess of $1,000 which he owed jointly with a member of his immediate family. Mr. Buckley intentionally omitted disclosing information in sections J.1 regarding the real property and section K.1 regarding this liability.

11. Mr. Buckley testified that at the time he prepared his statement he did not know whether his children owned any real property in this state with an assessed value in excess of $1,000, nor did he know of any reportable liability in excess of $1,000 owed by his wife or any of his children as of December 31, 1978.

12. Mr. Buckley and his family followed the legislative progress of the financial disclosure law. They had many discussions regarding protecting to the degree possible the privacy of the family members of public officials. His wife and children objected strenuously to any public disclosure of information regarding their activities since such disclosure, in their judgment, was not necessary to insure the integrity of his activities as a public employee. Mr. Buckley respected their wishes when preparing his Statement in order not to "exacerbate" the family situation.

III. Conclusions of Law

Three questions are raised in this case:

1) does the Commission have jurisdiction to hear and decide this matter; 2) does the financial disclosure law constitute an unconstitutional invasion into the privacy of the members of the immediate family of public officials, and 3) has the Commission exceeded the scope of its authority by requiring the disclosure of information not required by law to be revealed?

A. Jurisdiction

Mr. Buckley contends that the Commission lacks jurisdiction to conduct this proceeding because it failed to comply with the "jurisdictional prerequisites" mandated by section 4. Specifically, he seeks dismissal of the charges on the grounds that the Commission failed to conduct a sufficient preliminary inquiry and failed to send notice to the Attorney General of the initiation of the preliminary inquiry "at the beginning" thereof as is required by section 4(a). In essence, Mr. Buckley challenges the fact that the Commission authorized the preliminary inquiry and made the reasonable cause determination at the same time and on the same set of facts without affording him an opportunity for an "amicable resolution" of the dispute prior to entering into the public phase of the proceeding. He argues that the Commission should have coordinated its activities with the Attorney General. Furthermore, Mr. Buckley contends that the Commission did not have sufficient evidence to warrant the conclusion that there was "reasonable cause for belief" that a violation of the law had occurred.[4]

By enacting Chapter 210 of the Acts of 1978, the Legislature required certain public officials and employees to disclose publicly certain of their financial interests as a means of assuring the citizens of this Commonwealth of the "impartiality and honesty of public officials. . ." **Opinion of the Justices,** Mass. Adv. Sh. (1978) 1116, 1131, 376 N.E.2d 810, 819 (1978). Simultaneously, the Legislature created the State Ethics Commission, St. 1978, c. 210, §20(2). The Commission was and is authorized to implement, administer and enforce the financial disclosure law. St. 1978, c. 210, §20, §§2, 3, 4, 5. Authority to render advisory opinions interpreting the conflict of interest law, General Laws, Chapter 268A, was transferred from the Attorney General to the Commission, St. 1978, c. 210, §§10, 20(3)(g).

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[4]/Mr. Buckley concedes that the Commission has apparently unlimited power to commence a preliminary inquiry under section 4(a), Resp. Brief at 13. He contends, however, that while the contents of his SFI may have been sufficient to warrant the preliminary inquiry, they were not sufficient to warrant the reasonable cause determination. Furthermore, he suggests that there were no facts presented to the Commission to show that reportable information had actually been omitted from the SFI and, therefore, there was no reason to believe that the law had, in fact, been violated. Resp. Brief at 15.

In addition, the Commission was constituted as the primary civil enforcement agency for violations of the conflict of interest law, as well as the Financial Disclosure Law, St. 1978, c. 210, §§12, 18, 20, §§3(i), 4, 5. In this regard, the Commission is authorized to investigate allegations, initiate accusations, adjudicate violations and impose sanctions, St. 1978, c. 210, §20(4).

Pursuant to its enabling legislation, codified in General Laws Chapter 268B, the Commission is required to prescribe and publish rules and regulations to carry out the purposes of Chapter 268B, §3(a), and to prepare forms for Statements of Financial Interest for use by reporting persons, §3(b). Section 5(g) outlines the financial information which must be disclosed by a filer with respect to himself and his immediate family. A filer must disclose, among other things, information regarding business associations, §5(g)(1), property located in Massachusetts with an assessed value in excess of $1,000, §5(g)(6), and certain liabilities in excess of $1,000, §5(g)(3).[5] Upon receipt of a Statement of Financial Interest, the Commission must inspect the filing "in order to ascertain whether any reporting person has failed to file such a Statement or has filed a deficient Statement" and if it is ascertained that the SFI fails to conform with the requirements of the law, the Commission must send written notice to the delinquent filer detailing the alleged deficiency and the penalties for failure to file an SFI, §3(f). Section 5(g) provides that the failure of a reporting person to file an SFI within 10 days of having received notice to do so, or the filing of an incomplete statement after receipt of such notice, is a violation of the chapter for which the Commission may initiate appropriate proceedings pursuant to section 4 of the law.

Section 4 governs the investigations and "appropriate proceedings" conducted by the Commission and establishes the scope of the Commissions's remedial and punitive powers. Section 4(a) provides that upon receipt of a sworn complaint or evidence "deemed sufficient", the Commission shall initiate a confidential preliminary inquiry into any alleged violation of the law. That section further provides that the General Counsel shall notify the Attorney General "at the beginning" of any preliminary inquiry and shall, within 30 days, send notice of the preliminary inquiry and the general nature of the alleged inquiry to the subject thereof. If the preliminary inquiry indicates "reasonable cause for belief" that there has been a violation of the laws, the Commission may vote to initiate a full investigation and appropriate adjudicatory proceedings, §4(c).[6]/ If the Commission determines that a violation has occurred, it may order the violator to (1) cease and desist, (2) file any report, statement or other information required by Chapters 268A or 268B, and/or (3) pay a civil penalty of not more than $1,000 per violation, §4(d).

While it is open to a Respondent to show that the Commission failed to make the finding of reasonable cause required by the statute, the factual basis for making such a finding is not subject to challenge. **Standard Oil Co. of California v. F.T.C.,** 596 F.2d 1381 (9th Cir. 1979), cert. granted 40 U.S.L.W. 3554 (February 25, 1980); **Hills Bros. v. F.T.C.,** 9 F.2d 481 (9th Cir. 1926), cert. den. 270 U.S. 662 (1926). See also **Ewing v. Mytinger & Casselberry, Inc.** 339 U.S. 594, 70 S.Ct. 870 (1950). As stated in **Standard Oil Co. of California v. F.T.C., supra** at 1386,

> Because FTC complaints should not issue other than as prescribed in 14 USC §46(b), SOCAL's claims should be reviewed. However, we emphasize that review is limited. It cannot extend to an assessment by the District Court of what constitutes 'reason to believe' but simply whether the FTC disregarded the mandate and restrictions of 15 USC §45(b) by not even making the 'reason to believe' determination at all.
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> If the district court finds as a fact that the FTC made the 'reason to believe' determination albeit with outside pressures, then it can be concluded that the FTC has complied with 45 USC §45(b) and further review would be foreclosed. If on the other hand the district court finds that the complaint was issued soley because of outside pressure or with complete absence of a 'reason to believe' determination, that the FTC has not complied with the act.

The Commission has discretion to determine whether sufficient cause exists to warrant action

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[5]/See infra, page [9].

[6]/If, however, the preliminary inquiry fails to indicate "reasonable cause for belief" that a violation has occurred, the Commission must immediately terminate the inquiry and send notice thereof to the subject and the Complainant, §4(b).

under section 4, see **McKenney v. Commission on Judicial Conduct,** Mass. Adv. Sh. (1979) 1006, 388 N.E.2d 666, 672 (1979). The purpose of the preliminary investigation "is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, int he [agency's] judgment, the facts thus discovered should justify doing so." **Oklahoma Press Publishing Co. v. Walling,** 327 U.S. 186, 201, 66 S.Ct. 494, 501 (1946).[7]/ The nature and duration of the investigation must, of obvious necessity, depend on the circumstances of each case. See, generally, **McKenney v. Commission on Judicial Conduct,** Mass. Adv. Sh. (1980) 833. The law gives and agency "great discretion in deciding when to move from an investigative to adjudicative stage", **Standard Oil Co. v. F.T.C.,** 475 F. Supp. 1261, 1270 (N.D. Ind. 1979), or whether to make such a move at all. Compare **Binns v. Board of Bar Overseers,** 369 Mass. 851, 343 N.E.2d 868 (1976) (no appeal available from decision of the Board not to institute proceedings); **Vaca v. Sipes.** 368 U.S. 171, 87 S.Ct. 903 (1967) (discretion vested in General Counsel of the National Labor Relations Board to refuse to issue a complaint is unreviewable).

An administrative agency's investigations and probable cause determinations are analogous to grand jury proceedings, **United States v. Morton Salt Co.,** 338 U.S. 632, 642-3, 70 S.Ct. 357, 364 (1950); **Ewing v. Mytinger & Casselberry, Inc.,** 339 U.S. 594, 599, 70 S.Ct. 870, 873 (1950). Thus, just as it is clearly inappropriate to challenge an indictment which is valid on its face on the ground that the grand jury acted on the basis of inadequate or incompetent evidence since the adequacy of the evidence can be tested at trial, **United States v. Calandra,** 414 U.S. 338, 344-5, 94 S.Ct. 613, 618 (1974); **Commonwealth v. Robinson,** Mass. Adv. Sh. (1977) 2273, 368 N.E.2d 1210 (1977), an Order to Show Cause, valid on its face, will not be set aside on the ground that the evidence presented to the agency was inadequate or insufficient, since the adequacy and sufficiently of the evidence can and must be tested, in the first instance, at the administrative hearing.

Furthermore, no authority has been cited, or found, which suggests it was error for the Commission to authorize the preliminary inquiry, deliberate on the evidence presented, and make the reasonable cause determination at the same meeting of the Commission.

Accordingly, since the determinations required as conditions precedent to bringing this action were clearly made as required by section 4 of G.L. c. 268B, the Commission has jurisdiction to hear and decide the case.[8]/

Mr. Buckley also challenges the failure of the Commission to send notice of the initiation of the preliminary inquiry to the Attorney General "at the beginning" thereof as required by section 4(a). He notes that such notice serves the valid purpose of enabling criminal investigations and prosecutions to be coordinated between the various law enforcement agencies without damaging or hampering the rights of the state or the accused. Notice was sent to the Attorney General as required by section 4(a). While it is true that the notice was sent on the same day that the Order to Show Cause was filed, there is no evidence that Mr. Buckley was harmed in any way by the five (5) day delay in sending the notice. The harm, if there has been any, would have accrued to the Attorney General and he has not complained of the procedure followed in this case. Accordingly, the notice requirement of section 4(a) was satisfied.

III. Right of Privacy

Chapter 210 of the Acts of 1978, including the financial disclosure law, started as an initiative petition filed with the General Court under the provisions of Art. 48 of the Constitution of the Commonwealth. The Senate requested an opinion of the Justices of the Supreme Judicial Court as to whether the law would violate the constitutional rights of privacy of the persons required to file and the members of their immediate families. On April 27, 1978, the Justices upheld the financial disclosure provisions of the

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[7]/"An investigation discovers and produces evidence; an adjudication tests such evidence upon a record in an adversary proceeding . . . to determine whether it sustains whatever charges are based upon it." General Parts Co. v. F.T.C., 445, F.2d 1382, 1388 (5th Cir. 1971).

[8]/Furthermore, it should be noted that, on August 7, 1979, the Commission was advised that Mr. Buckley admitted on his SFI that he had omitted reporting information and that he had failed to correct the alleged deficiencies after having received the appropriate notice to do so. His admitted refusal to disclose reportable information under these circumstances constituted "reasonable cause for belief" that the law had been violated; further investigation to determine exactly what he had refused to disclose was unnecessary and could only have unduly delayed a resolution of the matter. In fact, the Commission still does not know exactly what information Mr. Buckley has failed to disclose since he objected to the introduction of such evidence at the hearing, preferring instead simply to admit that he has refused to disclose information requested on the form.

proposed law. **Opinion of the Justices,** Mass. Adv. Sh. (1978) 1116, 1124-1134, 376 N.E.2d 810, 816-820. The Court noted that the filing of Statements of Financial Interests by public officials, employees and candidates provides a means "which the Legislature or the people could believe to be rationally related to the achievement of the legitimate goal of assuring the people of 'impartiality and honesty of public officials (§1 of the proposed new G.L. c. 268B)." **Opinion of the Justices,** Mass. Adv. Sh. (1978) 1116, 1131, 376 N.E.2d 810, 819. While the Court held that the test to be applied in evaluating the statute against a right to privacy claim was whether the law was rationally related to a legitimate state purpose, it advised that, in its opinion, the law would be constitutional even under the more stringent "strict scrutiny" test. **Opinion of the Justices, spura.** Accordingly, the Court concluded that the financial disclosure law does not violate the rights of privacy of filers or the members of their immediate families in contravention of the Fourteenth Amendment to the United States Constitution or Articles 1, 14 or 16 of the Massachusetts Declaration of Rights.

The rationale underlying disclosure of the financial interests of family members are apparent:

> . . . [such disclosure] provisions are reasonably necessary to promote the act's underlying purposes, for otherwise an official could defeat the disclosure provisions by the simple means of transferring record title to his spouse or dependent children. Finally, even as to property in which the official has no beneficial interest whatever (such as his spouse's separate property), the act serves the legitimate purpose of assuring that the official disclose the fact that his spouse or dependent children own property which might be materially affected by his official actions. Common sense tells us that although an official may have no economic interest in such property, nevertheless, he may react favorably, or without total objectivity, to a proposal which could materially enhance the value of that property. Disclosure might substantially inhibit such sympathetic reaction, thereby promoting the act's goals of honesty and impartiality in government. **County of Nevada v. MacMillen** 11 Cal. 3d 662, 522 P.2d 1345, 1353 (1974).

In view of the strong public interest in assuring the honesty, integrity and impartiality of public officials and employees, the overwhelming weight of authority holds that financial disclosure laws do not violate the rights of privacy of public officials and employees or their immediate families. See **O'Brien v. DiGrazia,** 544, F.2d 543, 545-46 (1st Cir. 1976), cert. denied sub. nom., **O'Brien v. Jordan,** 431 U.S. 914 (1977); **County of Nevada v. MacMillen,** 11 Cal.3d 662, 676, 522 P.2d 1345, 1353-4 (1974); **Fritz v. Groton,** 83 Wash.2d 272, 517 P.2d 911, 923 (1974), app. dismissed 417 U.S. 902 (1974); **Stein v. Howlett,** 52 Ill.2d 570, 289 N.E.2d 409, 413, app. dismissed 412 U.S. 925 (1973); **Illinois State Employees' Association v. Walker,** 57 Ill.2d 512, 315 N.W.2d 9, 17, cert. denied sub. nom.; **Troopers Lodge No. 41 v. Walker,** 419 U.S. 1058 (1974). See also **Plante v. Gonzalez,** 575 F.2d 1119, 1123-4, 1127-37 (5th Cir. 1978), cert. denied 439 U.S. 1129 (1979) and cases cited therein.

In **City of Carmel-by-the-Sea v. Young,** 2 Cal.3d 259, 466 P.2d 225 (1970), relied upon by Mr. Buckley, the California Supreme Court, employing the strict scrutiny test, invalidated a requirement that public employees disclose all investments exceeding $10,000 since those disclosures were unrelated to the narrow provisions of the state's conflict of interest law and therefore intruded into irrelevant private financial matters. The California Supreme Court subsequently upheld the modified financial disclosure law, enacted in response to the **Carmel** decision, stating "[a]lthough the . . . act may to some extent invade the privacy of the official's spouse or dependent children, we think the public's interest in an honest and impartial government outweighs the interest of such persons in maintaining complete privacy in their financial affairs." **County of Nevada v. MacMillen,** 11 Cal.3d 662, 676, 522 P.2d 1345, 1353 (1974) (n.10).

The Supreme Judicial Court of Massachusetts, while clearly rejecting the strict scrutiny analysis applied in **Carmel, supra,** specifically indicated that our financial disclosure law would be constitutional even under the more stringent test. **Opinion of the Justices,** Mass. Adv. Sh. (1978) 116, 1130-31, 376 N.E.2d 810, 818. Moreover, in California, "[n]o effort [was] made to relate the disclosure to financial dealings or assets

which might be expected to give rise to a conflict of interest. . .", **City of Carmel-by-the-Sea v. Young,** 2 Cal.3d 259, 466 P.2d 225, 232 (1970). That is not the case in Massachusetts.

The Massachusetts financial disclosure law, unlike the California statute, complements the provisions of the Massachusetts conflict of interest law, General Laws Chapter 268B and the forms issued pursuant thereto by the Ethics Commission require a filer to disclose his own and his family's business associations,[9]/ interests in real property with an assessed valuation in excess of $1,000.[10]/ and certain liabilities in excess of $1,000.[11]/ These disclosures complement the provisions of the conflict of interest law which prohibit state employees from receiving "anything of value" from private sources in certain situations[12]/ or from participating, except in limited circumstances, in any particular matter in which the state employee, a member of his immediate family or certain business associates, has a financial interest.[13]/ Public financial disclosure identifies actual or potential violations of the conflict of interest law. The disclosures identify situations in which a public official cannot both maintain a private interest and exercise official authority; they also seek to prevent filers from circumventing the prohibitions of the conflict of interest law by transferring assets, income or liabilities to members of their immediate families. See **County of Nevada v. MacMillen,** 11 Cal.3d 662, 676, 522 P.2d 1345, 1353 (1974). The right of citizens to know that public office is not used for private financial gain in violation of the public trust justifies this limited intrusion into family financial matters. Therefore, the provisions of the financial disclosure law and the SFI's issued thereunder do not violate the rights of privacy of the family members of public officials and employees, **Opinion of the Justices,** Mass. Adv. Sh. (1978) 1116, 1124-34; 376 N.E.2d 810, 816-210 (1978).

IV. Authority of the Commission

Finally, Mr. Buckley contends that the Commission has exceeded its authority by requiring disclosure of information not required by law to be revealed. Specifically, he challenges the obligation to report interests in real property or certain liabilities valued in excess of $1,000 in which a member of his immediate family has a financial interest and the requirement to disclose the identity of the family member who has the business association, owns the property or owes the liability.

While an agency may not exceed or extend its statutory authority or adopt a regulation which conflicts with its enabling legislation, **Bureau of Old Age Assistance of Natick v. Commissioner of Public Welfare,** 326 Mass. 121, 124, 93 N.E.2d 267, 269 (1950), its powers are shaped by its enabling statute taken as a whole, and need not necessarily be traced to specific words in the law, **Commonwealth v. Cerveny,** 373 Mass. 345, 354, 367 N.E.2d 802, 808 (1977), and cases cited therein. When an agency has a broad grant of authority to implement a program of reform or social welfare, it has a "wide range of discretion in establishing the parameters of its authority" and should construe its enabling legislation broadly to further purposes of such reform, **Levy v. Board of Reg. & Discipline in Medicine,** Mass.Adv.Sh. (1979) 1857, 1865, 393 N.E.2d 1036, 1040, and to enable it to fill in the details of the law in accordance with the legislative policy. **Commonwealth v. Racine, 372 Mass.** 631, 635, 363 N.E.2d 500, 503 (1977); **Harborview Res. Comm., Inc. v. Quincy Housing Authority,** 368 Mass. 425, 332 N.E.2d 891, 895 (1975); **Commonwealth v. Diaz,** 326 Mass. 525, 527, 95 N.E.2d 666, 668 (1950). This authority includes adopting regulations which are reasonably related to the purposes of the enabling legislation. **Consolidated Cigar Corp. v. Department of Public Health,** 372 Mass. 844, 850-58, 364 N.E.2d 1202, 1207-11 (1977); **Town Taxi Inc., v. Police Commissioner of Boston,** Mass. Adv. Sh. (1979) 738, 387 N.E.2d 129, 135, **Levy v. Board of Reg. & Discipline in Medicine, supra** and cases cited therein.

The legislation mandating public disclosure of the financial interests of public officials and employees and their immediate families is a reform measure designed to assure the citizenry of the honestry and integrity of its officials and employees. The Ethics Commission, created as a part of this reform measure, is the primary civil enforcement agency for this law, G.L. c. 268B,

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[9]/M.G.L. c. 268B, §5(g)(1); section C.1 of the SFI, see infra.
[10]/M.G.C. c. 268B, §5(g)(6); section J.1 of the SFI, see infra.
[11]/M.G.L. c. 268B, §6(g)(3); section K.1 of the SFI, see infra.
[12]/M.G.L. c. 268A, §§2, 3 and 4.
[13]/M.G.L. c. 268A, §6.

§3(i); it is authorized to "prescribe and publish. . . rules and regulations to carry out the purpose" of the new law, G.L. c. 268B, §3(a), and to "prescribe and publish . . . forms for the statements [of financial interests] . . .", G.L. c. 268B, §3(b).

The information required by law to be disclosed is set forth in section 5(g) of G.L. c. 268B. That section provides in relevant part:

> Reporting persons shall disclose, to the best of their knowledge, the following information for the preceding calendar year or as of the last day of said year with respect to the information required by clauses . . . 3, and 6 below; such persons shall also disclose the same information with respect to their immediate family,[14]/ provided, however, that no amount need be given for such information with regard to the reporting person's immediate family;
>
> (1) the name and address of, the nature of the association with, the share of equity in, if applicable, and the amount of income if greater than one thousand dollars derived from each business with which he is associated;[15]/
>
> (3) the name and address of [certain creditors] to whom more than one thousand dollars was owed. . .; and
>
> (6) the description, as appearing on the most recent tax bill, and the amount of assessed value of all real property located within the commonwealth, in which a direct or indirect financial interest was held, which has an assessed value greater than one thousand dollars;. . .

The form Statement of Financial Interests for Calendar Year 1978, and the Instruction Manual promulgated by the Commission pursuant to section 3(b), require disclosure in section C.1 of the business associations of the reporting persons and the members of his immediate family, including the name of the person having the association and the position which they held. Section J.1 requires disclosure of real property located in Massachusetts with an assessed valuation in excess of $1,000 including the identity of the person holding the interest, and section K.1 requires disclosure of the reportable liabilities in excess of $1,000 and the identity of the debtor. The form and the instructions clearly indicate that amounts need not be reported with respect to family members.

Mr. Buckley claims that by requiring disclosures of real property valued in excess of $1,000 and liabilities in excess of $1,000 the forms and instructions, and the statute itself, require disclosure regarding the "amounts" of the assets or liabilities of family members in contravention of the introductory paragraph of section 5(g), **supra.** This argument overlooks the fact that the term "amount", when used in this statute, is defined as "a category of value, rather than an exact dollar figure. . ."[16]/ The $1,000 minimum valuation figure is the threshhold chosen by the legislature to trigger the obligation to report a particular asset or liability held, owned or owed by a filer and/or his immediate family, and disclosing that one is over the minimum is not disclosing an "amount" as that word is defined in the statute.

The legislature has limited the extent of the state's intrusion into the privacy of the filer and his family by requiring disclosure only of financial interests which, in its judgment, are of sufficient magnitude to potentially affect the filer in the discharge of his official responsibilities. The legislature has further limited the extent of the state's intrusion into the family member's personal privacy by providing that the filer need not reveal the "category of value" of the separate property or liabilities of a family member so long as he reveals the identity of the financial interests which might potentially be affected by his official action. The filer must, however, identify and list of the "category of value" for any property or liabilities which he owns or owes jointly with a family member; this limited intrusion into the family member's privacy is necessary to prevent

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[14]/"Immediate Family" is defined in section 1(i) as the spouse and any dependent children residing in the reporting person's household.

[15]/M.G.L. c. 268B, §1(c) defines "business with which he is associated" as any business in which the reporting person or a member of his immediate family is a general partner, proprietor, officer or other employee, including one who is self-employed, or serves as a director, trustee or in any similar managerial capacity; and any business more than one percent of any class of the outstanding equity of which is beneficially owned in the aggregate by the reporting person and members of his immediate family.

[16]/"Amount" is defined in Section 1(a) of G.L. c. 268B as "a category of value, rather than an exact dollar figure as follows: greater than $1,000 but not more than $2,500; greater than $2,500 but not more than $5,000; greather than $5,000 but not more than $10,000; greater than $10,000 but not more than $25,000; greater than $25,000 but not more than $50,000; greater than $50,000 but not more than $100,000; greater than $100,000.

a filer from avoiding disclosure of the "category of value" of his assets and liabilities simply by sharing them with a member of his family and thereby serves to assure the public that he has not benefitted financially from his public position.

Mr. Buckley also questions the requirement to disclose the identity of the family member who has the business association (and the position held), owns the real property or owes the liability. Section 5(g), **supra,** requires a filer to disclose "the same information" with regard to the members of his family which he discloses as to himself. Since the filer must disclose his assets, liabilities and the nature of his business associations, he must also disclose "the same information" for his immediate family; the most effective way to insure compliance with this mandate is to require disclosure of the identity of the individual having the interest. This information is also required in order to insure that reporting persons do not evade the requirements of the law by transferring these assets or liabilities to their spouse or dependents. Finally, this disclosure facilitates the Commission's ability to review the form and, if necessary, compare reported information with that information disclosed on previous SFI's or brought to the Commission's attention by some other means. Accordingly, the disclosure of "amount" and "identity" information is reasonable and rationally related to the Commission's obligation to implement, administer and enforce the statute and is proper.

Finally, Mr. Buckley contends that he did not violate section 5(g) because he did not fail to file an SFI after having received notice to do so. Section 3(g) requires the Commission to inspect SFIs and, if it is ascertained that an SFI fails to conform to the law, the Commission must send the filer notice detailing the alleged deficiencies and the penalties for failing to file an SFI, §3(f). Such a letter was sent in this case on June 20, 1979. Section 5(g) provides that the failure to file and SFI within 10 days of the receipt of notice or the filing of an incomplete statement after receipt of such notice is a violation of the statute. Mr. Buckley argues that the statute does not require a filer to amend a previously filed SFI after receiving notice under section 3(f), nor does it make the failure to amend a violation of chapter 268B. The financial disclosure law was enacted to require public officials to disclose certain of their financial interests and to provide sanctions in the event persons failed to comply with those requirements after having received detailed notice of the alleged deficiencies from the Commission. It is implicit in the statutory scheme that the failure to amend a deficient statement constitutes a violation subjecting the violator to appropriate proceedings under section 4; certainly the legislature could not have intended to insulate from sanctioning an individual who files a deficient SFI and then fails to respond when the Commission points out the deficiency. Accordingly, Mr. Buckley's failure to amend his Statement after having received the appropriate notice, constitutes a violation of section 5(g).

* * * * * *

Based on the foregoing, we conclude that John R. Buckley violated section 5(g) of General Laws Chapter 268B by knowingly and intentionally failing to disclose information on his 1978 Statement of Financial Interests which is required by law to be disclosed, and failing to correct the deficiencies within 10 days of having received notice to do so. The record reflects that Mr. Buckley's actions with respect to filing the SFI resulted from and were prompted by his concern for his family and were taken in good faith without any apparent attempt to mislead or deceive the Commission or the public with regard to his financial interests. On the other hand, we cannot condone the filing of deficient Statements or the refusal to list information known by a filer which is required by law to be disclosed. Accordingly, the Respondent, John R. Buckley, is hereby ordered to:

1. File a Statement of Financial Interests for 1978 which conforms to the requirements of the law, or amend his previously filed Statement within seven (7) days of receipt of this opinion;
2. Pay a civil penalty of $250.00 (two hundred fifty dollars) within 30 days of receipt of this opinion; and
3. Cease and desist from refusing to complete sections C.1, J.1, and K.1 to the best of his knowledge.

DATE: May 7, 1980

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss Commission Adjudicatory Docket No. 109

IN THE MATTER
OF
C. JOSEPH DOYLE

Appearances:
Scott Harshbarger, Esq.: General Counsel, State Ethics Commission
Kevin F. O'Donnell, Esq.: Counsel to the Respondent

Commissioners:
Vorenberg, Ch., Brickman, Bernstein, Kistler, McLaughlin

DECISION AND ORDER

I. Procedural History

On October 19, 1979, the Petitioner filed an Order to Show Cause alleging that the Respondent, C. Joseph Doyle, while serving as a full-time employee of the state legislature, acted as the agent for the Jamaica Plain Community Development Foundation (hereafter "JPCDF" or "foundation") in its efforts to secure funding from two (2) state agencies, the Department of Youth Services (DYS) and the Department of Community Affairs (DCA), in violation of section 4(c) of the conflict of interest law, General Laws Chapter 268A.[1]/ The Respondent denied the allegations.

The evidentiary hearing was held on March 5, 1980 before Linda Kistler, Vice-Chairman of the Commission. See M.G.L. c. 268B, §4(c). Post-hearing briefs were filed by counsel. Oral argument before the full Commission occurred on April 16, 1980; the Respondent waived his opportunity to appear at that proceeding.

In rendering this decision and order, each Member of the Commission has heard and/or read the evidence and arguments presented by the parties.

II. Findings of Fact

Based on the testimony and documents introduced at the hearing, the reasonable inferences to be drawn therefrom, the following findings of fact are hereby made:

1. From November 1, 1976 to June 1, 1979, C. Joseph Doyle was employed by the Massachusetts House of Representatives, House Committee on Rules, assigned as an aide to Representatives James Craven. His area of expertise involved transportation matters related to the Massachusetts Bay Transportation Authority (MBTA) and the Southwest Corridor rapid transit project.

2. Mr. Doyle was, at all times during the course of his employment, a full-time employee of the House of Representatives and of the Commonwealth.[2]/

3. In March and April, 1977, Mr. Doyle, a resident of Jamaica Plain, participated in the formation and incorporation of the Jamaica Plain Community Development Foundation (JPCDF), a private, non-profit corporation designed to stimulate the social and economic development of the Jamaica Plain Community. He originally served as the Clerk and Secretary to JPCDF.

4. In the late summer of 1978, Mr. Doyle began to serve on a voluntary basis as the Executive Director of JPCDF; his position was confirmed by the Board of Directors in December 1978. His role as Executive Director was to secure the initial operating funding for JPCDF and he intended to resign his state position in order to become the paid Executive Director as soon as sufficient funds were obtained to enable the Foundation to commence operations and pay him a salary.

5. In the late summer of 1978, Mr. Doyle was advised by Representative Craven that funds were available from DYS and DCA for grants to community organizations. Through the end of 1978 and the beginning of 1979, while continuing to serve as a full-time state employee, Mr. Doyle engaged in a series of activities designed to obtain funds from those agencies for JPCDF.

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[1]/Section 4(c) of Chapter 268A provides:

No state employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the commonwealth or a state agency for prosecuting any claim against the commonwealth or a state agency, or as agent or attorney for anyone in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest.

[2]/According to the House Rules, full-time employees may not engage in outside business activities during regular business hours and all employees are assumed to be full-time unless their personnel file indicates otherwise. Rules of the House of Representatives, 1979-80, Rule 16A(g) (formerly Rule 19A during 1977 and 1978). Mr. Doyle's personnel file at the House of Representatives does not contain any statement that he was permitted to engage in outside activities during his normal working hours.

6. In the late summer of 1978, Representative Craven arranged a series of meetings between Mr. Doyle and others representing JPCDF and the Commissioner of DYS and the Secretary of DCA. At these meetings, which were held in the office of the Chairman of the House Committee on Ways and Means, Mr. Doyle, in his capacity of Executive Director of JPCDF, described the goals and purposes of the Foundation to the agency officials and discussed with them the possibility of obtaining agency funds for JPCDF.

7. On November 7, 1978, JPCDF applied to DYS for a grant to conduct a case study to assess delinquency prevention and youth resource needs in Jamaica Plain; the Executive Director of JPCDF was to spend 25% of his time on this project and was to be paid from the grant funds. Mr. Doyle participated in drafting this grant proposal and, following its submission, he met with Sim Sitkin, Director of Research and Planning for DYS, on several occasions between mid-November and mid-December 1978 to negotiate the terms of the JPCDF/DYS contract. The $18,000 JPCDF/DYS contract was signed and executed by a representative of DYS and Mr. Doyle, acting in his capacity as the Executive Director of JPCDF, on December 21, 1978.

8. On December 1, 1978, JPCDF applied to DCA for a grant to conduct an urban reinvestment survey; Mr. Doyle participated in drafting this proposal and was listed on the applicant cover sheet as the contact person for JPCDF on this submission. On January 2, 1979, the Secretary of DCA advised Mr. Doyle that he was approving the grant to JPCDF subject to two (2) program alterations; Mr. Doyle was advised to contact Gerald Tuckman at DCA to discuss the program revisions. Between late summer, 1978 and April 30, 1979, Mr. Doyle and Representative Craven met with Mr. Tuckman on one occasion and Mr. Doyle also had several conversations with Mr. Tuckman regarding this contract. The $10,000 JPCDF/DCA contract was signed and executed by the Secretary of DCA and Mr. Doyle, Executive Director of JPCDF, on April 30, 1979.

9. Mr. Doyle, a full-time state employee, was acting solely as the representative of, and agent for, JPCDF when he attended the meetings and negotiated the contracts with DYS and DCA officials and when he signed the DYS and DCA contracts for grants on behalf of JPCDF; he was not discharging his official duties as a full-time employee of the House Rules Committee when he engaged in those activities on behalf of JPCDF.

10. Mr. Doyle resigned his state position as of Friday, June 1, 1979 and assumed the full-time position of Executive Director of JPCDF on Monday, June 4, 1979.[3]/

11. Mr. Doyle resigned his position with JPCDF on July 1, 1979; he did not receive any monies from JPCDF. Mr. Doyle testified that he is currently unemployed.

III. Conclusions of Law

The fundamental premise underlying the conflict of interest law is to restrain government employees from "engaging in conduct which *might be* inimical to the best interests of the general public" **United States v. Mississippi Valley Generating Co.**, 364 U.S. 520, 548 (1961) (emphasis added), in order to insure that a public employee will serve the public "first, last and only".[4]/ One of the ways in which the statute accomplishes these purposes is by restricting the activities in which a public employee may engage in his private capacity.

Section 4 of the conflict of interest law, General Laws Chapter 268A, the so-called "divided loyalties" section, essentially prohibits all full-time state employees from aiding or assisting private parties in their dealings with the state. Section 4(c) specifically and unequivocally prohibits a state employee, otherwise than in the proper discharge of his official duties, from acting as the agent for anyone other than the Commonwealth in relation to any particular matter in which the state is a party or has a direct and substantial interest[5]/; among other things, this section is designed to avoid the potential for "influence peddling". Since a state employee's influence, knowledge and contacts are presumed to extend beyond his own agency, the statute prohibits all state employees from actng as the agent for a private interest in any particular matter in which

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[3]/The JPCDF/DYS contract was cancelled on or about June 13, 1979, apparently in part after DYS discovered that Mr. Doyle had been a full-time state employee at the time he signed the contract on behalf of JPCDF. Mr. Doyle, upon learning of the reason for the contract cancellation, spoke to Robert Cordy, Associate General Counsel of the Ethics Commission, regarding the applicability of the conflict of interest law; at that meeting, Mr. Doyle told Mr. Cordy about the DCA contract and other contracts he negotiated and signed on behalf of JPCDF while serving as a state employee.

[4]/Buss, **The Massachusetts Conflict-of-Interest Statute: An Analysis**, 45, B.U. Law Rev. 299, 322 (1965) (hereafter Buss).

[5]/See note 1, supra.

the state has the requisite interest.[6]/ As a result, this abolsute proscription serves the board prophylatic purpose of preventing state employees from engaging in activities which have the potential for, or may give the appearance of, wrongdoing.[7]/ In other words, the proscription prevents temptation.[8]/

Mr. Doyle claims that he acted in good faith and was not aware that his actions violated the conflict of interest law. However, section 4(c) establishes an objective standard of conduct for state employees.[9]/ It is not necessary to show that a state employee acted with any corrupt intent, **Commonwealth v. Dutney,** 4 Mass. App. 363, 375 (1976).[10]/ Furthermore, ignorance of the law is no defense to an action brought pursuant to this section, **Commonwealth v. Everson,** 140 Mass. 292, 295 (1885); **Commonwealth v. O'Connell,** 274 Mass. 315, 321 (1931) and cases cited therein; **Scola v. Scola,** 318 Mass. 1, 7 (1945). Accordingly, a state employee is guilty of violating section 4(c) whenever he fails to act in accordance with the standard of conduct and behavior established therein.

It is clear that Mr. Doyle, while working for the Rules Committee of the House of Representatives, was compensated for performing services for and was employed by a state agency.[11]/ Accordingly, he was a "state employee" for purposes of the conflict of interest law[12]/ and, as a result, he owed his undivided loyalty to the state. It is equally clear that grant applications to and contracts made by state agencies are "particular matters"[13]/ to which the state, through its agencies, is a party and has a direct and substantial interest. See Attorney General Conflict Opinions 198, 312, 799, and 846. Accoridngly, section 4(c) prevented him from acting as the agent for a private interest in relation to those types of matters.

Mr. Doyle clearly acted as the "agent" for JPCDF — someone other than the Commonwealth. "One fundamental element in . . . every agency is that the alleged agent . . . does something for or in behalf of the allged principal. . ." **Patterson v. Barnes,** 317 Mass. 721, 723 (1945). Mr. Doyle was the Executive Director of JPCDF, having been confirmed in that position by its Board of Directors. By seeking grants from two state agencies, negotiating the terms of those agreements and signing the contract documents on behalf of the Foundation in his capacity as its Executive Director, Mr. Doyle repeatedly acted as the "agent" for JPCDF.[14]/

Furthermore, Mr. Dolyle was clearly not discharging his duties as a legislative aide when he represented JPCDF in connection with these grants. In other words, he was acting "otherwise than as provided by law for the proper discharge of his official duties."[15]/ While the duties of a legislative aide may well include assisting individuals and organizations in their dealings with the state, such was not the case here. Mr. Doyle was employed by the House Rules Committee, specializing in transportation matters. However, neither the subject matter of these grants — juvenile delinquency and urban reinvestment — nor the state agencies involved appear to be related in any way to Mr. Doyle's duties and responsibilities as a state employee or to the jurisdiction of the House Rules Committee. In addition, Mr. Doyle admitted that he was actively

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[6]/**Buss, supra** at 325.

[7]/The conflict of interest law was enacted "as much to prevent giving the appearance of conflict as to suppress all tendency to wrongdoing." **Board of Selectmen of Avon v. Linder,** 352 Mass. 581, 585 (1967).

[8]/See **United States v. Mississippi Valley Generating Co.,** 364 U.S. 520, 550 (1961) and cases cited therein.

[9]/**Id.** at 549.

[10]/Further Appellate Review denied 370 Mass. 868 (1976).

[11]/M.G.L.A.c. 268A, §1(p) defines "state agency" as "any department of state government including the . . . legislative . . ."

[12]/"State employee" is defined in M.G.L. c. 268A, §1(q) 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, . . .

This definition clearly encompasses individuals paid as consultants although such individuals may not be eligible for other benefits offered to state employees. See, for example, M.G.L.A. c. 32, §1 (excluding consultants paid from the 03 account from eligibility for membership in the state's contributory retirement system). Furthermore, since Mr. Doyle was not permitted to engage in outside activities during his normal working hours, see note 2, **supra,** he cannot be considered to have been a "special state employee" as that term is defined in section 1(o)(2) of Chapter 268A.

[13]/The definition of the term "particular matter" includes "any . . . application, submission . . . contract . . ." M.G.L.A. c. 268A, §1(k).

[14]/See Restatement (Second) of Agency, §§1(e), 1(f) (1957); **United States v. Sweig,** 316 F. Supp. 1148, 1156-7 (S.D.N.Y. 1970); **Conde Nast Press v. Cornhill Publishing Co.,** 255 Mass. 480, 485 (1926); **Cellucci v. Sun Oil Co.,** 368 Mass. 811 (1975) and cases cited therein.

[15]/While it is not necessary that the state employee have some affiliation — formal or informal — with the private entity on whose behalf he is acting in order to violate section 4(c), such an affiliation raises the presumption that the state employee is acting for the benefit of his private interests and not for the benefit of the government.

representing his private interest in its efforts to secure state contracts while serving as a state employee and that he intended to resign his state position once sufficient funds had been secured to enable the Foundation to pay him. This is the classic case of "divided loyalties."

* * * * * *

Based on the foregoing, we conclude that C. Joseph Doyle, while serving as a state employee acted, otherwise than as provided by law for the proper discharge of his official duties, as the agent for someone other than the Commonwealth in relation to particular matters in which the state is a party and has a direct and substantial interest in violation of section 4(c) of Chapter 268A. Clearly, by representing JPCDF in its efforts to secure state contracts, Mr. Doyle's actions violated the letter and the spirit of the law. Although he claims that he acted in good faith, he should have known that his activities on behalf of JPCDF were inconsistent with his obligation of loyalty to the state and with his public trust. We note, however, that Mr. Doyle voluntarily advised the Commission, through his request for an advisory opinion and his discussions with members of the staff, of the activities in which he engaged on behalf of JPCDF while serving as a state employee; that he voluntarily resigned his position with JPCDF within a reasonable time after questions were raised regarding the propriety of his earlier actions on its behalf; that he never received any compensation from JPCDF; and, finally, that he is currently employed. Accordingly, he is hereby Ordered to:

> Pay a civil penalty of two hundred fifty dollars ($250.00) within thirty (30) days of receipts of this decision.

DATE: June 18, 1980

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss Commission Adjudicatory
Docket No. 104

IN THE MATTER
OF
VICTOR ALMEIDA

Appearances:

Jo Ann Shotwell, Esq.: Counsel to the Petitioner

Fred Thomas, Esq.: Counsel to the Respondent

Commissioners:

Vorenberg, Chairman; Brickman; Bernstein; Kistler; McLaughlin

PROCEDURAL HISTORY

On July 11, 1979 the Petitioner filed an Order to Show Cause alleging that the Respondent, Dr. Victor Almeida, had violated §5 of the Financial Disclosure Law, General Laws Chapter 268B, by failing to file a Statement of Financial Interests (SFI). The Respondent filed a timely Answer in which he admitted that he had not filed but denied that he violated the law.

An evidentiary hearing, at which the Respondent represented himself, was held on February 27, 1980, before Commissioner Bernard McLaughlin. See G.L. c. 268B, §4(c). Before the hearing the parties entered into a written Stipulation of Facts which was incorporated into the record. Following the hearing, the Respondent retained counsel and both parties filed briefs. Each Commissioner received a copy of the transcript of the proceedings and the Exhibits, together with a copy of the briefs. In rendering this decision and order, each of the participating Commissioners had heard and/or read the evidence and arguments presented by the parties.

Finding of Fact

1. Dr. Almeida was a member of the Board of Registration of Chiropractors within the

Executive Office of Consumer Affairs of the Commonwealth of Massachusetts from December 1968 until his resignation on May 1, 1979.

2. The Board of Registration of Chiropractors is the state agency responsible for granting and revoking chiropractors' licenses pursuant to G.L. c. 13, §64. As a member of the Board, Dr. Almeida assisted in the examination of applicants and voted on whether or not they should be licensed. He also participated in revocation hearings.

3. The Board receives a periodic appropriation from the Commonwealth.

4. Each member of the Board receives from the Commonwealth $15.00 for each day or portion of a day spent in the performance of official duties. Each member is also paid the necessary traveling and other expenses actually incurred. See G.L. c. 13, §66. Dr. Almeida was so compensated during the time he served on the Board except that he accepted no compensation after January 31, 1979.

5. Dr. Almeida was designated by the Secretary of Consumer Affairs as an individual required to file, by May 1, 1979, an SFI for calendar year 1978. This designation was received by the Ethics Commission on January 10, 1979.

6. On February 3, 1979, Dr. Almeida was informed by Assistant Attorney General Mitchell Sikora, legal advisor to the Board, that he was required to file an SFI for calendar year 1978. Other Board members had been so informed at their meeting held on January 17, 1979. Dr. Almeida was not present at that meeting.

7. During the conversation on February 3rd, Sikora advised Dr. Almeida that he could resign immediately and "hope for the best" although resignation at that time would not be timely so as to exempt him from filing.* Sikora was never asked by the Board to submit to the Ethics Commission a request for an exemption on behalf of the Board. Sikora never advised Dr. Almeida that he had submitted such a request.

8. The Ethics Commission never received a request that members of the Board of Registration of Chiropractors be exempted from filing SFI's. The Commission did receive requests to exempt certain Boards of Registration on the ground that the Board members were not entitled to receive compensation for their services. The Commission "de-designated" those Board members on February 14, 1979.

9. Dr. Almeida did not file a Statement of Financial Interests for calendar year 1978 on or before May 1, 1979.

10. On May 18, 1979, Dr. Almeida received from the State Ethics Commission a formal Notice of Delinquency informing him that, unless he filed a Statement of Financial Interests for calendar year 1978 within ten days, he would be in violation of General Laws Chapter 268B and subject to adjudicatory proceedings under §4 of that Chapter and penalties, including a civil fine.

11. Dr. Almeida did not file a Statement of Financial Interests within ten days of receiving the Formal Notice of Delinquency. He has not to this day filed a Statement of Financial Interests for calendar year 1978.

12. By letter dated May 30, 1979, Dr. Almeida informed the Ethics Commission that he had resigned from the Board of Registration of Chiropractors, effective May 1, 1979.

DECISION

The Respondent contends that he was not required to file a Statement of Financial Interests on the grounds that (1) the Financial Disclosure Law, General Laws Chapter 268B and the SFI's issued thereunder violate his constitutional right of privacy, (2) he was not a public employee within the meaning of G.L. c. 268B, §1(o), and (3) he resigned from the Board.

Privacy

The provisions of the Financial Disclosure Law and the SFI's issued thereunder do no violate the rights of privacy of public officials and employees, and members of their families. See the discussion **In The Matter of John R. Buckley** Commission Adjudicatory Docket No. 108, pp. 15-19 (decided May 7, 1980). As the Supreme Judicial Court noted, the filing of Statement of Financial Interests provides a means "which the Legislature or the people could believe to be rationally related to the achievement of the legitimate goal of assuring the people of 'impartiality and honesty of public officials (§1 of the

*Chapter 210, §26 of the Acts of 1978 exempts from filing for 1978 all public employees who were not employed on February 1, 1979.

proposed new G.L. c. 268B)'". **Opinion of the Justices,** Mass. Adv. Sh. (1978) 1116, 1131, 376 N.E. 2d 810, 819.

Public Employee

Section 5(c) of G.L. c. 268B provides that:

> Every public employee shall file a statement of financial interests for the preceding calendar year with the commission within ten days after becoming a public employee, on or before May first of each year thereafter that such person is a public employee and on or before May first of the year after such person ceases to be a public employee; provided, however, that no public employee shall be required to file a statement of financial interests for any year in which he was a public employee for less than eight days.

What must be disclosed is set out in §5(g).

Since it is agreed that the Respondent failed to file an SFI within ten days after receiving notice that he was delinquent (see G.L. c. 268B, §3(f) and §5(g) (last paragraph)], the only issue is whether he was a public employee for purposes of filing. Public employee is defined in G.L. c. 268B, §1(o) as

> any person who holds 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 purposes of this chapter.

The Board of Registration of Chiropractors is a "governmental body" as that term is defined in G.L. c. 268B, §1(h). See G.L. c. 13, §64. Since the provisions of G.L. c. 13, §65 vests in all members of the Board the same powers and duties, each member will be considered the executive head of the Board so as to hold a "major policymaking position" as that term is defined in G.L. c. 268B, §1(l). See EC-FD-79-5. Accordingly, the Respondent will be considered a "public employee" unless either of the two exemptions set out in the definition of that term is satisfied i.e., he receives no compensation or the Board has no authority to expend public funds.

Clearly, the Respondent was compensated for his service on the Board during 1978. The $15.00 received by a member of the Board "for each day or portion thereof spent in the performance of his official duties", as authorized by G.L. c. 13, §66, is compensation and not reimbursement since it is in addition to payment for "necessary traveling and other expenses actually incurred".

It has been agreed that the Board receives a periodic appropriation from the Commonwealth. G.L. c. 29, §3 requires that every officer having charge of any office, department or undertaking which receives a periodic appropriation submit annual budget requests to the budget director. Such budget requests are "authorizations for expenditures of state funds". See G.L. c. 29, §6. No money is paid from an appropriation unless so authorized. See G.L. c. 29, §20. The Board, therefore, has authority to expend public funds.

Accordingly, neither exemption of §1(o) is satisfied in this case and the Respondent will be considered a public employee for purposes of Chapter 268B.

Resignation

The Respondent argues that he should be relieved of his obligation to file an SFI for 1978 because he resigned his position on the Board, effective May 1, 1979. However, any such resignation would have had to occur by February 1, 1979 to exempt the employee from the disclosure requirements of Chapter 268B. See Section 26 of Chapter 210 of the Acts of 1978.

It is of no consequence that the Respondent did not learn until February 3, 1979 that he would be required to file. Chapter 268B did not accord designated individuals any right to notice prior to February 1, 1979. Designations did not have to be submitted to the Commission until April 1, 1979. In any event, the Respondent, in spite of the suggestion of Assistant Attorney General Sikora, did not resign immediately but chose to remain on the Board for the next several months. He contends that he hoped the Board members would be "de-designated". However, Sikora was never asked by the Board to submit an exemption request on its behalf.

ORDER

Based on the foregoing, we conclude that Dr. Victor Almeida violated G.L. c. 268B, §5(g) by failing to file a Statement of Financial Interests within ten days of receiving the Commission's Notice of Delinquency. Accordingly, he is ordered to:

1. File a Statement of Financial Interests for 1978 within seven (7) days of receipt of its opinion; and

2. Pay a civil penalty of $100.00 (one hundred dollars).

DATE: July 10, 1980

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss Commission Adjudicatory Docket No. 110

IN THE MATTER
OF
JAMES J. CRAVEN, JR.

Appearances:

Robert J. Cordy, Esquire: Counsel to the Petitioner

Lawrence F. O'Donnell, Esquire: Counsel to the Respondent

Commissioners:

Vorenberg, Ch.; Kistler; Brickman; Bernstein; McLaughlin

DECISION AND ORDER

We find that the Respondent, Representative James J. Craven, violated Section 6 and 23(d) of Chapter 268A and order that he pay a civil penalty in the amount of $1,000 within 30 days of the issuance of this Decision.[1/]

I. Procedural History

On November 29, 1979, the Petitioner filed an Order to Show Cause alleging that the Respondent, James J. Craven, Jr., had violated Sections 2(b), 6, and 23(d) of Massachusetts General Laws Chapter 268A, the state's conflict-of-interest law. The Respondent filed his Answer to that Order on December 20, 1979, denying that he had violated those provions.

An evidentiary hearing was held in this matter on March 10 and 11, 1980, before James Vorenberg, Chairman of the Commission. See Mass. G.L. c. 268B, §4(c).[2/] Post-hearing briefs were filed by counsel. Each Commissioner received copies of the transcript of the proceeding and of all exhibits, together with copies of the briefs. Oral argument before the full Commission occurred on April 30, 1980. Each of the Commissioners participating in this Decision and Order has heard and/or read the evidence and arguments presented by the parties.

II. Findings of Fact

1. James J. Craven, Jr. has been an elected member of the Massachusetts House of Representatives representing parts of Roxbury, Jamaica Plain and Roslindale from 1957 to the present.

2. James J. Craven, Jr. has been a member of the Ways and Means Committee of the Massachusetts House of Representatives from 1957 to the present.

3. The Ways and Means Committee of the Massachusetts House of Representatives evaluates and makes recommendations to the full House on the budget requests of all state agencies. These recommendations carry great weight with the full House membership.

4. In 1976 Representative Craven assisted some associates in the formation of a community development corporation in Jamaica Plain, known as the Jamaica Plain Community Development Foundation, Inc. (JPCDF), by recruiting members of the Hispanic community in Jamaica Plain to serve on its Board of Directors.

[1/]The Respondent was also charged with having violated Section 2(b) of Chapter 268A. We do not find him in violation of that provision.

[2/]Mass. G.L. c. 268B, §4(c) (¶5) provides "Any member of the Commission may administer oaths and any member of the Commission may hear testimony or receive other evidence in any proceeding before the Commission."

5. JPCDF was incorporated in April of 1977. The first Executive Director of JPCDF was Cornelius Joseph Doyle. Mr. Doyle was, from November, 1976, through June, 1979, employed by the Rules Committee of the Massachusetts House of Representatives and assigned to Representative James J. Craven.[3]/

6. In the late summer or fall of 1978 Representative Craven assisted JPCDF in its efforts to obtain government funds by advising persons associated with that organization of the availability of grant monies in the budgets of the Massachusetts Department of Youth Services (DYS) and Department of Community Affairs (DCA) and by arranging and attending a meeting between DYS Commissioner Calhoun and representatives of JPCDF.

7. In December of 1978, JPCDF was awarded an $18,000 contract by DYS. That contract was cancelled in June, 1978, because DYS officials determined that there was a conflict-of-interest involved in the award.

8. In the spring of 1979, JPCDF was tentatively awarded one $40,000 contract and one $24,500 contract from the City of Boston. Both awards were subsequently cancelled.

9. In August or September of 1978, Representative Craven arranged and attended a meeting in the offices of the Massachusetts House Ways and Means Committee. Also attending were Cornelius Joseph Doyle, then Executive Director of JPCDF, William Flynn, then Secretary of the Executive Office of Communities and Development of the Commonwealth of Massachusetts (EOCD), and Paul Collis, then William Flynn's legislative assistant. At this meeting Representative Craven recommended that JPCDF be funded by EOCD. Secretary Flynn advised Representative Craven at this meeting that there were several EOCD programs, including the Urban Reinvestment Study (URS) Program, under which JPCDF could apply for funding.

10. In November, 1978, Representative Craven attended another meeting with Secretary Flynn in the Ways and Means Committee offices. Several other state legislators representing portions of the City of Boston were also in attendance at this meeting. The subject of this meeting was the funding by EOCD of community development groups in Boston. Secretary Flynn advised the persons present at this meeting that there were three EOCD programs, including the URS Program, under which Boston groups could apply for funding.

11. During the fall of 1978, DCA, a state agency within the jurisdiction of EOCD, was implementing a $150 million program which could not proceed to the actual construction phase until the Massachusetts House Ways and Means Committee approved a schedule submitted to it by DCA. This schedule was pending before the Ways and Means Committee of which Representative Craven was a member at the time that the two meetings described in Paragraphs 9 and 10 above took place, a fact of which Secretary Flynn was aware.

12. On November 21, 1978, James J. Craven, Jr. attended a meeting at the DCA offices located at 10 Tremont Street in Boston. Also in attendance were Cornelius Joseph Doyle, then Executive Director of JPCDF, two professionals who were to conduct the research for JPCDF in the event that it received a URS grant from DCA (Dr. Janet Duncan, Associate Professor of Geography at Boston State College, and Dr. John Shea, also affiliated with Boston State College), and two DCA staff members who would review any proposal submitted by JPCDF for a URS grant (Gerald Tuckman, Director of the DCA office of Resource Development, and Jeanne Myerson, Community Economic Coordinator in that office). Gerald Tuckman described at this meeting the Request for Proposals for the Department's URS grants and explained that the RFP had been circulated to a number of groups throughout the state.

13. In the course of this November 21, 1978 meeting, Representative Craven strongly pressed the DCA staff members present to award a URS grant to JPCDF and indicated that the DCA budget might be adversely affected if that award were not made.

14. Gerald Tuckman knew of Representative Craven's position on the House Ways and Means Committee and was very concerned about Craven's comments at the November 21, 1978 meeting. Tuckman reported the occurrence to

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[3]/Mr. Doyle was the named Respondent in an Order to Show Cause issued by the Associate General Counsel of the Ethics Commission on October 19, 1979. That Order alleged a violation of the conflict-of-interest statute arising out of Mr. Doyle's dual roles as employee of the House Rules Committee and Executive Director of JPCDF. The Decision and Order of the Commission in that matter is being issued simultaneously with this Decision.

his immediate supervisor, David Entin, that same day. Mr. Entin knew of Craven's position on the Ways and Means Committee and was concerned about the reported reference by Representative Craven to the DCA budget, since he views DCA as primarily a public housing agency serving many people in need. Entin subsequently advised Secretary Flynn and Gerald W. Hayes, Assistant Secretary of EOCD, of Representative Craven's reference to the DCA budget. Mr. Hayes was aware that DCA had programs that could not get under way without Ways and Means approval of schedules and took David Entin's report of Representative Craven's reference to the DCA budget very seriously.

15. On December 1, 1978, JPCDF submitted to DCA a proposal for a URS grant. DCA received six other proposals for the $30,000 in URS monies. All seven proposals were reviewed and evaluated by Gerald Tuckman, Jeanne Myerson, Jack Kittredge, an expert in community investment with the Social Economic Council, and Harriet Tagget, an official in the Banking Commissioner's office. They were evaluated on the basis of the criteria set forth in the Request for Proposals prepared by the DCA staff.

16. As a result of these evaluations, the DCA staff submitted to Secretary Flynn a recommendation that three of the groups receive grants, in the amount of $10,000 each. Those three groups were the Community Union Rural Development, Inc., in Greenfield, Massachusetts, the Jamaica Plain Banking and Mortgage Committee, Inc., and the Southeastern Massachusetts Advocacy Center in New Bedford, Massachusetts. In making this recommendation, the staff noted that a fourth proposal, that from the Brightwood Neighborhood Council, Inc., in Springfield, was of very high quality, but was not as good as the other three. The staff did not recommend that JPCDF receive funding under the URS program because JPCDF did not propose the creation of strategies to deal with disinvestment, as required by the RFP.

17. Gerald Hayes subsequently informed David Entin that he had discussed the URS proposals with Secretary Flynn and that they had decided to fund two of the groups recommended for funding by the staff — namely, the Community Union Rural Development, Inc. and the Jamaica Plain Banking and Mortgage Committee, Inc. — and tentatively to commit funds to JPCDF subject to their improving their proposal to meet the program requirements. The contacts made by Representative Craven with EOCD officials relative to JPCDF and the concern generated by those contacts over the implications for the DCA budget of failing to award a grant to JPCDF were major factors leading to this decision tentatively to commit funds to JPCDF.

18. Cornelius Joseph Doyle and Representative Craven were notified by letter dated January 2, 1979, from Secretary Flynn that an award of $10,000 in URS monies had been approved subject to two alterations in the program design.

19. When Secretary Flynn was replaced by Secretary Matthews in January of 1979, the latter agreed to award all grants to which Flynn had committed EOCD. On April 30, 1979, Secretary Matthews signed the $10,000 contract between DCA and JPCDF.

20. By the spring of 1979, then, JPCDF had been tentatively or finally awarded $92,500 in state and city funds.

21. On May 5, 1977, Representative Craven and four of his brothers established the Celtic Realty Trust. Representative Craven and the four brothers were named as beneficiaries of the Trust. Albert Buchwald, who was then serving as President of JPCDF, and John Lawless, a Director of JPCDF, were named as Trustees of the Trust. Also in May of 1977, the Celtic Realty Trust purchased the building located at 2-16 Hyde Park Avenue, Jamaica Plain (the "Minton Building"). In the fall of 1977, Representative Craven assigned his 20 percent beneficial interest in the Celtic Realty Trust to his daughter, Theresa Craven. The other four beneficial interests remained unchanged throughout 1978 and 1979.

22. During the fall of 1978, it was the intention of JPCDF to use some portion of the URS grant, if received, to pay rent on office space in the Minton Building. Representative Craven was, during the period of time that he was arranging and attending meetings with EOCD officials relative to JPCDF, aware of this intention.

23. The proposal submitted to DCA by JPCDF for URS funds called for, and the contract ultimately awarded to JPCDF authorized, the expenditure of some portion of the grant monies on overhead expenses.

24. JPCDF paid to the Celtic Realty Trust out of the URS grant monies $490 in rent on

space in the Minton Building for the month of June, 1979. JPCDF subsequently received from Gerald Tuckman of DCA a notice not to make further expenditures out of the URS grant monies.

III. Decision

The Respondent has been charged with violating three separate provisions of Chapter 268A — Sections 6, 2(b), and 23(d). We will address each of these charges separately.

Before turning to the three charges, however, we will discuss certain preliminary issues.

A. Constitutional Issues

The Respondent lists, in his Brief, six issues relating to the constitutionality of Chapter 268A and/or Chapter 268B [Arguments #1-6].[4]/ The Respondent provides no discussion or citations relative to these issues and has not, therefore, properly raised the issues for our consideration. In any event, the Commission has no authority to adjudicate the constitutionality of Chapters 268A or 268B, as distinguished from the constitutionality of applications of either statute to particular facts. **See Weinberger v. Salfi,** 422 U.S. 749, 765 (1975); **Johnson v. Robison,** 415 U.S. 361, 367-68 (1974); **Public Utilities Commission of California v. U.S.,** 355 U.S. 534, 539 (1957); **Engineers Public Service Co. v. U.S.,** 138 F.2d 936, 952-53 (D.C. Cir. 1943), **dismissed as moot,** 332, U.S. 788 (1947); **Panitz v. District of Columbia,** 112 F.2d 39, 41-42 (D.C. Cir. 1940); Davis, **Administrative Law Treatise,** §20.04 at 74 (1st ed. 1958). Respondent's issues numbered one through four and six constitute pure questions of the constitutionality of legislation acts and are, therefore, not within the jurisdiction of this Commission. Respondent's issue number five, while posing a question of constitutional applicability, is again addressed to the wrong forum. That issue is not relevant in the context of this civil enforcement proceeding.

B. Respondent's Motion to Dismiss

The Commission rejects the Respondent's conclusion that there is a lack of probative evidence on the record of any wrongdoing on his part and accordingly denies the Respondent's Motion to Dismiss this matter.

C. Standard of Proof

The question has arisen as to what standard of proof applies to this proceeding.[5]/ The Petitioner argues for application of the "preponderance of the evidence" standard. It is settled law that the "beyond a reasonable doubt" standard of proof need not be satisfied before sanctions are imposed by an administrative agency, even where the conduct for which the administrative sanctions are imposed may also be prosecuted criminally. **See Alsbury v. U.S. Postal Service,** 530 F.2d 852, 855 (9th Cir. 1976); **Polcover v. Secretary of the Treasury,** 477 F.2d 1223, 1231-32 (D.C. Cir 1973); **Kowal v. U.S.,** 412 F.2d 867, 870 (Ct. Cl. 1969). Proof by a preponderance of the evidence is the standard generally applicable to administrative proceedings. **See Fairfax Hospital Association Inc. v. Califano,** 585 F.2d 602, 611-12 (4th Cir. 1978); **Kephart v. Richardson,** 505 F.2d 1085, 1089 (3rd Cir. 1974); **Kent v. Hardin,** 425 F.2d 1346, 1349 (5th Cir. 1970). This standard applies to administrative proceedings in Massachusetts, even where a sanction as serious as disbarment is imposed. **See Matter of Ruby,** 328 Mass. 542, 547 (1952).

Administrative agencies are occasionally held to a standard of clear and convincing proof in cases where the potential consequences to the

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[4]/Those issues are characterized in the Respondent's Brief as follows:

"1. Whereas the functions of the State Ethics Commission are judicial in nature, its membership is unlawfully constituted in violation of the Constitution of the Commonwealth of Massachusetts, Part II, c. II, s. I, Article IX.

2. General Laws c. 268B is an unconstitutional delegation of power which is reserved to grand juries under the Constitution of the Commonwealth of Massachusetts.

3. General Laws c. 268B is an unconstitutional contravention of the Separation of Powers Clause of the Constitution of the Commonwealth of Massachusetts, Part I, Article XXX.

4. General Laws c. 268A and c. 268B violate the Fourteenth Amendment to the United States Constitution in an unconstitutional classification of public officers and employees in relation to offenses which are criminal in nature.

5. General Laws c. 268B establishes unconstitutional procedures and requirements which, in the context of the massive publicity that surrounded their application in this case, constituted a denial of the right of an impartial trial by jury with respect to any person whose case is referred for prosecution.

6. General Laws c. 268A and c. 268B purports to set forth standards of conflict of interest which are unconstitutionably vague and overbroad."

[5]/While the Respondent raised this issue at the evidentiary hearing before Chairman Vorenberg, he did not raise it to the full Commission. We address the issue here because it was addressed in the Petitioner's Brief to the full Commission.

subject of the adjudicatory proceeding are extremely serious. **See, e.g., Addington v. Texas,** 441 U.S. 418 (1979) [civil commitment proceeding]; **Woodby v. INS,** 385 U.S. 277 (1966) [deportation proceeding]; **Schneiderman v. U.S.,** 320 U.S. 118, 125 (1943) [denaturalization] **Collins Sec. Corp. v. S.E.C.,** 562 F.2d 820, 824 (D.C. Cir. 1977) [deprivation of livelihood by revocation of broker's license].

Since the sanctions which the Commission may impose upon the Respondent as a result of this proceeding — namely, civil penalties and orders to cease and desist[6]/ — are not nearly as severe as those involved in the cases requiring a clear and convincing standard, we hold that the traditional perponderance standard applies to this proceeding.

D. Single Presiding Commissioner

As was noted in Section I of this Decision, James Vorenberg, Chairman of the Commission, served as Presiding Officer at the evidentiary hearing in this matter. The Respondent has objected, both at the hearing and in his Brief, to the absence of the full Commission from that hearing. He claims that the procedure followed was an unconstitutional denial of his right to due process of law in that "the single Commission member hearing the matter could recommend criminal prosecution" and "was the same single member who signed and served upon the Respendent the Order to Show Cause."[7]/ The Commission rejects these arguments on the grounds that the factual allegations upon which they are based are untrue. A single Commission member has no authority to refer a matter for criminal prosecution, since Chapter 268B, Section 2(j) requires the affirmative votes of three Commission members for any action or recommendation of the Commission. The Order to Show Cause was signed by Robert J. Cordy, Associate General Counsel of the Commission, and not by Chairman Vorenberg. That Order was issued following a majority vote of the Commission that there existed reasonable cause to believe that the Respondent had violated Chapter 268A.

We would point out that the combination of investigative and adjudicatory functions in one administrative agency is quite typical and has been upheld by the United States Supreme Court. **See Withrow v. Larkin,** 421 U.S. 35, 46-59 (1974). Thus, the issuance of the Order to Show Cause in this matter by a majority of the Commission members who were to participate in the ultimate decision was entirely appropriate. **See School Committee of Stoughton v. Labor Relations Commission,** 4 Mass. App. Ct. 262, 272, 346 N.E.2d 129, 137 (1976) [". . . the mere issuance of the complaint by the Commission does not indicate a prejudgment of the merits of the case."].

The Respondent further contends that the denial of his request for a hearing before the full Commission violated Chapter 268B, Section 4(c),[8]/ which authorizes the Commission to initiate "appropriate proceedings" to determine whether Chapter 268A has been violated. Contrary to the Respondent's assertion, Section 4(c) expressly authorizes "any member" of the Commission to "administer oaths" and to "hear testimony" or "receive other evidence" in any proceeding before the Commission. In view of the facts that there are only five Commission members, that they serve on a part-time basis, and that evidentiary hearings can be very time-consuming, we believe it is reasonable for the Commission to authorize single members to preside at hearings.

We hold, therefore, that the denial of the Respondent's request for a hearing before the full Commission did not violate Chapter 268B, Section 4(c).

E. Section 6

We believe the prosecution has proved, by a perponderance of the evidence, a violation of Chapter 268A, Section 6. Indeed, we would reach the same result even were we to apply the more stringent standard of clear and convincing evidence.

Section 6 embodies what has been described as "the most obvious of all conflict-of-interest principles" — namely, "that a public official does not act in his official capacity with respect to matters in which he has a private stake." W.G. Buss, "The Massachusetts Conflict-of-Interest Statute: An Analysis," 45 **B.U.L. Rev.** 299, 353 (1965). That section prohibits a state employee from knowingly participating in "particular matters" in which he/she or members of his/her

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[6]/See Chapter 268B, Section 4(d).

[7]/See Respondent's Brief, Arguments 7 and 9.

[8]/See Respondent's Brief, argument 8.

immediate family have a financial interest. It seeks to ensure honesty in government by preventing state employees from advancing their own interests or those of family members at the expense of the public welfare.

The Respondent, being an elected member of the Massachusetts House of Representatives, is a "state employee" for purposes of Chapter 268A. The award of the URS contract to JPCDF is a "particular matter" for purposes of that Chapter. See Chapter 268A, Section 1(k).

Chapter 268A, Section 1(j) defines "participate" to mean "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." (Emphasis Supplied] We find that Representative Craven "participated" in the award of the URS contract by EOCD to JPCDF by his "recommendation" of JPCDF for the contract. We also find that he "participated" by injecting himself into the EOCD "decision" relative to that contract.

We have found that Representative Craven had, during the fall of 1978, contacts with EOCD officials relative to funding for JPCDF. At the time of these contacts DCA, an agency within EOCD, was implementing a $150 million program which could not proceed to actual construction until the House Ways and Means Committee of which Representative Craven was a member approved a schedule pending before it. The record contains much and conflicting testimony as to whether Representative Craven "threatened" the DCA budget at a November 21, 1978 meeting with DCA officials. Indeed, some of the questions posed by counsel for the Respondent suggest a concern for whether Gerald Tuckman was personally threatened, obviously not an issue in this case. While we do not believe that any particular characterization of Representative Craven's reference to the budget is crucial to this case, we do conclude, having reviewed all of the testimony and made assessments as to credibility, that Representative Craven strongly pressed the DCA officials present at the November 21 meeting to award a grant to JPCDF and indicated that the DCA budget might be adversely affected if that award were not made.

The pressure applied by Representative Craven to EOCD officials at a time when they had a matter of significance pending before his Committee and his reference to the agency's budget amounted to substantial participation in the award of the contract to JPCDF by way of recommendation. Moreover, the record shows that Representative Craven's contacts with EOCD officials and the concern generated by those contacts for the DCA budget were major factors leading to the ultimate decision to award the URS contract to JPCDF. Thus, Representative Craven actually participated personally and substantially in the decision to fund JPCDF.

Even if we had not made the finding noted above with respect to Representative Craven's reference to the DCA budget at the November 21 meeting, we would still hold that his strong pressing of agency officials who knew of his position on the Ways and Means Committee at a time when their agency had a significant matter pending before that Committee constituted "participation" in the award of the grant, both by way of "recommendation" and by way of "decision."

Representative Craven's brothers and daughter had a "financial interest" in the award of the URS contract to JPCDF. JPCDF had decided, prior to that award, to rent office space in the Minton Building, which Representative Craven's brothers and daughter owned as beneficiaries of the Celtic Realty Trust. JPCDF intended to pay some portion of the URS grant, once received, over to the Trust as rent on that space. Since Representative Craven's family members stood to benefit financially from the award of the contract to JPCDF, they had a "financial interest" in that contract within the meaning of Section 6. It is irrelevant that the Celtic Realty Trust could secure other paying tenants for the space which JPCDF intended to occupy and meet its mortgage payments without renting that space and that JPCDF could make the rental payments without receiving the URS grant.[9]/

The evidence further shows that Representative Craven knew, at the time he had his contacts with EOCD officials relative to JPCDF, that

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[9]/The Respondent places great emphasis in this connection on the fact that only $490 was ever paid in rent by JPCDF to the Celtic Realty Trust. That fact is also irrelevant to the analysis here. Moreover, it was clearly anticipated, before JPCDF was ordered by DCA to stop expending the URS contract monies, that more of those funds would be paid to the Trust.

JPCDF planned to move into the Minton Building and to pay rent to his family members through the Celtic Realty Trust.

Thus, Representative Craven knowingly participated in a particular matter in which members of his family had a financial interest in violation of Chapter 268A, Section 6. In so doing, Representative Craven exhibited an insensitivity to the fundamental principle that a public official may not act on matters where the financial interests of family members may interfere with his or her impartial execution of the public trust.

We hereby order the Respondent to pay within 30 days of the issuance of this Decision a civil penalty in the amount of $1,000 for his violation of Chapter 268A, Section 6.

F. Section 2(b)

Chapter 268A, Section 2(b) prohibits a state employee from "corruptly" demanding anything of value for himself or for another person or entity in return for being influenced in his/her performance of any act within his/her official responsibility. The Petitioner contends that Representative Craven violated this provision by corruptly demanding at the November 21, 1978 meeting with DCA employees a $10,000 contract for JPCDF in return for being influenced not to take unfavorable action as a member of the House Ways and Means Committee on the DCA budget.

While we are clear that Representative Craven's conduct, including his conduct at the November 21, 1978 meeting, constituted an abuse of his public position and so find in connection with his violation of Sections 6 and 23 of Chapter 268A, we do not believe that the record in this case sufficiently establishes a separate violation of Section 2(b).

G. Section 23

Section 23 of Chapter 268A sets out a code of conduct to which public officials and employees must adhere if public confidence in government is to be maintained. Paragraph (d) of that Section provides that no state employee may "use or attempt to use his official position to secure unwarranted privileges" for himself or others. We find that Representative Craven violated this provision of the state's conflict-of-interest law when he attempted to and did use his position as a member of the powerful House Ways and Means Committee to secure the $10,000 DCA contract for JPCDF.

It is appropriate for members of the state legislature and other public officials to recommend constituents for government benefits.[10]/ However, no public official may use his or her official position to apply pressure to other state employees or officials to abandon normal agency procedures for evaluating applicants for and awarding those benefits. An award of government benefits based not on such procedures but rather on pressure by a public official to act upon an extraneous and inappropriate consideration such as concern for the agency's budget in an "unwarranted privilege" within the meaning of Chapter 268A, Section 23(d). Moreover, public officials and employees should not use their public positions to benefit ventures in which they or members of their families have a financial interest.

The record shows that Representative Craven, in his contacts with EOCD officials, went beyond merely recommending a constituent for government benefits. His intense efforts to secure the grant from DCA at a time when a schedule of considerable importance to that agency was awaiting action by his Committee and his indication that failure to award the grant to JPCDF might have adverse consequences for the DCA budget constituted an attempt to secure an unwarranted privilege for JPCDF in violation of Section 23(d).

The record reflects that these efforts by Representative Craven were a major factor leading to the decision by EOCD officials to award a grant to JPCDF even though the established process for evaluating competing proposals did not lead to a recommendation for such an award. Thus, Representative Craven not only attempted to use his position to secure the grant, but was actually successful in that attempt. In other words, Representative Craven did in fact "use" his official position to secure the grant in violation of Section 23(d).

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[10]/This is true provided they do not violate the restrictions of Chapter 268A, Section 4 on assistance in connection with "particular matters" to which the state is a party or in which it has a "direct and substantial interest."

If the Section 23(d) charge stood alone in this case, we would order the Respondent to pay a civil penalty for its violation. However, since the conduct involved here is closely related to that which we have already found violative of Chapter 268A, Section 6, we will not impose a separate penalty for this violation.[11]/

DATE: June 18, 1980

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 130

IN THE MATTER
OF
BERNARD J. SMITH

DISPOSITION AGREEMENT

This Agreement is entered into between the State Ethics Commission ("Commission") and Bernard J. Smith ("Mr. Smith"), pursuant to Section 11 of the Commission's **Procedures Covering the Initiation and Conduct of Preliminary Inquiries and Investigations.** The parties agree that this Agreement constitutes a final order of the Commission enforceable in the Superior Court of the Commonwealth.

On January 23, 1980, the Commission, pursuant to Section 4(a) of General Laws Chapter 268B, initiated a Preliminary Inquiry into possible violations of the Conflict of Interest Law, General Laws, Chapter 268A, involving Mr. Smith, an independent contractor engaged by the Massachusetts Department of Public Health, Lemeul Shattuck Hospital ("Hospital").

The Commission has concluded its investigation into Mr. Smith's involvement in the matters set forth herein and makes the following findings of fact and conclusions of law to which the parties hereto agree.

1. Mr. Smith has been engaged as a nurse recruiter for the Massachusetts Department of Public Health, Lemuel Shattuck Hospital since November of 1978. His official duties as a nurse recruiter include traveling through New England and other parts of the United States on behalf of the Hospital to attend nursing conventions and other events organized for the purpose of nurse recruitment. His contract of employment with the Commonwealth provides for compensation in the form of salary, together with reimbursement for travel and related expenses. Said contract also authorizes Mr. Smith to contract on behalf of the Hospital directly with private businesses for advertising and other nurse recruiting related services. Mr. Smith's contract for the period from November of 1978 through June of 1979 provided for salary at the rate of $100 per day; an advertising budget of $3,500, a travel and lodging budget of $1,500, and an external recruitment budget of $2,000. His contract from July 1979 through June 1980 provided for salary of $103.04 per day; an advertising budget of $9,000, a travel and lodging budget of $3,500, and an external recruitment budget of $1,500.00.

According to the terms of said contract, Mr. Smith was to submit itemized vouchers for payment of advertising, travel and recruiting expenses on forms approved by the Dept. of Public Health to the Fiscal Office.

2. During 1978 and 1979, Mr. Smith regularly contracted on behalf of the Hospital with Alfred S. Buyer Inc. of Needham, for advertising related to the recruitment of nurses for the Hospital. During this same period of time Mr. Smith occasionally contracted with Prime National Publishing, Inc. of Weston ("Prime") on behalf of the Hospital for other services related to the recruitment of nurses for the Hospital. Both of these firms, promptly and satisfactorily performed all services required by these contracts and periodically submitted bills to Mr. Smith for payment. Mr. Smith routinely requested and received reimbursement from the Commonwealth for these expenses but neglected to forward payment to the aforementioned firms for several months. These contracts totalled in excess of $5,000.

3. On numerous occasions during 1979 and 1980 Mr. Smith attended and participated in Nursing Job Fairs, organized and conducted by Prime in cities throughout the United States. Mr. Smith was employed by Prime at these Job Fairs at the rate of $200 per day and received

[11]/Commissioner McLaughlin dissents from the conclusion that there was a violation of this Section. In his opinion, the record of this case does not indicate evidence adequate to support a judgment that a violation of 23(d) occurred. Commissioner Kistler joins in the finding that Representative Craven violated Section 23(d) and further believes that Representative Craven's conduct in violation of that Section warranted a $500 civil penalty in addition to the $1,000 sanction imposed for violation of Section 6.

air travel and lodging paid for by Prime. Mr. Smith also attended several of these same job fairs on behalf of the Hospital and received his full salary of $103.04 per day from the Commonwealth in addition to receiving compensation and related expenses from Prime. The total salary he received from the Commonwealth while working simultaneously for Prime at these job fairs was $2,679.04.

4. In connection with two of the job fairs identified above, Mr. Smith contracted with Prime on behalf of the Hospital to rent exhibitor's booth space at job fairs at which Mr. Smith was also employed by Prime. At one of these job fairs, the contract to rent exhibitor's booth space was cancelled prior to the job fair.

5. Mr. Smith's conduct as set out in Paragraph 2, above, violated Section 23(d) of Chapter 268A in that he used his official position to obtain unwarranted privileges, to wit: the personal use of the Commonwealth's funds for several months, which funds were properly due and payable to those firms mentioned in Paragraph 2.

6. Mr. Smith's conduct as set out in Paragraph 3, above, violated Section 4(a) and 4(c) of Chapter 268A in that Mr. Smith received compensation from and acted as an agent for Prime at job fairs for which the Commonwealth had also compensated Mr. Smith and at which the Commonwealth had a direct and substantial interest in his full time recruiting services.

7. Mr. Smith's conduct as set out in Paragraph 4, above, violated Section 6 of Chapter 268A, in that he participated in his official capacity, in the award of contracts between the Hospital and Prime, a business organization with which he had an arrangement for employement at job fairs.

WHEREFORE, 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 representations, terms and conditions hereby made and agreed to by Bernard J. Smith:

1. That he is represented by Harvey Alford, Esq., 600 Pleasant St., Watertown, MA and has been fully advised as to all matters relating to these proceedings and this agreement;

2. That he cease and desist from any present or future conduct violating General Laws, Chapter 268A;

3. That he pay the State Ethics Commission the sum of $1,500 forthwith as civil penalty for the following violations:

(a) $500 for violating Section 4 of Chapter 268A,

(b) $500 for violating Section 6 of Chapter 268A;

(c) $500 for violating Section 23 of Chapter 268A;

4. That he pay to the State Ethics Commission the sum of $2,679.04 as recoupment of salary received from the Commonwealth at Nursing Job Fairs at which he was also employed and compensated by a private firm; which payments are to be made in accord with the schedule of payments set out in appendix A of this Agreement and incorporated herein by reference; and

5. That, in the future he promptly pay all vendors, with whom he has occasion to contract with on behalf of the hospital, in full, in accordance with their billing terms.

6. That he waive all rights to contest findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any related administrative or judicial proceeding.

DATE: September 23, 1980

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss Commission Adjudicatory Docket No. 133

IN THE MATTER
OF
RICHARD B. SIMCHES

DISPOSITION AGREEMENT

This Agreement is entered into between the State Ethics Commission ("Commission") and Richard B. Simches ("Mr. Simches"), pursuant to Section 11 of the Commission's **Procedures Covering the Initiaiton and Conduct of Preliminary Inquiries and Investigations.** The parties agree that upon its execution this Agreement shall constitute a final order of the Commission enforceable in the Superior Court of the Commonwealth.

On April 30, 1980, the Commission, pursuant to Section 4(a) of General Laws Chapter 268B, initiated a Preliminary Inquiry into possible violations of General Laws Chapter 268A, (hereinafter referred to as either "Chapter 268A" or the "Conflict of Interest Law") involving Mr. Simches, a member of the Board of Governors ("The Board") of the Motor Vehicle Reinsurance Facility ("The Facility").

The Commission has concluded its investigation into Mr. Simches' involvement in the matters set forth herein and make the following findings of fact to which the parties hereto agree.

Findings of Fact

1. At all times in 1979, Mr. Simches was the Regional Executive Director of Motor Club of America Insurance Company ("MCA"); and the owner of twelve (12) insurance agencies. In addition, Mr. Simches has been the controlling stockholder of the Safety Insurance Company ("Safety") since its formation in the Summer of 1979.

2. In November of 1977, Mr. Simches was appointed by the Commissioner of Insurance to be one of the members of the Facility's Governing Board, and he has served in that capacity at all times relevant herein.

3. The Facility was established pursuant to M.G.L. Chapter 175, Section 113H, to ensure that all Massachusetts drivers, and specifically high risk drivers, would be able to obtain automobile insurance. It is governed by a thirteen-member Board, all of whom are required to be associated with the insurance industry. Board members are unpaid and are appointed by and serve at the pleasure of the Commissioner of Insurance who also exercises other supervisory powers over the Facility. All automobile insurors in Massachusetts are members of the Facility and all operating costs of the Facility are paid for by the member insurance companies.

4. Automobile insurance companies reinsure their high risk policies through the Facility which allocates the losses from those policies among all the member insurance companies. Two types of policies are reinsured through the Facility:

a. Policies written by insurance brokers with a high percentage of risk business ("designated brokers"), who are assigned to an insurance company (a "servicing carrier") because no company will voluntarily underwirte their policies; and

b. Policies written by agents with a low percentage of risk policies ("voluntary agents") which are voluntarily underwritten by insurance companies.

5. In 1979 the Motor Club of America Insurance Company (MCA), which had developed particular expertise with high risk business, was one of the Facility's largest servicing carriers, having been assigned many designated brokers including the twelve insurance agencies owned by Mr. Simches.

6. Automobile insurance companies report monthly to the Facility the amount of money taken in as premiums and the amount of losses suffered from policies under the jurisdiction of the Facility. On a quarterly basis, the Facility staff squares accounts with the companies; if premiums exceed losses, a company must pay the difference to the Facility and if losses exceed premiums, the Facility pays the difference to the company. If, in any one month, the amount of loss exceeds the amount of premiums by one and a half times, the company can request an interim reimbursement rather than wait for the close of the quarter. Interim reimbursements can only be granted by vote of the Board. MCA requested interim reimbursements, sometimes in excess of one million dollars, on seven occasions in 1979. Mr. Simches, in his capacity as MCA's Regional Executive Director, often personally made these reimbursement requests in writing to the President of the Facility, who then put them on the agenda of the Board.

7. In the Spring of 1979 it became apparent that MCA had severe financial difficulties and its status as a servicing carrier became compromised. In order to protect his business interests, Mr. Simches, in the Summer of 1979, began to form a new insuror, Safety, and proposed to the Board that Safety assume MCA's business once MCA was eliminated as a Facility member. In July, 1979, Safety applied for a license at the Division of Insurance, which took no final action on this application until December 12, 1979.

8. On November 30, 1979, several Facility Board members met with Division of Insurance officials who experssed their serious concerns regarding the continued viability of MCA. The Board called a special meeting for December 4,

1979, to determine what action, if any, should be taken.

9. Mr. Simches was present at the December 4, 1979, meeting, and in his capacity as Regional Executive Director of MCA answered questions from Board members concerning MCA's viability. After discussion, the Board voted, with Mr. Simches abstaining, to terminate MCA as a servicing carrier as of January 1, 1980, and to have its staff develop a plan to reassign MCA's business to already licensed carriers. The Board also voted not to consider reassigning MCA's business to Safety until it was licensed. On December 6, 1979, one of Simches' insurance agencies filed suit to enjoin the termination of MCA by the Facility.

10. Mr. Simches and his attorney then called upon Neil Lynch, Counsel to the Governor, and requested his assistance in breaking the apparent bureaucratic logjam delaying action on Safety's license application. Mr. Lynch then called the Commissioner of Insurance and told him that a decision one way or another should be made quickly on Safety's application to avoid a substantial dislocation of the consumer market caused by bureaucratic red tape.

11. The Facility Board met in public session on December 10, 11 and 12, 1979, to consider further a number of matters concerning the termination of MCA as a servicing carrier, the reassignment of MCA's designated brokers, and the resolution of the law suit brought by one of Mr. Simches' insurance agencies. At each of these meetings, Mr. Simches appeared personally before the Board as the corporate agent of his insurance agency and urged the Board to consider designating Safety as a servicing carrier and assigning to it MCA's designated brokers, or, in the alternative, reappointing MCA as a servicing carrier.

12. At the meetings on December 10th and 11th, the Board voted not to change the reassignment plan it adopted at the December 4, 1979, meeting. Although present at these meetings as a corporate agent, Mr. Simches absented himself from the executive sessions in which the Board discussed and finally voted not to change its position.

13. On December 12, 1979, Safety was licensed by the Division of Insurance. The Board met later that day and after questioning Mr. Simches who now appeared as Safety's corporate agent, voted to award 80% of MCA's business to Safety. This decision was made only after Mr. Simches agreed that all his insurance agencies would change from being designated brokers to voluntary agents. This would result in 25% of Safety's business being written as "voluntary," and thereby substantially increase its financial contribution to the Facility's operating funds as compared to the contributions made by MCA. Mr. Simches again absented himself from the Board's vote on this matter.

14. By absenting himself from votes by the Board on December 4, 10, 11 and 12th, concerning matters affecting the financial interests of MCA and Safety, Mr. Simches was attempting to avoid a conflict between his obligations as a Board member and his personal interest in MCA and Safety.

15. There is no evidence that by acting as agent for his insurance agency, Safety or MCA before the Board, Mr. Simches unduly or improperly influenced its decisions regarding either the approval of MCA's interim reimbursement requests, or the transfer of 80% of MCA's business to Safety, as set out in paragraphs 6, 9 and 11-13 above. Nor is there evidence that the Board's decisions on these matters were contrary to the best interests of the insurance industry or the Commonwealth.

16. At the time that he attended the Board meetings on December 4, 10, 11 and 12 as agent for MCA, Safety and his insurance agency, and abstained from the votes noted in paragraph 14, Mr. Simches did not know that he might be subject to the provisions of the Conflict-Of-Interest Law. In part, this belief was the result of a legal opinion given to the Facility by its legal counsel in July 1978, and repeated thereafter, which opined that the Facility was not a "governmental body" for purposes of the State Administrative Procedure law, General Laws Chapter 30A.

Conclusions of Law

The Commission concludes that the Facility is a "state agency" within the meaning of and consistent with the purposes of the Conflict-Of-Interest Law, which purposes are broader and more preventative in nature than those of the State Administrative Procedure Law. The Commission also concludes that members of the Facility's Board are "special state employees"

within the meaning of Section 1(o) of Chapter 268A, and therefore subject to the provisions of the Conflict-Of-Interest Law. In light of these conclusions, which are made by the Commission and not contested by Mr. Simches, the parties agree that Mr. Simches violated Section 4(c) of Chapter 268A, which prohibits special state employees from acting as agents for private entities in relation to matters which are pending in the state agency for which they serve, by: (1) personally appearing before the Board as the corporate agent for his insurance agency, for MCA and for Safety at its meetings on December 4, 10, 11 and 12, 1979; and (2) acting as MCA's agent in requesting the Board to grant MCA several interim reimbursements in 1979.

DISPOSITION

THEREFORE, in view of the facts and circumstances set out in paragraphs 1-16 of this Agreement, 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 representations, terms and conditions hereby made and agreed to by Richard B. Simches:

1. That he is represented by Frederick Pritzker, Esq., One Federal Street, Boston, and has been fully advised as to all matters relating to these proceedings and this Agreement;
2. That he cease and desist from acting as the agent for Safety, MCA, or any other entity in connection with any matter which is pending before the Board while he remains a member of the Board;
3. That he pay the sum of $500 to the State Ethics Commission within three (3) days of the execution of this Agreement; and
4. That he waive all rights to contest the findings of fact, conclusions of law, and the terms and conditions contained in this Agreement, in this or in any related proceeding.

DATE: October 7, 1980

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss Commission Adjudicatory
Docket No. 134

IN THE MATTER
OF
BADI G. FOSTER

DISPOSITION AGREEMENT

This Agreement is entered into between the State Ethics Commission ("Commission") and Badi G. Foster ("Mr. Foster") pursuant to Section 11 of the Commission's **Procedures Covering the Initiation and Conduct of Preliminary Inquiries and Investigations.** The parties agree that upon its execution this Agreement shall constitute a final order of the Commission enforceable in the Superior Court of the Commonwealth.

On February 25, 1980, the Commission, pursuant to Section 4(a) of General Laws, Chapter 268B, initiated a Preliminary Inquiry into possible violations of the Conflict-of-Interest Law, Chapter 268A, involving Mr. Foster, a former Professor at the University of Massachusetts at Boston.

The Commission has concluded its investigation into Mr. Foster's involvement in the matters set forth herein and makes the following findings of fact, to which the parties hereto agree:

1. Mr. Foster was a full-time member of the faculty at the University of Massachusetts at Boston from November of 1972 until August 31, 1976. He was on a leave of absence from the University for the period September 1, 1976 to August 31, 1977, at which time he reassumed his faculty position on a 2/3's time basis.

2. Cedar Associates Incorporated, was formed in May 1975, as a "for-profit" corporation. Mr. Foster was the President and sole stockholder of the company. Its principal purpose was to provide professional consultant services in the field of minority education, minority employment and other related areas.

3. On March 6, 1975, Mr. Foster was selected by the State Department of Education ("DOE") to be a member of an Ad Hoc Committee to review proposed programs for disad-

vantaged students. He served as a member from July 1, 1975 to June 30, 1976. The responsibility and purpose of the members was to review grant proposals to determine their relevance to particular federal funding areas and the target population. Such grant proposals were approved or disapproved by DOE. However, grant proposals had to be reviewed by at least three Ad Hoc Committee members, who recommended approval, disapproval, or referral to another funding area. Members of the Ad Hoc Committee who reviewed a proposal did not review the budget for the proposal, as they had no responsibility for review with respect to costs. Mr. Foster reviewed at least 12 program proposals and he recommended approval of each proposal that he reviewed. The review of a proposal by a member typically took about one half hour. As a member of this committee, Mr. Foster was a "special state employee" within the meaning of Section 1(o) of Chapter 268A.

4. In the month of July, 1975, while serving on the Ad Hoc Committee, Mr. Foster was one of three members who reviewed Project Number D15976, entitled "Vocational Counseling and Career Development Program" which was proposed by the Boston YWCA Cass Branch ("Boston YWCA"). After reviewing the proposal, Mr. Foster, as well as the other two readers, recommended to DOE that the project be approved. The Boston YWCA was subsequently awarded $76,000 by DOE, and began work on this grant in early 1976.

5. In or about August 1976, Melvin McCoy, Vice President of Cedar Associates, met an official of the Boston YWCA at a National Urban League Convention being held in Boston. They discussed programs of the Boston YWCA for disadvantaged youth, and the need for evaluation of the effectiveness of those programs.

On August 31, 1976, Badi Foster and Melvin McCoy met with the Director of the Boston YWCA and proposed that Cedar Associates review and evaluate the programs developed under the above DOE grant.

6. On October 30, 1976, the Director of the YWCA requested permission from the DOE to transfer funds from various budget line items of the grant for the purpose of acquiring the assistance of Cedar Associates.

7. On December 7, 1976, Cedar Associates entered into a contract with the Boston YWCA to perform a "formative and summative evaluation of the Vocational Counseling and Career Development Program." Cedar Associates received DOE grant funds totalling $9,213 for this evaluation, and submitted its final report on May 12, 1977.

8. At the time that the contract between Cedar Associates and the Boston YWCA was executed, and during the period in which the evaluation was performed, Mr. Foster was no longer a member of the Ad Hoc Committee or the University of Massachusetts faculty and was, therefore, a "former state employee" within the meaning of Chapter 268A.

9. There is no evidence that Mr. Foster used his prior state positions to improperly secure this contract, or that at the time he recommended that DOE award the $76,000 grant to the Boston YWCA he intended to seek this contract, or that at the time that Cedar Associates entered this contract with the Boston YWCA he knew that said contract would violate the Conflict-of-Interest Law.

Based on the facts as set out in paragraphs 1-9 above, the Commission has concluded, and the parties agree, that by Cedar Associates entering a contract to perform services under a grant which Mr. Foster reviewed, Mr. Foster violated Section 5(a) of Chapter 268A, which prohibits a former state employee from receiving compensation in relation to any matter in which the Commonwealth has a direct and substantial interest and in which he participated while a state employee.

THEREFORE, 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 representations, terms and conditions hereby made and agreed to by Badi G. Foster:

1. That he is represented by Thomas G. Shapiro, Esq., 33 Broad St., Boston, and has been fully advised as to all matters relating to these proceedings and this Agreement;

2. That he cease and desist from entering into contracts on behalf of Cedar Associates in relation to any grant, contract or other particular matter in which he participated while a state employee;

3. That he pay to the State Ethics Commission the sum of $1,800.00 as recoupment of

the economic benefit directly or indirectly received by him under the contract between Cedar Associates and the Boston YWCA; which payment is to be made in accord with a schedule of payments set out in Appendix A of this Agreement and incorporated herein by reference;

4. That he pay to the State Ethics Commission the sum of $250.00 forthwith as civil penalty for violating Section 5(a) of Chapter 268A; and

5. That he waive all rights to contest the findings of fact, conclusions of law, and the terms and conditions contained in this Agreement, in this or in any related proceeding.

DATE: October 7, 1980

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 124

IN THE MATTER
OF
WILLIAM L. BAGNI, SR.

Appearances:

David Burns, Esquire - Counsel to the Petitioner

Ralph Champa, Esquire - Counsel to the Respondent

Commissioners:

Vorenberg, Ch.; Kristler; Brickman; Bernstein; McLaughlin

DECISION AND ORDER

We find that the Respondent, William L. Bagni, Sr., violated Section 4 and 23 of Chapter 268A and order that he pay civil penalties totalling $2,000 within 30 days of the issuance of this Decision.

I. Procedural History

On February 13, 1980, the State Ethics Commission initiated a Preliminary Inquiry in the matter of William L. Bagni, Sr., in accordance with General Laws Chapter 268B, Section 4(a). On May 13, 1980, the State Ethics Commission found that there was reasonable cause to believe that William L. Bagni, Sr. had violated Sections 4 and 23 of General Laws Chapter 268A and authorized a full investigation into the matter and the initiation of adjudicatory proceedings in accordance with General Laws Chapter 268B, Section 4(c).

On July 11, 1980, the Petitioner filed an Order to Show Cause in accordance with the State Ethics Commission's **Rules of Practice and Procedure,** 930 C.M.R. 1.01(5)(a), alleging that William L. Bagni, Sr. had violated Sections 23(a), (e) and (f) and Sections 4(a) and 4(c) of General Laws Chapter 268A. That Order was subsequently served on the Respondent, William L. Bagni, Sr., in accordance with the State Ethics Commission's **Rules of Practice and Procedure,** 930 C.M.R. 1.01 (4)(f). On July 29, 1980, the Respondent filed his Answer to the Order denying that he had violated Section 23 or Section 4 of Chapter 268A.

An evidentiary hearing was held in this matter on September 29, 1980, before Commissioner David Brickman. See General Laws Chapter 268B, Section 4(c). Each Commissioner received copies of the transcript of the proceeding and of all exhibits. Each of the Commissioners participating in this Decision and Order has heard and/or read the evidence and arguments presented by the parties.[1]/

II. Findings of Fact

1. The Respondent William L. Bagni, Sr. was, at all times relevant to the violations alleged in the Order to Show Cause in this matter, employed by the Massachusetts Department of Public Utilities ("DPU") as an inspector assigned to the Commercial Motor Vehicle Division ("CMVD").

2. The Massachusetts General Laws and regulations promulgated by the DPU require all two truck operators and other common carriers operating in Massachusetts to file written tariff schedules showing their current prices for towing and other related services with the Rates and Research Division of the DPU.

[1]/Oral argument before the full Commission was scheduled for December 16, 1980 but was waived by the parties on December 15, 1980.

3. The principal functions of the CMVD relate to the administration and enforcement of the Massachusetts Motor Carrier Act, General Laws Chapter 159B. That Chapter regulates persons transporting property for compensation by motor vehicles, including tow truck owners and operators, and provides for administrative and criminal sanctions for violation of its provisions.

4. The Respondent's official duties and responsibilities as an inspector assigned to the CMVD include the periodic inspection of records of all tow truck operators and other common carriers for compliance with applicable state laws and regulations, the investigation of all complaints involving said tow truck operators and other common carriers, and the gathering of evidence for administrative and/or criminal prosecution of violations of said laws and regulations.

5. As an inspector assigned to the CMVD, the Respondent had no official duties relating to the preparation or filing of written tariff schedules by tow operators or other common carriers with the Rates and Research Division of the DPU.

6. At the direction of Mr. Richard Connors, the Director of the CMVD, Mr. George E. Williams, the Assistant Director of the CMVD, issued a memorandum dated September 19, 1978 to all CMVD personnel advising that "CMVD personnel shall not act as couriers for carriers" in filing tariffs and other documents with the Rates and Research Division. This memorandum was subsequently incorporated into the rules and procedure of the DPU.

7. George Herbert Simmons, Jr., a Senior Rate Analyst employed in the Rates and Research Division of the DPU, tries to assist carriers with their tariff filings by telling them what format to use. The DPU provides blank forms for tariff filings and maximum rate schedules free of charge to tow operators upon request.

8. On six occasions during the years 1977, 1978, and 1979, the Respondent received from the tow truck operators listed below the sum of $25.[2]/ for preparing or causing to be prepared tariff certificates or tariff certificate supplements:

a. Alexander Despo, d/b/a Massachusetts Custom Coach and Glass Works (Certificate issued July 3, 1979);

b. George A. Veracka, d/b/a Maynard Shell (Certificates issued March 22, 1977 and July 17, 1979 and a supplement issued March 6, 1978);

c. Howard A. Rhone, d/b/a Sunnyside Exxon (Certificate and supplement issued April 3, 1978);

d. Celorier and Elliot, Inc., Wayland Shell Service (Certificate issued February 16, 1978).

9. In five of the six instances listed in paragraph 8, it was the Respondent who suggested that new rates were needed and that the documents be prepared and filed.

10. A tariff certificate typically is a five page document, four pages of which, however, appear to be a pre-prepared standard schedule of rates. The only page that is required to be filled out is the cover page on which (in spaces provided) is typed the name and address of the tow truck operator, a number, a date and an indication of the purpose of the certificate(for example, "Used motor vehicles; within a radius of 10 miles Town Hall, Natick").

11. On at least the following two other occasions, the Respondent prepared and filed Certificates on behalf of tow truck operators but, according to the operators involved, was not compensated for doing so:

a. Cochituate Motors, Inc. (Certificate issued September 14, 1979);

b. Edmond Dionne, d/b/a Ed's Sunoco Station (Certificate issued July 23, 1979).

12. There was also evidence that the Respondent assisted others in the preparation of tariff certificates although it is unclear whether he was compensated for doing so or whether he actually filed the certificates on behalf of the operators. On one occasion the Respondent suggested to an operator that his rates should be adjusted and offered to prepare the certificate for $50; the operator indicated he would do it himself.

13. All the parties named in paragraphs 8 and 11 above were, at the times referred to in those paragraphs, subject to the Respondent's authority as an inspector for the CMVD.

III. Decision

The Respondent has been charged with violating Sections 4(a) and (c) and 23(a), (e), and (f) of General Laws Chapter 268A. We shall address Sections 4 and 23 separately.

[2]/In five of these six instances, the Respondent also received the sum of $3 to cover the fee for filing these documents.

A. Section 4

Chapter 268A, Section 4(a) provides that "[no] state employee shall otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the Commonwealth or a state agency, in relation to any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest."

The parties have stipulated that the Respondent is a "state employee" as that term is defined in Chapter 268A. See General Laws Chapter 268A, Section 1(q). Clearly, the tow truck operators listed in paragraphs 8 and 11 above are not "Commonwealth or a state agency." The parties have stipulated, and we have found (in paragraph 5 above), that, as an inspector assigned to the Commercial Motor Vehicle Division of the Department of Public Utilities, the Respondent had no official duties relating to the preparation or filing of written tariff schedules by tow operators or other common carriers with the Rates and Research Division of the DPU. The parties have also stipulated that the preparation and filing of a common tariff certificate by a tow operator or other regulated carrier with the Rates and Research Division of DPU is a "particular matter" as that term is defined in Chapter 268A (see General Laws Chapter 268A, Section 1(k) to which the Commonwealth is a party within the meaning of Chapter 268A, Sections 4(a) and (c).

"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." See General Laws Chapter 268A, Section 1(a). The $25 the Respondent received on six separate occasions from tow truck operators in return for the preparation of certificates constituted compensation. The evidence warrants a finding that the Respondent sought this money for himself and not for a typist. Such a fee would have been disproportionate to the amount of typing involved. On one occasion the Respondent was seen actually typing a certificate. On another occasion, he sought $50 for what would have been the same amount of typing. Even if the Respondent turned the money over to another individual, it would still constitute "compensation" since, as that term is defined, the money may be "received . . . in return for services . . . to be rendered by . . . another."

Accordingly, we find that on the six occasions set out in paragraph 8 above, the Respondent violated Section 4(a). In those two instances where compensation may not have been received, the Respondent nevertheless violated Section 4(c) of Chapter 268A which prohibits a state employee from acting "as agent . . . for anyone in connection with any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest." In filing tariff certificates with the Rates and Research Division of DPU on behalf of tow truck operators, the respondent acted as their agent. See **Patterson v. Barnes,** 317 Mass. 721, 723 (1945); Restatement (Second) of Agency, §1 (1957).

"[P]ublic officials should not in general be permitted to step out of their official roles to assist private entities or persons in their dealings with government." Perkins, The New Federal Conflict-of-Interest Law, 76 Harv. L. Rev. 1113, 1120 (1963). Section 4 of Chapter 268A:

> says, in effect, that the norm of government employment is that the regular public employee should, in the usual case, be a public employee first, last and only. For him to be a private employee is a contradiction in terms; it suggests that he is serving two masters. The appearance of potential impropriety is raised - influence peddling, favoring his private connections and cheating the government. Whether or not any or all these evils result, confidence in government is undermined because the public cannot be sure that they will not result.

Buss, The Massachusetts Conflict-of-Interest Statute: An Analysis, 45 B.U.L. Rev. 299, 322 (1965).

Whenever state employees receive compensation from private interests or represent them in matters in which the state also has an interest, there is the potential that employees will favor those private interests at the expense of the state. Such favoritism is especially pernicious where the state employee is receiving compensation from a private party which has dealings with, has a matter pending before, or is regulated by the

state employee's own agency or where the employee represents the private party in its dealings with his or her own agency. No state employee could ever in good faith think it appropriate to conduct private business with the very people he is duty bound to regulate.

We hereby order the Respondent to pay within 30 days of the issuance of this Decision civil penalties totalling $2,000, that is, $300 for each of his six violations of Section 4(a) and $100 for each of his two violations of Section 4(c).

B. Section 23

Section 23 of Chapter 268A sets forth six additional prohibitions applicable to all public employees. These provisions are collectively referred to as the "Standards of Conduct." Since they articulate some of the most fundamental principles and prohibitions applicable to public employment, the Standards serve essentially as a general code of ethics which supports and supplements the other provisions of the conflict of interest law. The Standards extend beyond single actions which constitute conflicts and address both courses of conduct raising conflict questions and appearances of conflicts.

Section 23(a) of Chapter 268A prohibits state employees from accepting other employment which will impair their independence of judgment in the exercise of their official duties. Sections 23(e) and (f) prohibit state employees from engaging in conduct which will give reasonable basis for the impression that any person can improperly influence them or unduly enjoy their favor in the performance of official duties or from pursuing courses of conduct which will raise suspicion among the public that they are likely to be engaged in acts that are in violation of their public trust.

The testimony and other evidence contained in the record of this hearing show a repeated pattern of transactions for private gain between the Respondent and several of the tow truck operators which the Respondent regularly inspected in the course of his official duties. The Respondent's conduct is a classic example of precisely the type of dealings between public employees and private businesses which Section 23(a) was intended to prohibit. As shown by the testimony of the Director and Assistant Director of the Commercial Motor Vehicle Division and by the testimony of each tow truck operator, the Respondent had substantial inspection and regulatory authority over those tow truck operators requiring the exercise of his official judgment in a fair and impartial manner. Indeed, it was while he was on the premises conducting an official inspection of their records that the Respondent discussed and entered into these private business arrangements. The fact that the Respondent assisted some of those same tow truck operators in the preparation and filing of their tariff certificates and requested and received private compensation from them for those services would irreparably compromise his impartiality and independence of judgment in his official dealings with those tow truck operators.

The evidence also supports findings that the Respondent violated Section 23(e) and 23(f) by repeatedly soliciting private work from those businesses over whom he has official responsibility. There can be little doubt that such conduct creates an impression in the mind of the public that those private tow truck operators who paid for the services of the Respondent to assist them in the preparation and filing of their tariff certificates, could improperly influence him or unduly enjoy his favor in the conduct of his official inspections of their towing operations. Moreover, the Respondent's repeated solicitations and receipt of private compensation from those tow truck operators over whom he had official inspection and regulatory authority, clearly raises suspicion among the public that he was likely to be engaged in acts in violation of his public trust.

If the Section 23 violations stood alone in this case, we would order the Respondent to pay civil penalties for them. However, since we have already imposed penalties under Section 4 for those same incidents, we will not impose separate penalties under Section 23.

DATE: January 29, 1981

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 139

IN THE MATTER
OF
ANDREW BAYKO

DISPOSITION AGREEMENT

This Agreement is entered into between the State Ethics Commission ("Commission") and Andrew Bayko ("Mr. Bayko") pursuant to Section 11 of the Commission's **Procedures Covering the Initiation and Conduct of Preliminary Inquiries and Investigations.** The parties agree that this Agreement constitutes an assented to final order of the Commission enforceable in the Superior Court of the Commonwealth.

On September 26, 1980, the Commission, pursuant to Section 4(a) of General Laws Chapter 268B, initiated a Preliminary Inquiry into possible violations of the Conflict-of-Interest law, General Laws Chapter 268A, involving Mr. Bayko, the former Wiring Inspector for the Town of Salisbury.

The Commission has concluded its Inquiry into Mr. Bayko's involvement in the matters set forth herein and makes the following findings of fact and conclusions of law to which the parties hereto agree:

1. Mr. Bayko was employed by the Town of Salisbury as its Wiring Inspector, during the period from June, 1973 through September 15, 1980, and as such was a "municipal employee" within the meaning of Section 1(g) of General Laws Chapter 268A.

2. On September 8, 1980, Mr. Bayko submitted his resignation to the Salisbury Board of Selectmen, and the same was accepted effective September 15, 1980. Although Mr. Bayko had attempted to resign his position on two prior occasions, he had been asked by the Selectmen, and he had agreed, to continue in his capacity as Wiring Inspector.

3. Mr. Bayko's official duties as the Town of Salisbury Wiring Inspector included the issuing of wiring permits for electrical work being done in the town, enforcing Section 3L of General Laws Chapter 143 which requires that wiring permits be applied for and obtained for all such electrical work, and inspecting all electrical work performed in the town to insure its compliance with Massachusetts Electrical Code, 527 CMR 12.00.

4. In addition to his official duties as Wiring Inspector, Mr. Bayko has, since approximately 1974, performed private electrical work in the Town of Salsibury through Bayko Electrical Company.

5. Mr. Bayko, during the years he served as the Salisbury Wiring Inspector, did not apply for and obtain electrical permits for the private electrical work that he performed in the Town of Salisbury, as required by General Laws Chapter 143, Section 3L. His appointing authority, the Salisbury Board of Selectmen, was aware that Mr. Bayko was performing private services as an electrician in the Town of Salisbury but was unaware that permits were not being obtained for this work.

6. Mr. Bayko, during the years he served as the Salisbury Wiring Inspector, did not have the work he performed as a private electrician in Salisbury, inspected as required by General Laws, Chapter 143, Section 3L.

7. Mr. Bayko, by his conduct as set out in paragraphs 3-6 above, violated the standards of conduct for municipal employees set out in Sections 23(d) and (e) of General Laws Chapter 268A, which standards prohibit municipal employees and officials from engaging in conduct which creates the impression that they can be unduly affected in the performance of their official duties, and from securing unwarranted privileges or exemptions for themselves or others.

8. Mr. Bayko by his conduct as set out in paragraphs 3-6 above, violated Section 19 of General Laws Chapter 268A, by participating in official matters in which he had a financial interest.

WHEREFORE, 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 representations, terms and conditions hereby made and agreed to by Andrew Bayko:

1. That he is represented by David Hallinan, Esquire, One Church St., Salem, MA, 01970, and has been fully advised as to all matters relating to these proceedings and this Agreement;

2. That he will in the future cease and desist from participating in his official capacity in matters in which he has a financial interest;

3. That he pay forthwith to the Commission a civil penalty which, in view of other sanctions imposed on Mr. Bayko by the Board of Examiners of Electricians, the Commission has set at $250; and

4. That he waive all rights to contest the findings of fact, conclusion of law, and terms and conditions contained in this Agreement, in this or any related administrative or judicial proceedings.

DATE: February 9, 1981

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss: Commission Adjudicatory Docket No. 140

IN THE MATTER
OF
THE COLLECTOR-TREASURER'S OFFICE
OF THE CITY OF BOSTON, ET AL.

DISPOSITION AGREEMENT

This agreement is entered into between the State Ethics Commission ("Commission"), and the following officials and employees of the City of Boston ("the City"): Newell Cook ("Mr. Cook"), the former Collector-Treasurer and current Auditor of the City, Dora Fredman ("Mrs. Fredman"), a clerk in the Collector-Treasurer's Office, Lowell Richards ("Mr. Richards"), the Collector-Treasurer of the City, and Kenneth Glidden ("Mr. Glidden"), the First Assistant Collector-Treasurer of the City, pursuant to Section 11 of the Commission's **Procedures Covering the Initiation and Conduct of Preliminary Inquiries and Investigations.** The parties agree that upon its execution, this Agreement shall constitute a final order of the Commission, enforceable in the Superior Court of the Commonwealth.

On December 1, 1980, the Commission initiated a Preliminary Inquiry, pursuant to Section 4 of General Laws Chapter 268B, into alleged violations of the Conflict-of-Interest Law, General Laws Chapter 268A ("Chapter 268A"), by certain officials and employees of the Collector-Treasurer's Office of the City of Boston ("Treasurer's Office"). Specifically, the Preliminary Inquiry was initiated after the Commission received a complaint alleging that a part-time clerk employed by the Treasurer's Office to process municipal lien certificates, was receiving private fees to expedite the issuance of said certificates; that the only way to obtain a certificate within the statutorily required time period was to pay a private expediting fee; and that these private fees had been charged and collected for several years with the knowledge and approval of the officials responsible for the operations of the Treasurer's Office, and with the full cooperation and participation of the majority of attorneys who convey real property in the City of Boston.

The Commission has concluded its Inquiry into these allegations, and makes the following findings of fact and conclusions of law to which the parties hereto agree:

1. A municipal lien certificate ("certificate") is a document furnished by the collector of taxes for all cities or towns of 5,000 residents or more which indicates all taxes and other assessments, which constitute liens on a particular piece of property. Almost every transfer of real property entails the issuance of a certificate.

2. Pursuant to G.L. c. 60, Section 23, certificates are to be furnished by the collector of taxes within five business days of application. The fee schedule, set by statute, and in Boston by ordinance as well, begins at $10 per certificate for vacant land and land housing single-family structures, and graduates to $100 for commercial properties.

3. The issuance of certificates in Boston is handled by the Collecting Division of the Treasurer's Office. Prior to July of 1977, the entire operation (receipt of applications and processing of certificates) was handled by two full-time clerks. Approximately three years ago, one of the clerks, Dora Fredman, retired at age 70 leaving only one clerk to handle the work, with the occasional aid of other clerks in the Division. Requests for certificates have frequently been backlogged because of staff shortages.

4. The Collecting Division issues approximately 6,000 certificates each year. Of the certificates issued during the period from June 1979 -

September 1980, (the only period for which precise dates were available), approximately 40% were furnished within the 5 business day period as required by statute. Most of the other certificates were issued within a period of from two to four weeks after application.

5. A sampling of thirteen of the many law firms which regularly received the certificates which they requested within the 5 day statutory period, revealed that all thirteen firms paid private "expediting fees" to Mrs. Fredman for prompt processing of their certificates. The amount of the individual fee paid varied between five and ten dollars per certificate.

6. Prior to paying these expediting fees to Mrs. Fredman, several of these firms had regularly paid a similar fee to another employee of the Treasurer's Office who subsequently retired and is now deceased.

7. All thirteen firms contacted were of the understanding that Mrs. Fredman was a part-time or retired city employee who was authorized to collect these private fees. Few, if any, of the firms pursued their inquiry into the legality of this arrangement beyond asking Mrs. Fredman if the private fees were authorized. However, if they had inquired of anyone in authority in the Treasurer's Office, they would have been advised that she had been authorized by officials in the Treasurer's Office to collect private expediting fees.

8. The issuance of a certificate involves the accumulation of tax-related information from three city departments: the Treasurer's Office, the Building Department, and the Public Improvements Commission. Once gathered, this information, is recorded on a certificate by the clerks in the Collecting Division of the Treasurer's Office. The actual collection of the tax data in each department takes only a matter of minutes, however, the issuance of a certificate when processed through normal channels, can take several days or even weeks depending on the characteristics and history of the parcel of property for which the certificate has been requested and the length of delays in circulating the application from department to department. When a certificate is "expedited," it is processed out of order and the information necessary to its completion is personally gathered from the other departments by the clerk doing the expediting. It is possible to expedite up to twenty (20) certificates in a single day if those certificates do not present any unusual problems.

9. Although difficult to determine with precision the exact amount of the expediting fees paid to Mrs. Fredman in the 1978-1980 period, the Commission finds that said payments totalled approximately $10,000.

HISTORY

10. Subsequent to Mrs. Fredman's retirement in June of 1977, she approached James Young, then Deputy Mayor for Fiscal Affairs, and Newell Cook, then First Assistant Collector-Treasurer and asked if it would be possible for her to return to work in the Collecting Division to process municipal lien certificates on a part-time, contractual basis. Because Mrs. Fredman had been an extremely effective employee, who knew all of the quirks in the system, Mr. Young hired her back on contract at terms which would be consistent with the requirements of her retirement.

11. Mrs. Fredman's first contract ran from February 21, 1978 through June 30, 1978 for an amount which was not to exceed $4,000. Her second contract, again for $4,000, ran from February 26, 1979 through June 30, 1979. Her third contract was increased to a maximum of $10,000 and became effective on July 7, 1980. Pursuant to these contracts she was paid $2,280 in 1978, $2,742 in 1979, and $5,000 in 1980. She also worked from time to time in the Treasurer's Office, in an uncompensated capacity, during periods when she was not under the terms of these contracts and after being permitted to do so as set out in paragraphs 13 and 14 below.

12. None of the aforementioned contracts between Mrs. Fredman and the City authorized her to collect private fees for her services in addition to the compensation paid by the City. Each of the contracts specifically stated that she "shall be considered an employee for the purposes of G.L. c. 268A (the Conflict-of-Interest Law)", and directed her attention to the prohibitions of that law.

13. Mrs. Fredman approached Newell Cook in 1978 during the term of her first contract to ask if she could accept private fees from a limited number of attorneys who she knew and who needed expedient certificate delivery. Mr. Cook authorized her to collect these private expediting fees for work she performed on her own time. Mr. Cook authorized this arrangement because Mrs. Fredman was on a contract and

not in his view a "city employee", and because he felt that this arrangement would be advantageous to the City by helping to clear up the backlog of certificates at no additional cost to the City. When her first contract expired in June 1978, she continued to work in the Collecting Division on a part-time unpaid basis to service her private customers for private fees.

14. Mrs. Fredman's 1979 and 1980 contracts were approved by then Collector-Treasurer Mr. Richards. During the terms of those contracts, Mrs. Fredman sought and received authorization from Mr. Richards, and from First Assistant Treasurer Mr. Glidden to continue to use the facilities of the Treasurer's Office to expedite certificates for private fees on her own time. Both Mr. Richards and Mr. Glidden authorized this arrangement because it appeared to be advantageous to the City in that this expediting service would not cost the City any money and would help alleviate the backlog of certificate requests, and because it was their understanding that the acceptance of expediting fees was a long-standing practice in the Treasurer's Office.

15. Messrs. Cook, Richards and Glidden authorized Mrs. Fredman to collect these private fees, as noted in paragraphs 13 and 14 above, without checking with or advising Corporation Counsel, and will full knowledge of the statutory responsibility of the City to issue certificates within five days of application without the payment of an expediting fee for that service.

16. Although Messrs. Cook, Richards and Glidden authorized Mrs. Fredman to collect these private fees, the full extent of her expediting business was not known to them. Mrs. Fredman's private clientele grew from the limited number of attorneys whom she had known from the past and for whome she was authorized to expedite certificates, to a large number of attorneys who regularly conveyed real property in the City of Boston. She collected expediting fees throughout 1978, 1979, and 1980: both during the periods when she was under contract with the City, and also during those perios when she was not under cotract but was permitted to conduct her private business out of the Treasurer's Office. However, during those periods when she was not under contract with the City, Mrs. Fredman also performed numerous official tasks for and at the direction of the Treasurer's Office, for which she received no compensation.

17. In addition to authorizing Mrs. Fredman to continue to collect expediting fees, and for the purpose of establishing an orderly system for giving priority to the issuance of those certificates that were needed right away, Messrs. Richards and Glidden set up a parallel expediting system to be run by the City. Starting in January 1980, applicants for municipal lien certificates could pay an additional fee of $10, by certified check made payable to the City, if they wished to be certain of getting their certificate within the five-day statutory period. This "official" expediting fee was never adopted by ordinance and existed in addition to Mrs. Fredman's private expediting business.

18. The practice of collecting expediting fees, both private and public, was brought to a stop by the City on October 16, 1980, after being advised by the Commission that the practice raised substantial questions under Chapter 268A.

CONCLUSIONS

19. The practice of City employees expediting the issuance of municipal lien certificates for an additional private fee has existed in the office of the Treasurer of the City of Boston for many years, predating the employment by the City of the aforementioned employees and officials, and has been explicitly and implicitly approved by the Corporate City through and by its officers and employees. During the years 1978-1980, which were subject to the Commission's Inquiry, it was unlikely that a citizen applying for a municipal lien certificate from the City could obtain that certificate within the 5 day statutory period without paying a private expediting fee for that service.

20. The receipt by city employees, part-time or otherwise, of private fees to expedite official actions violates Sections 3 and 17 of the Conflict-of-Interest Law, Chapter 268A, because those fees are paid to city employees for or because of official acts, and are paid in relation to matters in which the City is a party and has a substantial interest. The knowledge of those officials responsible for the actions of the Treasurer's Office, and their approval of the receipt of these private expediting fees, in no way exempts those actions from the prohibitions of the law.

21. The authorization of this improper practice by the City and its officials, while not motivated by considerations of personal gain, nevertheless, tended to undermine public confidence in government, in that it created the impression that official acts could be unduly influenced by those willing to pay private fees to City employees for those acts, and that employees of the Treasurer's Office were acting in violation of their public trust, in violation of the standards of conduct for municipal employees as set out in Section 23(f) of Chapter 268A.

WHEREFORE, the Commission has determined that the public interest would be served by the disposition of this matter without further proceedings on the basis of the following representations, terms and conditions hereby made and agreed to by the parties:

A. The City officials and employees who are parties hereto will forthwith take such steps as are required, including the issuance of appropriate executive orders, to insure that

1. The practice of accepting private expediting fees by employees of the Treasurer's Office will not be resumed;

2. All employees in the Treasurer's office are advised that the receipt of private fees for public services is prohibited by the Conflict-of-Interest Law, Chapter 268A, unless said receipt is specifically authorized by law.

B. The City officials and employees who are parties hereto will report to the Commission, within 30 days of the execution of this Agreement, what steps they have taken to implement the terms set out in paragraph A, above.

DATE: February 27, 1981

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss Commission Adjudicatory
Docket No. 128

IN THE MATTER
OF
ALLISON GOODSELL

Appearances:
John H. Cunha, Jr., Esq.; Counsel for the Petitioner
No appearance on behalf of Respondent

Commissioners:
Vorenberg, Chairman; Brickman; Bernstein; Kistler; McLaughlin

DECISION AND ORDER

I. Procedural History

On August 20, 1980, the Petitioner filed an Order to Show Cause alleging that the Respondent, Allison Goodsell, violated §5(g) of the Financial Disclosure Law, General Laws Chapter 268B, by failing to file a Statement of Financial Interests for 1979 (1979 SFI). On November 14, 1980, the Sheriff of Washington County, Rhode Island, served the Order to Show Cause in hand to Respondent. The Respondent failed to file an Answer. On December 16, 1980, the Petitioner moved for a Summary Decision pursuant to 930 CMR 1.01 (6)(f)(2).[1]/ On January 7, 1981, the Petitioner submitted affidavits of staff members

[1]/930 CMR 1.01 (6)(f)(2) provides as follows:

When the record discloses the failure of the Respondent to file documents required by these Rules, to respond to notices or correspondence, or to comply with the orders of the Commission or Presiding Officer, or otherwise indicates a substantial failure to cooperate with the Adjudicatory Proceeding, the Presiding Officer may issue an order requiring that the Respondent show cause why a summary decision should not be entered against him. If the Respondent fails to show such cause, a summary decision may be entered in favor of the Petitioner. Any such summary decision shall be granted only by the Commission, shall be a Final Decision, and shall be made in writing as provided in Section 9(m) of these Rules.

of the State Ethics Commission (the Commission) stating they had been informed telephonically by the Respondent's attorney, Bruce Goodsell, that the Respondent had no intention of filing her 1979 SFI because inter alia, she was beyond the jurisdiction of the Commission. Presiding Commissioner Bernstein[2]/ ordered the Petitioner to file a brief setting forth the Petitioner's argument that the Respondent is subject to the personal jurisdiction of the Commission. Upon the timely filing of Petitioner's brief, Commissioner Bernstein, on March 6, 1981, ordered the Respondent to show cause why summary judgment should not be entered against her for failure to file an Answer and to submit, as of March 24, 1981, a reply brief on the issue of personal jurisdiction. He scheduled a hearing on the Petitioner's Motion for Summary Decision on March 30, 1981. Pursuant to notice, the full Commission attended the hearing; the Petitioner argued but the Respondent made no appearance. The Commission deliberated and ruled on the Petitioner's Motion in plenary session pursuant to 930 CMR 1.01 (6)(f)(2).[3]/

II. Findings of Fact

1. The Respondent was designated a "public employee" within the meaning of Chapter 268B Section 1(o) and worked for more than eight (8) days as a public employee in 1979.

2. The Respondent failed to file her 1979 SFI on or before May 1, 1980.

3. The Respondent failed to file her 1979 SFI after receiving notice of her delinquency.

DECISION

Jurisdiction

The Respondent's residence in Rhode Island did not preclude the Commission from obtaining personal jurisdiction over her in this adjudicatory proceeding. Personal and subject matter jurisdiction are conferred by General Laws Chapter 268B, Section 5(c).[4]/

Violation

It is clear from the procedural history of this case that the Respondent has had ample opportunity to participate in this proceeding. No appearance, however, either special or general, has been made on her behalf. We are compelled, therefore, to find that Allison Goodsell violated Section 5(g) of General Laws Chapter 268B by failing to file a 1979 SFI.

Penalty

In previous Final Decisions, the Commission chose not to impose the maximum civil penalty for failure of a Respondent to file a Statement of Financial Interests.[5]/ This case is distinguishable from those because, unlike Respondents Buckley and Almeida, Allison Goodsell refused to respond in any way to this action. At a minimum, she could have made a special appearance to challenge the Commission's personal jurisdiction, but chose instead to ignore these proceedings. In so doing, she demonstrated a lack of good faith in this matter.

ORDER

The Petitioner's Motion for a Summary Decision is granted. Accordingly, the Respondent Allison Goodsell is ordered to:

1. File a Statement of Financial Interests for 1979 within seven (7) days of receipt of this opinion; and

2. Pay a civil penalty of $1,000 (one thousand dollars) to the Commission within thirty (30) days of receipt of this opinion.

DATE: April 22, 1981

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[2]/Single members of the Commission may preside over adjudicatory proceedings. See 930 CMR 1.01 (1)(c)(8) which defines "Presiding Officer" as "The individual . . . duly designated by the Commission to conduct adjudicatory proceedings". See also In the Matter of James J. Craven, Jr., Commission Adjudicatory Docket No. 110, Decision and Order, p. 13 (June 18, 1980).

[3]/930 CMR 1.01 (6)(f)(2) provides in pertinent part that "summary decision shall be granted only by the Commission".

[4]/G.L. c. 268B, §5(c) provides as follows:

Every public employee shall file a statement of financial interests for the preceding calendar year with the Commission within ten days after becoming a public employee, on or before May first of the year after such person ceases to be a public employee; provided, however, that no public employee shall be required to file a statement of financial interests for any year in which he was a public employee for less than eight days.

We find no provisions within G.L. c. 268B which condition these filing requirements on the choice of residence of the public employee.

[5]/The maximum civil penalty is established in G.L. c. 268B, §4(d)(3) which provides that "the Commission, upon a finding . . . that there has been a violation of c. 268A or [c. 268B] may issue an order requiring the violator to . . . (3) pay a civil penalty of not more than $1,000 for each violation. . ." As to the imposition of penalties for violations of Section 5(g) of G.L. c. 268B, see In the Matter of John R. Buckley, Commission Adjudicatory Docket No. 108 Decision and Order, pp. 26-27 (May 7, 1980) and In the Matter of Victor Almeida, Commission Adjudicatory Docket No. 104, Decision and Order, p. 8 (July 10, 1980).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 131

IN THE MATTER
OF
LOUIS L. LOGAN

Appearances:

David J. Burns, Esq; Counsel for the Petitioner, State Ethics Commission

David A. Mills, Esq: Counsel for the Respondent, Louis L. Logan

Commissioners:

Vorenberg, Ch.; Kistler, Brickman, Bernstein, McLaughlin

DECISION AND ORDER

I. Procedural History

The Petitioner filed an Order to Show Cause on September 26, 1980 alleging that the Respondent, Louis L. Logan, had violated Sections 3(b), and 4(a) and 6 of Chapter 268A, the Conflict of Interest Law and Section 7 of Chapter 268B, the financial disclosure law. The Petitioner subsequently amended the Order on November 5, 1980 to allege that Logan had also violated Sections 23(a), 23(e) and 23(f) of Chapter 268A. The Respondent filed a timely Answer and Supplemental Statement of Material Facts which denied any violation of the aforementioned provisions.

Pursuant to notice, evidentiary hearings were conducted on January 13, 14 and 28, 1981 and February 4 and 6, 1981 before Commission Vice-Chairman, Linda H. Kistler, a duly designated presiding officer. See M.G.L. c. 268B, §4(c). The parties thereafter filed post-hearing briefs on March 27, 1981 and argued orally before the full Commission on March 30, 1981. In rendering this decision and order, each member of the Commission has heard and/or read the evidence and arguments presented by the parties.

II. Findings of Fact

1. Louis L. Logan is a certified public accountant. During the period of December, 1976 to April, 1980, Mr. Logan was employed by the Massachusetts Science and Technology Foundation (Foundation) and its successor, Massachusetts Technology Development Corporation (Mass. Teck) and provided financial management and technical assistance to private companies in Massachusetts.

2. The Foundation was an entity created by the General Court in 1969 to encourage, promote and assist scientific and technological development in the Commonwealth. St. 1969, c. 843, §§1 et seq. Foundation employees and consultants provided a broad range of free technological and financial assistance to small and emerging technology-based businesses.

3. Section 10 of the Foundation's enabling legislation (St. 1969, c. 843) established the following limitations on Foundation offices and employees:

> No officer or employee of the Foundation shall be in the employ of or be in any way, directly or indirectly, financially interested in any person, partnership, corporation or association having any business or financial transactions with the Foundation. No member shall act as a member of the governing board, or vote as such, in connection with any matter in which to his knowledge, he, his immediate family, or any organization which he is serving as a director, officer, trustee, partner or employee, has a financial interest; and any member, immediately upon learning that any such matter is being considered or proposed by the board, shall fully disclose to the board the nature of his interest therein.

As a Foundation employee, Logan was aware that he was prohibited from accepting compensation from companies which dealt with the Foundation.

4. The Foundation received an annual appropriation from the General Court ranging from $50,000 to $280,000. The Foundation was subject to an annual audit by the state auditor and used stationery and forms bearing the seal of the Commonwealth. Foundation employees were not eligible for membership in the state employee retirement system or group insurance plan. Additionally, the Foundation was represented by private firms for legal and financial matters. Foundation officials regarded the Foundation as a quasi-public organization.

5. The General Court enacted legislation in 1978 which abolished the Foundation and replaced it with Mass. Teck. St. 1978, c. 497, §§1 et seq. Mass. Teck continued the Foundation's management assistance functions and was additionally authorized to lend nearly one million dollars to technologically oriented businesses. Mass. Teck delegated the investment decision-making to an Investment Advisory Committee (IAC) comprised of Mass. Teck governing board members who met periodically in 1979 and 1980 to review and discuss investment applications with the Mass. Teck staff.

6. Section 2 of the enabling statute of Mass. Teck, G.L. c. 40G, establishes, in part, the following limitations on Mass. Teck directors, officers and employees:

> The provisions of Chapter two hundred and sixty-eight A shall apply to all directors, officers and employees of the MTDC, except that the corporation may invest in, purchase from, sell to, borrow from, loan to, contract with or otherwise deal with any person or entity in which any director of the corporation is in any way interested or involved, provided that such interest or involvement is disclosed in advance to the members of the board and recorded in the minutes of the board and provided, further that no director having such an interest or involvement may participate in any decision of the board relating to such person or entity.

7. During the period of December 2, 1976 to September 26, 1977, Mr. Logan was employed as a consultant to the Foundation. With few exceptions, Mr. Logan worked on a full-time five-day work week basis at a daily compensation rate of one hundred dollars.

8. Mr. Logan assumed full-time employee status with the Foundation on September 26, 1977 until October, 1978.

9. Mr. Logan continued as a full-time employee when Mass. Teck succeeded the Foundation in October, 1978 and remained at Mass. Teck until April 25, 1980. His annual salary level at Mass. Teck in 1979 was approximately $28,000.[1]/

10. As an employee of the Foundation and Mass. Teck and as part of his official duties, Mr. Logan provided expert management and financial analysis assistance to several technologically-based Massachusetts businesses. These services included the preparation of financial projections and assisting businesses in preparing and pursuing loan applications with private and public financial sources. Mr. Logan received assignments from his supervisor, Paul Kelley, and also worked directly with John Silvers and Irving Sacks. Dr. Silvers was the Director of the Foundation until May, 1977. Mr. Sacks served as the Director of the Foundation and later President of Mass. Teck until April, 1980. Mr. Logan additionally made presentations directly to Mass. Teck governing board members during IAC meetings in 1979 and 1980.

11. New England Ocean Services, Inc. (NEOS) had developed and was attempting to market micro-computer-based meters for underwater use by divers in recreational, military and commercial activities. During the period of 1977 to 1980, NEOS sought and received considerable assistance from both the Foundation and Mass. Teck. Mr. Logan was the principal staff member to NEOS and serviced NEOS for approximately two hundred hours during this period. His financial management responsibilities included assisting NEOS in the preparation and pursuit of SBA loan applications. In particular, Mr. Logan successfully assisted NEOS in receiving an SBA—backed $220,000 loan from the Shawmut Bank in May, 1979.

12. The Compactor Corporation (Compactor) is a Chicopee-based company which produces household garbage compactors. When Compactor was referred to the Foundation in 1976 or 1977, Mr. Logan became the principal Foundation staff member for Compactor. Mr. Logan's assistance to Compactor began in 1977 and continued through the summer of 1979 while at Mass. Teck. His services included providing advice to Compactor in seeking Small Business Administration (SBA)-backed loans, and in preparing balance sheets and financial projections.

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[1]/The record is not precise on this point. Although Esther Larson, a Mass. Teck bookkeeper, testified that she believed Mr. Logan's 1979 salary to be $29,700, Mr. Logan's 1979 Statement of Financial Interests states that he received $27,555 in income from Mass. Teck in 1979. Accepting either version, it is clear that Mr. Logan's salary level as of January 1, 1979 exceeded $21,162 which represents the salary for state employees classified in Step One of Job Group XXV of the general salary schedule. See G.L. c. 268B, §1(i).

13. During an unspecified period in 1977 prior to September, Mr. Logan prepared Compactor's Massachsuetts Corporation Excise Tax Return and United States Corporation Income Tax Return for the taxable year ending October 31, 1976. Mr. Logan performed the work on several weekends at Compactor's office in Chicopee. Mr. Logan did not immediately submit the returns to Compactor. On June 12, 1978, Mr. Logan forwarded duplicates of the Massachusetts and United States tax returns to Compactor together with signing and mailing instructions which directed Compactor to pay $254 to the Commonwealth of Massachusetts.

14. Within one week after receiving the Massachusetts and United States tax returns from Mr. Logan, Compactor mailed to Mr. Logan a check for $600 as compensation for Mr. Logan's preparation of the tax returns. Mr. Logan received and endorsed the check shortly thereafter. During this period, Mr. Logan was a full-time employee of the Foundation.

15. While employed as a Foundation consultant in 1977, Mr. Logan prepared documentation for NEOS which included financial projections and financial statements to accompany a NEOS SBA-backed loan application. On September 20, 1977, Mr. Logan submitted a bill to NEOS for $1,192 which included $980 for his professional services in preparing the aforementioned documentation and $212 in expenses. Mr. Logan wrote the following message on the bottom of the invoice to NEOS:

> Mike: Next Monday, I become a full-time employee of the Foundation. Therefore, I can no longer be your accountant. I'll work with my replacement to insure a smooth transition.
>
> I know that you folks are broke. Whenever you have some excess cash, I'd appreciate a little on account.

NEOS paid Mr. Logan $1,192 in two installments in 1978. On March 30, 1978 and November 11, 1978, NEOS wrote two checks to Mr. Logan for $502 and $690, respectively. Mr. Logan received the checks in 1978 and endorsed them.

16. In January, 1978, NEOS invited a small group of outside experts in the areas of finance, insurance and engineering, including Mr. Logan, to serve on the NEOS Board of Advisors. Following a discussion with his supervisor, Paul Kelley, over the propriety of joining this group, Mr. Logan accepted the invitation. Mr. Logan forwarded to Mr. Kelley a copy of his January 27, 1978 acceptance letter in which he stated that as a Foundation employee he was constrained not to accept stipends, gratuities or compensation in any form from any Foundation clients for any services which he rendered. Mr. Logan attended a NEOS Board of Advisors meeting in early 1978 and received and endorsed a $25 check from NEOS in April, 1978 as a fee for his advisory services.

17. On at least four occasions in 1978, Mr. Logan received checks from NEOS which he characterized as loan reimbursements or reimbursements for the use of his credit card which he had lent to NEOS officers. The checks were for $512.50, $502.75, $1,000 and $200.[2]/

18. On March 14, 1978, Mr. Logan was elected to the NEOS Board of Directors as one of its three directors.[3]/ Mr. Logan diligently pursued his duties as director until his resignation on December 28, 1979. In particular, Mr. Logan signed a resolution as a NEOS director on January 12, 1979 authorizing either of the NEOS officers, including himself, to execute a loan application to the Shawmut Bank for up to $250,000. Shawmut subsequently approved a

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[2]/The purpose of a fifth check for $300 which Mr. Logan received in 1978 is questionable. Michael Dembowski, the President of NEOS, originally testified that the check was for private accounting services which Logan had rendered but later changed his testimony to say that the check was for a flight or loan. Mr. Dembowski conceded, however, that he was uncertain and was speculating. Mr. Logan could not recall the purpose of the check, which was written to him on the same date on which NEOS wrote a $690 check to Mr. Logan in partial payment for his prior financial services.

The Petitioner should have removed the uncertainty of purpose for this check by subpoenaing NEOS' financial records which would presumably have indicated how NEOS characterized the check for its accounting purposes. Although there are inferences suggesting that the check was intended as compensation to Mr. Logan, the inference are not persuasive, and we note that the Petitioner has chosen not to address or pursue this point.

[3]/Although Mr. Logan claims that his employers knew about and approved his serving on the NEOS Board of Directors during this period, the record does not furnish corroborating evidence that any Mass. Teck or Foundation officials knew about the directorship prior to December, 1979. Mr. Sacks denies such knowledge until December, 1979; Mr. Kelley had no clear recollection of a discussion with Logan over a NEOS directorship and could confirm only a discussion with Mr. Logan over joining the NEOS Board of Advisors; Robert Crowley, a Mass. Teck employee testified that he did not know about Logan's directorship with NEOS until an IAC meeting in 1980. It is also notable that Mr. Logan never formaly notified the Foundation of his acceptance of the NEOS directorship; two months earlier, Mr. Logan had sent to Mr. Kelley a copy of his acceptance of the NEOS Advisory Board offer.

$220,000 SBA-backed loan to NEOS in May, 1979.

19. Mr. Logan was elected as NEOS Vice-President in June, 1979[4]/ and resigned from this office on December 28, 1979.

20. On several occasions in 1978 and 1979, NEOS attempted to hire Mr. Logan as a full-time officer. In early or mid-1978, Mr. Logan rejected a NEOS offer to serve as its Treasurer at an annual salary of $35,000. Mr. Dembowski frequently invited Logan to join NEOS as an officer and informed Shawmut Bank officials on two occasions about his interest in Logan. In September, 1979, both Mr. Dembowski and NEOS Treasurer and Director, John Conway, expressed to Mr. Logan their interest in his becoming President of NEOS, although Mr. Logan did not regard these discussions as formal job offers.

21. In June or July, 1979, Mr. Logan prepared financial projections for NEOS which he understood were to be submitted with a NEOS SBA loan application. In September, 1979, Mr. Logan received and endorsed a check from NEOS for $300 for his preparation of the financial projections.

22. On three separate occasions in 1979, Mr. Logan received and endorsed checks from NEOS, which he had characterized as reimbursements, for loans to officers who had used Mr. Logan's personal credit card. The first two checks for $450 and $483.35 were reimbursements for out-of-state trips by NEOS officers.[5]/ The third check for $67.20 was a reimbursement for dinner. On each occasion, Mr. Logan allowed NEOS officers to use his personal credit card to cover NEOS' expenses.

23. By the end of 1979, NEOS owed money to Logan for loans which he had advanced through the use of his personal credit card, including $570 for a business trip in December, 1979. Mr. Logan testified that NEOS continued to owe him money through 1980.

24. By the latter part of 1979, NEOS needed additional capital. During the fall of 1979, Mr. Dembowski and Mr. Sacks discussed the availability of loans from Mass. Teck, and NEOS thereafter notified Mass. Teck that it wished to become a loan candidate. NEOS filed a formal loan application for $200,000 with Mass. Teck on January 15, 1980, although Mass. Teck was aware of NEOS' application in December, 1979 and had commenced its investigation of the anticipated application well before the actual filing date.

25. Mass. Teck scheduled an initial IAC meeting for January 23, 1980 to consider the NEOS loan application. Prior to this meeting, Mr. Logan played a primary role in the Mass. Teck staff review of the loan application. Mr. Logan prepared the necessary staff work including documentation and analysis and rewrote the NEOS financial projections. Mr. Logan also prepared, with another Mass. Teck staff member, a flip chart as a visual aid for the January 23, 1980 IAC meeting. Mr. Logan evaluated the NEOS loan application for Mr. Sacks and determined that NEOS was qualified as a Mass. Teck loan candidate. Mr. Sacks thereafter recommended presentation of the NEOS loan application to the IAC on the basis of Mr. Logan's recommendation.

26. Mr. Logan attended the January 23, 1980 IAC meeting and made a three to five-minute staff presentation regarding the NEOS application. Mr. Logan utilized the flip chart showing his projections for NEOS and outlined the background of the company and how much it was seeking. Mr. Logan also displayed a sample of NEOS' technology. Although Mr. Logan did not state that he was recommending approval of the loan, both Mr. Sacks and Mr. Kelley believed that the recommendation of a Mass. Teck staff member was implicit in an appearance before and presentation to the IAC. Following Mr. Logan's presentation, the IAC decided to invite the officers of NEOS to appear before the IAC.

27. Mr. Logan and the NEOS principals attended the second IAC meeting on February 13, 1980. Mr. Logan introduced the NEOS principals to the IAC and sat down. Although

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[4]/There is persuasive evidence which supports this point. Mr. Logan, through his attorney, admitted in his Answer to the Petitioner's Order to Show Cause that he had been elected on June 25, 1979 as NEOS' Vice-President. Not only do NEOS' corporate records verify Mr. Logan's election and service as a NEOS Vice-President, but also Mr. Logan's December 28, 1979 letter to NEOS states that he is resigning as an officer and director; Mr. Logan testified that only the positions of President, Vice-President, Treasurer and Clerk could be characterized as NEOS corporate officers. Even assuming that Mr. Logan was not active in the Vice-Presidency and that the NEOS corporate records were not accurate in all respects, we cannot adopt Mr. Logan's assertion that he did not serve as the NEOS Vice-President in 1979.

[5]/Contrary to the allegation in the Petitioner's Order to Show Cause, there is no evidence that Mr. Logan actually participated in these trips. The extent of Mr. Logan's participation, however, is immaterial to whether he received reimbursements.

Mr. Logan did not play an active role at this meeting, he may have answered a question posed by an IAC member regarding NEOS. Following the meeting, the IAC expressed skepticism over NEOS' financial outlook and assigned Mass. Teck staff member Robert Crowley to investigate the matter.

28. During the three-week period following the February 13, 1980 IAC meeting, Mr. Logan met with NEOS officials on four occasions and discussed the Mass. Teck loan application.[6]/ Additionally, Mr. Logan attended a meeting in Waltham on March 17, 1980 where the participants discussed ways of raising money for NEOS. Mr. Logan's activity sheets which he prepared for Mass. Teck payroll purposes reveal references to NEOS on one dozen occasions during this period.

29. During a NEOS Board of Directors meeting in January, 1980,[7]/ Mr. Conway requested that the Board replace Dembowski as President. During the discussion, Mr. Logan's name was raised as a replacement. Mr. Logan responded, "Let's think about it and take it from there."

30. On the basis of this discussion, Mr. Conway drafted a new version of the NEOS business plan in January, 1980 which contained biographical information about Mr. Logan and which stated that Mr. Logan was a candidate for President of NEOS. Mr. Conway testified that he notified neither Mr. Logan nor Mr. Dembowski of his changes to the NEOS business plan. Mr. Conway distributed several copies of the business plan containing Mr. Logan's name to the investment community during the period of January to March, 1980.[8]/

31. Mr. Logan may have been unaware until March, 1980 that a NEOS business plan was in circulation containing his resume and indicating his candidacy for NEOS President.[9]/

32. When Mr. Sacks became aware of the NEOS business plan in mid-March, 1980, he met with NEOS and Mass. Teck officials, including Mr. Logan, and announced that NEOS would not receive a loan from Mass. Teck. When the issue of the appearance of Mr. Logan's name on a NEOS business plan was discussed, Mr. Dembowski denied that Mr. Logan was to become the President of NEOS.

33. In February, 1979, the Executive Office of Economic Affairs notified the Commission that certain employees appointed to positions within the secretariat, including Mr. Logan, Mr. Sacks and Mr. Kelley, were required to file annual financial disclosure statements.

34. In April, 1979, the Commission mailed to Mr. Logan a financial disclosure form for 1978 together with instructions for filing. Mr. Logan received the form and instructions on April 12, 1979 at the office of Mass. Teck. Mr. Logan read the instructions for ten to fifteen minutes and discussed with Mr. Kelley whether they should file the form. Following this discussion, Mr. Logan quickly filled out the form. Mr. Logan testified that he filled out the form "hastily" and "gratuitously" to get the matter out of the way before the form became lost. Mr. Logan directed Esther Larson to type a copy of his handwritten form. Mr. Logan signed the form on April 12, 1979 and mailed it to the Commission. Mr. Logan did not allege to the Commission at the time of his 1978 or 1979 filings that he had been improperly designated as a reporting employee.

35. Mr. Logan did not disclose in either his original April, 1979 filing or in his amended filing in July, 1979 that he was a Director of NEOS in 1978, that he was employed by NEOS and Compactor in 1978, or, alternatively, that he was engaged in the private practice of accounting in 1978. Further, Mr. Logan failed to list the income which he derived from businesses such as NEOS with which he was associated, including the private practice of accounting.[10]/

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[6]/Robert Henderson, a Shawmut Bank official testified that Mr. Logan informed him at one such meeting in late February, 1980 that he was going to join NEOS as a financial Vice President. In view of Mr. Logan's denial of this statement as well as our uncertainty with Mr. Henderson's testimony, we are unpersuaded by Mr. Henderson's testimony on this point.

[7]/Mr. Conway was not certain about this date.

[8]/Although Mr. Dembowski testified that the business plan containing Mr. Logan's name may have been in circulation as early as October or November, 1979, we regard Mr. Conway to be a more credible witness on this point inasmuch as he prepared the business plan. We have no doubt that such a plan existed.

[9]/Although not free from doubt, we tend to credit Mr. Logan's testimony on this point. While there is evidence in the record, particularly in Mr. Logan's March 12, 1980 discussion with Mass. Teck employee, Esther Larson, which creates an inference that Mr. Logan was not surprised to learn about the business plan containing his name, we do not find Mr. Logan's testimony to be untenable, as suggested by the Petitioner.

[10]/Question C-1 of the 1978 Statement of Financial Interests (SFI) directed Mr. Logan to identify each business with which he was associated in 1978 as an employee or director. Question C-3 directed Mr. Logan to identify the amount of income, if greater than $1,000, which Mr. Logan had derived from any of the businesses identified in Question C-1. The instructions to both question contained specific examples of how Mr. Logan should have reported this information.

36. Mr. Logan testified that he filed his 1979 United States and Massachusetts Income Tax Returns on April 15, 1979 and included within his computation of gross income for 1978 the compensation which he had received from NEOS and Compactor.

37. In January, 1980, the Executive Office of Economic Affairs again designated Mr. Logan as an employee subject to the financial disclosure law, G.L. c. 268B. Accordingly, Mr. Logan received a 1979 SFI form and instructions from the Commission in April, 1980. Mr. Logan reviewed the form and instructions and determined that they had not changed from the previous year. Mr. Logan thereupon filled out the form as "gratuitously" as in 1979. Mr. Logan did not disclose in his 1979 SFI that he was a Director and Vice-President of NEOS in 1979, that he had received reimbursements from NEOS in 1979,[11]/ that he was employed by NEOS in 1979, or, alternatively, was engaged in the private practice of accounting in 1979.

III. Decision

The Respondent has been charged with violating Sections 3(b), 4(a), 6, 23(a), 23(e) and 23(f) of Chapter 268A and Section 7 of Chapter 268B. We will address these charges separately.

A. Jurisdiction under Chapter 268A.

Mr. Logan initially contends that he was not a state employee within the meaning of Section 1(q) of Chapter 268A because neither the Foundation nor Mass. Teck are state agencies within the meaning of Section 1(p) of Chapter 268A. Alternatively, Mr. Logan argues that it is unfair to impute to him any knowledge that either the Foundation or Mass. Teck is a state agency. We agree with the Petitioner that the Foundation and Mass. Teck are state agencies and that Mr. Logan is therefore a state employee for the purposes of Chapter 268A. We will consider Mr. Logan's alternative argument in due course.

1. Foundation

Section 1(p) of Chapter 268A defines state agency as "any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department, and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town." On the basis of our review of the Foundation's enabling legislation and evidence presented during the hearings, we conclude that the Foundation complies with this definition as an independent instrumentality. Contrary to Mr. Logan's assertion, we find ample interrelation between the Foundation and Commonwealth to warrant the application of Chapter 268A to the Foundation.

Under the terms of the Foundation's enabling legislation, Chapter 843 of the Acts of 1969, the Foundation was created to accomplish the public purposes of encouraging, prompting and assisting scientific and technological development in the Commonwealth. The Governor appointed the Foundation's governing board members and, during the Foundation's existence, it received an annual appropriation from the General Court. The Foundation was also subject to an annual audit by the State Auditor and used copies of the official seal of the Commonwealth on its stationery and forms. We regard the interrelation between the Foundation and the Commonwealth to be sufficient for the purposes of the application of Chapter 268A. While it may be true that the Foundation's organizational structure was more akin to a corporation rather than to a traditional public sector agency,[12]/ we do not believe that the application of Chapter 268A can be conditioned on the organizational status of an entity. Previous opinions of the Attorney General and Commission have applied the definition of state agency broadly to a wide range of entities, and we find no reason to depart from this policy on the facts of this case. See, EC-COI-79-131; EC-COI-79-105; Attorney General Conflict Opinion No. 856 (division of savings bank life insurance); Attorney General Conflict Opinion No. 855 (governor's council on vocational education); Attorney General Opinion No. 548 (Lowell Technological Institute of Massa-

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[11]/Question I on the 1979 SFI directed Mr. Logan to identify certain reimbursements which he had received in 1979. The instructions to Question I explained that reimbursements in excess of $100 had to be reported if the source was a person having a direct interest in a matter before a governmental body, and contained specific examples of how Mr. Logan should have reported the reimbursements from NEOS.

[12]/In 1972, the Attorney General advised the Foundation that the liability of its governing board members was comparable to the liability of the board of directors of a corporation. See, 1972-73 Attorney General Opinion No. 10.

chusetts Research Foundation); W.G. Buss, "The Massachusetts Conflict-of-Interest Statute: An Analysis", 45 B.U. Law Rev. 299, 309 (1965).

Further, we do not believe that the General Court intended to exempt the Foundation from the provisions of Chapter 268A when it created the Foundation in 1969. To the contrary, the terms of the enabling legislation and, in particular, Section 10 of Chapter 843 of the Acts of 1969, demonstrate a legislative perception of the need for standards of conduct by Foundation employees and officers which are consistent with Chapter 268A. Moreover, our examination of the progression of legislative drafts which culminated in the passage of Chapter 843 of the Acts of 1969 reveals that the specific issue of exempting the Foundation from Chapter 268A was at no time raised or considered by the General Court.[13]/

2. Mass. Teck

We conclude that Mass. Teck is a state agency within the meanings of Section 1(p) of Chapter 268A. By its terms, Mass. Teck's enabling statute applies the provisions of Chapter 268A to all directors, officers and employees of Mass. Teck. See, M.G.L. c. 40G, §2.[14]/

3. Status as a State Employee

Section 1(q) of Chapter 268A defines a state employee in relevant part as follows:

> 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. . .

Inasmuch as we have previously concluded that the instrumentalities which employed Mr. Logan between December, 1976 and April, 1980 are state agencies within the meaning of Section 1(g) of Chapter 268A, we conclude that Mr. Logan performed services for a state agency on a "full-time, part-time, intermittent or consultant basis" within the meaning of the above-cited definition of state employee.

3. Chapter 268A Allegations

1. Section 3(b)

The Petitioner contends that Mr. Logan violated Section 3(b) of Chapter 268A by receiving $300 from NEOS in 1979 as private compensation for his assistance in preparing financial projections for an SBA loan application. We agree.

Section 3(b) prohibits a state employee "otherwise than as provided by law for the proper discharge of official duty, directly or indirectly . . . [to] receive anything of substantial value for himself for or because of any official act or act within his official responsibility performed or to be performed by him."

Mr. Logan admits receiving $300 in private compensation from NEOS in 1979 but claims that the preparation of financial projects was outside of his official responsibility at Mass. Teck. We have reviewed the record and find substantial and credible evidence which demonstrates that the preparation of financial projections was within Mr. Logan's responsibilities both at the Foundation and at Mass. Teck.[15]/ Further, we find that Mr. Logan's receipt of $300 from NEOS was not as provided by law for the proper discharge of his official duty.[16]/ We conclude that the $300 which Mr. Logan received from NEOS constitutes something of substantial value. See, **Commonwealth v. Famigletti,** 4 Mass. App. 584, 354 N.E. 2d 890 (1976).

Mr. Logan argues that he was unaware of the provisions of Chapter 268A and therefore had not intent to violate the statute. Even assuming that Mr. Logan was unaware of the provisions of Chapter 268A[17]/ the issue of Mr. Logan's intent is irrelevant to our finding of a violation of Section 3(b). **Commonwealth v. Dutney,** 4 Mass. App. 353, 369, 375, 348 N.E. 2d 812 (1976); **In the Matter of C. Joseph Doyle,**

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[13]/See, 1969 House Doc. No. 46, 1969 Senate Soc. No. 1439, 1969 Senate Doc. No. 1555, and 1969 House Doc. No. 5340.

[14]/The provisions of Section 2 of Chapter 40G appear in paragraph 6 of the findings of fact.

[15]/The testimoney of Messrs. Dembowski, Conway and Kelley as well as documents prepared by Mr. Logan support this point.

[16]/Both Mr. Sacks and Mr. Kelley testified that the receipt of additional compensation or remuneration by Mr. Logan for acts within his official responsibility would be improper.

[17]/In view of Mr. Logan's correspondence to NEOS described in paragraphs 15 and 16 of the findings of fact, we find the contention somewhat doubtful.

Commission Adjudicatory Docket No. 109, Decision and Order, p. 7 (June 18, 1980). See, Final Report of the Special Commission on Code of Ethics, 1962 House Doc. No. 3650, at 11.

Accordingly, we find by a preponderance of evidence that Mr. Logan violated Section 3(b) by receiving $300 from NEOS in 1979 as private compensation for his assistance in preparing financial projections for an SBA loan application. We disagree with Mr. Logan's contention that the standard of proof applicable in Commission proceedings is "proof beyond a reasonable doubt". We have fully treated this matter previously and find no reason to repeat that discussion here. See, **In the Matter of James J. Craven, Jr.,** Commission Adjudicatory Docket No. 110, Decision and Order, pp. 10-12 (June 18, 1980). See, also, **Steadman v. Securities and Exchange Commission,** U.S., 101 S. Ct. 999 (February 25, 1981) where the United States Supreme Court added further support to our view that Commission findings need be supported by a preponderance of evidence rather than by stricter standards of proof.

2. Section 4(a)

We agree with the Petitioner that Mr. Logan violated Section 4(a) of Chapter 268A by receiving $600 in private compensation from Compactor in 1978 for the preparation of Compactor's Massachusetts Corporation Excise Tax Return. Section 4(a) prohibits a state employee from ". . . otherwise than as provided by law for the proper discharge of official duties, directly or indirectly [to] receive or request compensation from anyone other than the Commonwealth or a state agency, in relation to any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest". Section 1(k) of Chapter 268A defines "particular matter" to include submissions. Since 1963, both the Attorney General and more recently the Ethics Commission have advised state employees that state tax returns are submissions and are therefore particular matters within the meaning of Section 1(k). Further, these Advisory Opinions have consistently stated that the Commonwealth is a party to and has a direct and substantial interest in state tax returns and in the collection of state taxes. See, Attorney General Conflict Opinion Nos. 645, 154, 2; EC-COI-80-16, EC-COI-79-23. See, also, Commission Compliance Letter 80-7 (May 23, 1980). Accordingly, Mr. Logan's receipt of $600 from Compactor for the preparation of Compactor's Massachusetts Corporation Excise Tax Return involved a matter of direct and substantial interest to the Commonwealth. Inasmuch as Mr. Logan prepared the tax return for Compactor and received compensation from Compactor while serving as a state employee, we conclude that Mr. Logan violated Section 4(a) of Chatper 268A.

Mr. Logan concedes that he received $600 from Compactor in 1978 for the preparation of a state tax return but claims that his supervisor and agency head at the Foundation were aware of his private arrangement with Compactor and had condoned it. Even assuming that Mr. Logan's superiors had approved of the arrangement, their condonation does not establish a defense for Mr. Logan or otherwise exempt him from the provisions of Chapter 268A. See, **In the Matter of Collector-Treasurer's Office of the City of Boston, et al.,** Commission Disposition Agreement pg. 8 (March 2, 1981). As a matter of sound policy, to hold otherwise would legitimize an agreement by the supervisors of a state agency to undermine the provisions of Chapter 268A. Evidence of condonation is relevant, however, in determining the sanctions which the Commission will impose under Section 4(d) of Chapter 268B following the finding of a violation. Accordingly, we will consider the evidence surrounding the condonation of Mr. Logan's activities at an appropriate point in this Decision.

3. Section 6

The Petitioner alleges that Mr. Logan violated Section 6 of Chapter 268A by participating in the Mass. Teck review and evaluation of the NEOS loan application while he was negotiating or had an arrangement with NEOS concerning prospective employment. On the basis of our review of the record, we conclude that Mr. Logan's actions did not constitute a violation of Section 6.[18]/ In particular, we find insufficient persuasive evidence from which we can conclude that

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[18]/Section 6(a) of Chapter 268A provides in relevant part as follows:

Except as permitted by this section, any state employee who participates as such employee in a particular matter in which to his knowledge he, his immeidate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

Mr. Logan was actively negotiating with NEOS or had an arrangement with NEOS concerning prospective employment. While a NEOS business plan containing Logan's name as a NEOS presidential candidate was apparently circulating in January, February and/or March, 1980, we find insufficient evidence to conclude that Mr. Logan was aware of the plan prior to March or had authorized its distribution. Although there is evidence that NEOS had offered positions to Mr. Logan in 1978 and 1979, we are not persuaded that Mr. Logan was continuing to negotiate with NEOS in 1980. In particular, we note that when Mr. Conway raised the possibility in January, 1980 of Mr. Logan becoming President of NEOS, Mr. Logan's response was neutral. While there are other inferences in the record from which we could arguably speculate that Mr. Logan was negotiating with NEOS, we find such inferences, as a whole, unpersuasive.

4. **Section 23**

Section 23(a) of Chapter 268A prohibits a state employee from "accept[ing]" other employment which will impair his independence of judgment in the exercise of his official duties". The record is clear that Mr. Logan received $600 in private compensation from Compactor and over $1300[19]/ from NEOS during the period in which he was the primary staff person assigned by the Foundation and Mass. Teck to assist these companies. The compensation, moreover, was intended to pay Mr. Logan for services which were within areas of his official responsibility at the Foundation and Mass. Teck. We therefore conclude that Mr. Logan's acceptance of private compensation from the companies which he was assisting as a state employee compromised his impartiality and independence of judgment in violation of Section 23(a).

Section 23(e) of Chapter 268A prohibits a state employee from engaging in ". . . conduct [which would] give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties. . ." Section 23(f) of Chapter 268A prohibits a state employee from, ". . . pursu[ing] a course of conduct which will raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust."

We conclude that Mr. Logan violated both provisions by his conduct during the period of December, 1979 through February, 1980. By the end of 1979, NEOS owed money to Logan from the use of Mr. Logan's credit card and from personal loans which he had advanced to NEOS. During this period, NEOS notified Mass. Teck that it was intending to apply for a large loan, and Mr. Logan accepted the Mass. Teck assignment to investigate and review the anticipated application prior to the January 23, 1980 IAC meeting. It is clear that Mr. Logan played a primary role in the Mass. Teck staff review and recommended NEOS as a qualified applicant. The IAC later recognized that NEOS' financial picture, which had been based in part on Mr. Logan's input, was unduly optimistic and warranted further investigation.

Mr. Logan should not have involved himself in any way in the Mass. Teck review of the NEOS loan application and should have immediately disclosed his financial connection with NEOS when he received the assignment to review the application. We conclude that by advancing his personal funds to NEOS during the period of his investigation of the merits of the NEOS loan application, Mr. Logan created the impression that NEOS could unduly enjoy favor in the performance of his official duties and raised suspicion that his actions were in violation of his trust.

C. Jurisdiction under Chapter 268B

We agree with the Petitioner that Mr. Logan was a public employee within the meaning of Section 1(o) of Chapter 268B and was therefore properly designated as a reporting person for 1978 and 1979.[20]/ The definition of public employee under Section 1(o) of Chapter 268B applies to any person who holds a major policy-making position in a governmental body. Section 1(e) defines a major policy-making position as

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[19]/The $1,300 figure does not include $212 which Mr. Logan characterized as "expenses" or $300 for whose purpose Mr. Logan could not account.

[20]/In view of our jurisdictional conclusion, we need not reach the issue of whether Mr. Logan is estopped from now challenging his status as a reporting person. In essence, Mr. Logan contends that he was entitled to file SFIs for 1978 and 1979 with impunity because he was unaware that he had been designated as a reporting person or was otherwise subject to the provisions of Chapter 268B. We find the contention somewhat strained, particularly where Mr. Logan prepared, reviewed and signed both SFIs and at no time prior to the institution of thes proceedings

". . . 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 department head". We find that Mr. Logan complies with this definition. His annual salary exceeded the statutory threshold, and he regularly reported directly to the administrative head of the Foundation and Mass. Teck. Notwithstanding Mr. Logan's assertions that his policy-making role was minimal, we find that evidence such as Mr. Logan's presentations to the IAC confirms Mr. Logan's direct reporting relationship to his executive or department heads.

D. Chapter 268B Allegations

We agree with the Petitioner that Mr. Logan filed false SFIs in both 1978 and 1979 in violation of Section 7 of Chapter 268B and, accordingly, we will order appropriate sanctions. However, we do not concur with the Petitioner's contention that the false filings were intentionally motivated, and we therefore find no need to impose maximum sanctions in each instance or to commence proceedings for perjury.[21]/

1. 1978 SFI

The evidence establishes that Mr. Logan was a NEOS Director in 1978 and that he was employed by NEOS and Compactor in 1978. Further, Mr. Logan received in excess of $1,000 in income from NEOS.[22]/ Inasmuch as the 1978 SFIs which Mr. Logan prepared, signed and filed do not disclose that he was a NEOS Director, that he was employed by NEOS and Compactor in 1978 or that he received in excess of $1,000 income from NEOS in 1978, we conclude that Mr. Logan filed a false 1978 SFI.[23]/

2. 1979 SFI

The evidence establishes that Mr. Logan held the offices of NEOS Director and Vice-President in 1979, that he received reimbursements from NEOS in 1979 totalling $1,000.25, and that he was employed by NEOS in 1979. Inasmuch as the 1979 SFI which Mr. Logan prepared, signed and filed did not disclose his NEOS offices, his reimbursements from NEOS and his employment with NEOS in 1979, we conclude that Mr. Logan filed a false 1979 SFI.

3. Intentional False Filing

On the basis of our review of the record, we find that Mr. Logan's conduct in preparing and filing his 1978 and 1979 SFIs did not rise to the level of intentional and deliberate false filings, as alleged by the Petitioner. We do find, however, that Mr. Logan demonstrated a cavalier and reckless approach in his filings. The Supreme Judicial Court has recognized that the filing of SFIs provides a means "which the Legialture or the people could believe to be rationally related to the achievement of the legitimate goal of assuring the people of 'impartiality and honesty of public officials (§1 of the proposed new G.L. c. 268B)'". **Opinion of the Justices,** Mass. Adv. Sh. (1978) 1116, 1131, 376 N.E. 2d 810, 819. The law requires a commitment to a reasonable degree of care and diligence in fulfilling this legislative goal. We expect no less from certified public accountants such as Mr. Logan who serve in positions of public trust.

On the basis of the foregoing, we conclude that Louis L. Logan violated Sections 3(b), 4(a) and (e) and (f) of General Laws Chapter 268A and Section 7 of General Laws Chapter 268B. Pursuant to our authority under Section 4(d) of Chapter 268B, we hereby order Mr. Logan to pay the civil penalties as set forth below. In arriving at these penalties for violations of Chapters 268A and 268B, we have carefully considered the mitigating factors raised by Mr. Logan and

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[21]/Mr. Logan signed both the 1978 and 1979 SFIs under the pains and penalties of perjury.

[22]/Mr. Logan received fees totaling $1,217 from NEOS in 1978. Even assuming that we disregard $212 which Mr. Logan billed as "expenses", the remaining sum exceeds $1,000. While we could have arguably characterized as an honorarium the $25 which Mr. Logan received for his service for the NEOS Board of Advisors, Mr. Logan has not raised this point. Moreover, our adoption of this argument would only justify further violations inasmuch as Mr. Logan stated in his 1978 SFI that he received no honoraria.

[23]/We also find that Mr. Logan failed to report the maintenance of a private accounting practice in his 1978 SFI. However, in view of our findings of multiple violations with regard to the 1978 SFI, we need not address this additional omission.

in particular are aware that the practice of the Foundation and Mass. Teck in advocating private companies may have created ambiguity for Mr. Logan over his loyalty to the Commonwealth. While this factor does not excuse Mr. Logan's violations of Chapter 268A, it does furnish a basis for our decision to impose less-than-maximum penalties in this case. Accordingly, we order Louis L. Logan to:

1. Pay $300 (three hundred dollars) to the Commission as reimbursement for the amount of compensation which he received from NEOS in violation of Section 3(b) of Chapter 268A.[24]/
2. Pay $200 (two hundred dollars) to the Commission as a civil penalty for receiving compensation from NEOS in violation of Section 3(b) of Chapter 268A.
3. Pay $600 (six hundred dollars) to the Commission as reimbursement for the amount of compensation which he received from Compactor in violation of Section 4(a) of Chapter 268A.
4. Pay $200 (two hundred dollars) to the Commission as a civil penalty for receiving compensation from Compactor in violation of Section 4(a) of Chapter 268A.
5. Pay $500 (five hundred dollars) to the Commission as a civil penalty for his violations of Sections 23(e) and (f) of Chapter 268A.[25]/
6. Pay $750 (seven hundred fifty dollars) to the Commission for the false filing of his 1978 SFI in violation of Section 7 of Chapter 268B.
7. Pay $750 (seven hundred fifty dollars) to the Commission for the false filing of his 1979 SFI in violation of Section 7 of Chapter 268B.

We order Mr. Logan to pay these penalties totalling $3,300 (three thousand three hundred dollars) to the Commission within thirty days of receipt of this Decision and Order.

DATE: April 28, 1981

[24]/We will not permit Mr. Logan to keep the compensation which he received unlawfully from NEOS and Compactor. See, **In the Matter of Joseph Counter,** Commission Disposition Agreement, p. 3, (February 12, 1980); **In the Matter of Badi Foster,** Commission Disposition Agreement, p. 5, (October 7, 1980.

[25]/Since we have already assessed penalties under Sections 3(b) and 4(a) for conduct which also forms the basis of a violation of Section 23(a), we find no need to impose a separate penalty for Mr. Logan's violation of Section 23(a).

THE COMMONWEALTH
OF MASSACHUSETTS

STATE ETHICS COMMISSION

July 29, 1981

Richard Ames, Esquire
General Counsel
Commonwealth of Massachusetts
Department of Mental Health
160 North Washington Street
Boston, MA 02114

COMPLIANCE LETTER 81-21

Dear Mr. Ames:

In the Matter of Rae Ann O'Leary, Commission Docket No. 113, the Commission found that the employment of employees of the Department of Mental Health (DMH) by service providers was not an uncommon practice at partnership clinics. Since that time [October, 1979], your office and the staff of the State Ethics Commission have engaged in discussions of this and other personnel practices involving various forms of dual compensation to DMH employees from public and private sources. You have voluntarily provided detailed examples of such compensation arrangements, as well as copies of intradepartmental correspondence and legal memoranda addressing the subject. This material and the discussions have significantly aided our analysis and understanding of DMH's needs, rationale and options.

As set out below, it is the Commission's view that these dual compensation arrangements violate the conflict of interest law, General Laws Chapter 268A, particularly §§4 and 7. The Commission also recognizes that many of these personnel practices have developed over a long period of time and have been approved by the Department, in part, in an effort to insure proper coverage and service. On the other hand, the Commission has a responsibility to interpret and enforce the law in an even-handed manner and not to single out any agency of government for particularly lenient or harsh treatment.

To strike an appropriate balance between these concerns, the Commission will not at this time initiate any formal inquiry or enforcement

action against any DMH employee with respect to the practices discussed below, but will consider this Compliance Letter as notice to the Department, its employees and vendors that all such practices must end.* The Commission's decision not to commence enforcement proceedings with respect to future violations is conditioned upon receiving an acceptable Plan of Compliance from the Department by September 30, 1981. That Plan should indicate the steps taken and to be taken to conform the Department's personnel and contracting practices to the requirements of Chapter 268A. If the Department considers it necessary for some arrangements to continue beyond September 30th in order to maintain critical services, it may request in its Plan that they be allowed to continue for a specified length of time. Any such request must 1) describe the arrangement(s), 2) identify the position(s)/employee(s) involved, 3) explain why the arrangement must continue, and 4) propose a schedule for phasing out such practices within a year. Within thirty (30) days of receiving the Plan, the Commission will notify the Department whether the Plan is acceptable, and, if it is not, what further action must be taken. Thereafter, assuming submission of an acceptable Plan, any deviation or amendment will require a specific request (indicating the individual(s) involved, the service(s) to be performed, and the target date for phase-out). If the Commission does not approve the request, it will notify the Department and the individual within thirty (30) days of receiving the request. In any event, no such arrangement may continue for longer than one year. Any acts inconsistent with the conclusions reached below which have not been the subject of a specific approval will be pursued in the context of formal enforcement proceedings.

Copies of this letter will be sent to Regional and Area Directors of the Department. We trust that your office will disseminate this letter to other personnel and outside groups involved in these practices so that they may be aware of the Commission's interpretation of the law and its position regarding enforcement in this matter.

A. Current Practices in DMH

Broadly stated, the personnel practices in question fall into two categories:

(1) DMH employees working in the context of "partnership clinics" and being paid for that work by DMH with state funds and simultaneously, by the non-government partner, primarily with funds which do not originate from the state;

(2) Individuals who are employed by DMH either part-time or full-time and who, on their own time, work for private corporations which are DMH vendors, and are paid for the latter by funds which originate from DMH, from other state sources, or from non-state sources.

The first category encompasses DMH employees who receive the additional compensation from the non-state partner for performing the services which are part of their state duties (hereinafter referred to as "plain supplementation"), and other DMH employees who receive the additional compensation for performing extra duties, beyond the scope of their state responsibilities, at a partnership clnic (hereinafter referred to as "earned supplementation").

The rationale advanced by DMH for these arrangements is:

(a) that the salary supplementation is necessary to attract qualified professionals, who might otherwise choose more lucrative private employment, into the partnership clinic where they perform administrative as well as treatment functions;

(b) that the receipt of dual compensation does not automatically result in conflict because the two partners providing the compensation have mutual goals, not adversarial interests, and thus there is no dual or conflicting loyalty, but rather loyalty to the clinic;

(c) that the compensation arrangement is "provided by law for the proper discharge of official duties" (thus satisfying Ch. 268A, §4) by virtue of Ch. 19, §1 which authorizes the Department to enter into agreements with "partnership clinics"; and

(d) that a fixed annual salary alone from the private partner does not constitute "financial interest in a state contract" in violation of Ch. 268A, §7 unless the recipient has a proprietary interest, or a "controlling interest" in the private contractor.[1/]

*It remains in the discretion of the Attorney General and District Attorneys whether any criminal proceedings are to be initiated.

[1/] Letter of Richard Ames to Scott Harshbarger, July 30, 1980.

The second category of personnel practices covers DMH employees, some of whom are assigned to work for vendors as part of their regular responsibilities, who have a second job working for a DMH vendor. Sometimes the second job is with the same vendor to which the person is assigned in his/her state capacity; in other cases, the second job is with a different vendor. Sometimes the two jobs are performed at the same work site; sometimes at separate locations.

The Department's justifications for this practice appear to be:

> (a) that the individual's state salaries are insufficient to attract good people to work with the client populations served by DMH and the vendors, and there is a personnel shortage in some areas;
>
> (b) that it is often the only way to insure round-the-clock provision of services for clients;
>
> (c) that the receipt of a fixed salary or hourly rate from the vendor does not rise to the level of a "financial interest in a state contract" in contravention of Ch. 268A, §7;
>
> (d) that the source of the earned compensation is not, in some cases, the DMH7 contract fee, but rather a non-DMH or even non-state account; and
>
> (e) that after the Ethics Commission had put a temporary moratorium on issuing opinions regarding §7 in 1980 pending the passage of an amendment to §7, resumption of §7 enforcement would be irrational and discriminatory, and any actual conflicts could better be detected and handled by a systematic in-house Departmental review of such arrangements.[2]/ Such a review is already in force within your office.

B. Position of the State Ethics Commission

1. Partnership Clinic Context

This letter will not address at length those situations in which the recipient of supplemention from the private partner is assigned to work at area or regional offices of the Department, where treatment policy, funding decisions and evaluations affecting partnership clinics are made. Your office has acknowledged the potential impropriety of such arrangements and distinguishes these situations (apparently few in number) from the more common examples of recipients working at the partnership clinics.[3]/ A DMH employee's receipt of outside compensation from an outside entity which the employee is obligated to evaluate in any way is a clear example of one of the serious problems which Ch. 268A was intended to prevent. This holds true whether the recipient has final authority over partnership contracts or merely contributes evaluative information which could subsequently be used by the individual responsible for negotiating or executing such contracts. The Commission's view is necessarily that any such compensation must *not* be allowed.

(a) Plain supplementation

In the case of plain supplementation paid to state employees assigned to work at a partnership clinic, such compensation is improper. Specifically, the Commission views such arrangements as violative of Ch. 268A, §4(a) which states:

> No state employee shall otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the commonwealth or a state agency, in relation to any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest.

The statutory definition of "particular matter" includes a contract, decision, determination, proceeding, application, submission, and other items.[4]/ According to opinions of the Attorney General, it may also include the treatment of patients[5]/ and the placement of patients in programs.[6]/ From the information you have provided to us, it is clear that plain supplementation is paid to DMH employees as a result of the partnership contract between the Department and the private entity which is clearly a particular matter of direct and substantial interest to DMH.

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[2]/ Letter of Richard Ames to James Vorenberg, November 12, 1980.
[3]/ Supra, note 1, at 6.
[4]/ M.G.L. Ch. 268A, §1(k).
[5]/ Attorney General Conflict Opinion No. 746.
[6]/ Attorney General Conflict Opinion No. 821.

In addition, plain supplementation may, in some cases, also relate to other matters, such as the treatment of patients, placement of patients in communty-based programs, the private partner's application for a grant, the submission of a new or modified program, an accreditation decision, Medicaid certification, or similar situation. In all of these cases, the payment relates to a "particular matter" and is prohibited.

M.G.L. Ch. 19, §1, which you cite as authorization for the dual compensation, merely states that DMH

> may enter into agreements with non-profit charitable corporations, partnerships or collaboratives. . . for the establishment and maintenance of community health centers . . . for the providing of mental health services and may enter into such agreements with other partnership clinics providing mental health services with the department.

Neither the statutory language nor any interpretive case law specifically mentions dual compensation to state employees or sanctions it, nor does M.G.L. Ch. 40, §5, paragraph 40C, which permits towns to appropriate money to pay for services rendered by outpatients mental health partnership clinics. These statutory enactments are general authorizations to permit the establishment of partnership clinics and payment to the clinics for services rendered, respectively. Contraposed is the precise language of Ch. 268A, §4 which controls in the absence of specific statutory language to the contrary.

In addition to §4, it should be noted that §3 also prohibits public employees from receiving additional compensation for performing the very duties which they are already obligated to perform by virtue of state employment, even if there is no corrupt intent involved in such compensation.[7]/

Several arguments, besides statutory language, support this view. *First,* there is an inherent danger that the private partner feels coerced into paying the supplementation in order to maintain good relations and its contract with DMH. This potential for coercion exemplifies one of the very reasons that Ch. 268A was passed, namely, that the state employees should not be allowed to use their status for their own pecuniary advantage. In addition, they should not be in a position of simultaneously serving two masters.

Second, this issue is not new, nor is it the first time it has been raised in your Department. In your January, 1979 memorandum concerning the proposed salary supplementation of the Commission of Public Health, you noted that

> [t]he Attorney General clearly believed that a statutory amendment should be sought for such a direct salary supplement . . . Subsequent events suggest that [the Secretary of Human Services] made a serious error in not requesting the Attorney General's advice at the outset of his negotiations [for the supplementation]. We should be careful not to repeat that mistake.[8]/

In fact, when the Attorney General was asked about salary supplementation more recently, in a situation very similar to that of DMH, he again stated that it was illegal under §4.[9]/

Third, while it may be true that state salaries for mental health professionals are lower than private sector salaries, and that recruitment is difficult, this is not a unique situation. The same might be said for attorneys, auditors, computer specialists, engineers and other professionals. Those who accept state emplolyment must often do so at a financial sacrifice.

Although it is unclear from the figures you have provided to us exactly how many employees receive **plain** supplemtntation, you have told us that 370 state employees receive additional compensation from partnership corporations. You have also disclosed that 30 out of 45 clinic directors receive supplementation. This is of particular concern, since according to the DMH Manual of Operating Policies and Procedures for Partnership Clinics, the clinic directors are responsible for fiscal management, recommending the employment and dismissal of DMH staff on assignment to the clinic, hiring and dismissing of the non-DMH staff, and preparing fiscal

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[7]/See, e.g., In the Matter of the Collector-Treasurer's Office of the City of Boston, et al., Commission Disposition Agreement (March 8, 1981); In the Matter of Louis L. Logan, Commission Decision and Order (April 28, 1981), pp. 19-20; Attorney General Conflict Opinion No. 805.

[8]/Memorandum of Richard Ames to John Isaacson, Re: Commissioner of Public Health - Supplemental Income, January 18, 1979.

[9]/Attorney General Conflict Opinion No. 805.

projections for inclusion in the state budget. It is obvious that these functions could all have a substantial effect on an ongoing contract with DMH, as well as the negotiation of such a contract. A state employee performing these tasks can hardly be expected to have only the state's best interests in mind when that person is also being paid by the private partner. Like the private partner, such an employee would have a vested interest in seeing a contract renewed with terms and amounts favorable to the private entity.

For all of these reasons, in the absence of specific legislative authorization, plain supplementation of income for DMH employees is prohibited by Ch. 268A, §4. Designation of these individuals as "special state employees" would not affect this conclusion, since under the seventh paragraph of §4 a special state employee is still subject to restrictions when the additional compensation is paid in relation to a particular matter

> (1) in which he has at any time participated as a state employee, or
>
> (2) which is or within one year has been a subject of his official responsibility, or
>
> (3) which is pending in the state agency in which he is serving.

Because §4 is seen to be determinative, further discussion of other sections of Ch. 268A, (e.g. §3 and §23) which may also be relevant will be omitted here.

(b) Earned supplementation

Earned supplementation, that is compensation from the non-state partner to a state employee for services performed under contract at a partnership clinic, is nevertheless "compensation from anyone other than the commonwealth". It relates to a contract in which DMH (and the state) is a party and has a direct and substantial interest, so that the previous discussion of Ch. 268A, §4 and related policies is similarly applicable here. It should be noted that the prohibition of §4 does not depend on the level of responsibility of the state employee's job. Nor does it depend on the extent to which the public position would allow the employee to exert influence over or in favor of the non-state party. Rather, the prohibition attaches by virtue of the compensation and its relation to the particular matter, in this instance, the partnership contract and the second employment contract. Prior opinions of the Attorney General suggest that a state employee is prohibited from assisting a private entity in any phase of a matter which is ultimately of interest to the state.[10]/

A public employee cannot serve two masters. It is immaterial that the state employee working in the context of a partnership clinic may be furthering the same goals, common to the state and the private partner, in both jobs. The interest of the commonwealth or state agency is not required to be adverse to the interest of the outside entity;

> . . . it is not always easy, or even possible, to know when interests are consistent or identical. Moreover, even when the state's interest is indistinguishable from that of the private employment, the state employee may be able to use the leverage of his state position to his own private advantage.[11]/

Even in the case of a cooperative enterprise between the state and an outside employer, it is difficult to assume identity of interests when the outsider is a private entity rather than another level of government.[12]/

It might appear that a possible exemption from the §4 rule is available to special state employees under the tenth paragraph of §4, which states:

> This section shall not prevent a present or former special state employee from aiding or assisting another person for compensation in the performance of work under a contract with or for the benefit of the commonwealth; provided, that the head of the special state employee's department or agency has certified in writing that the interest of the commonwealth requires such aid and the certification has been filed with the State Ethics Commission.

Since the word "person" is not defined in this statute, it is arguable that it includes not only a natural person but any entity which might contact with the commonwealth, including a private non-profit corporation.

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[10]/See, e.g. Attorney General Conflict Opinions Nos. 126, 119.

[11]/Buss, **The Massachusetts Conflict of Interest Statute: An Analysis**, 45 B.U.C. Rev. 299, 332 (1965).

[12]/Id. at 333.

However, the application of this exception has been very narrow, and it has been used only when the seventh paragraph of §4 (discussed above) was satisfied. In a recent conflict opinion dealing with this paragraph, the Attorney General allowed an exemption from §4 only where neither the state employee *nor her department* participated in the award or implementation of the grant for services in any way, the contract for services was competitively bid, and the employee's department had no formal agreement or contract with the service provider.[13]/ Such is not the case in the compensation arrangements you have described to us, since DMH clearly has a contractual relationship with the partner which provides services and supplementation. Thus, this paragraph of §4 would not appear to apply to the supplementation practices you have described to us. Any attempt to use this exemption would necesitate individual certification to the State Ethics Commission and a finding that such certification was appropriate.

Even if special state employees utilized this exemption, they would still be subject to the restrictions of §6 of Chapter 268A, which in some cases prohibit the employee from participating as a state employee

> in a particular matter in which to his knowledge he . . . [or] a business corporation in which he is serving as . . . employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest . . .

The phrase "business organization" in this context has been construed to include a private non-profit corporation.[14]/ It is the Commission's view that "financial interest" would include an employee's interest in receiving a salary relating to the particular matter, as well as a business organization's interest in receiving a government contract; the former is discussed at greater length in the next section.

2. Employment With Vendors

In our discussions, you have expressed concern about DMH employees who work on their own time for DMH vendors for compensation.

The present view of the Commisison is that where state funds are involved, this practice is prohibited by §7 with certain exceptions. Additionally, some cases may violate §§4, 6 and 23 of Ch. 268A. The main focus of this letter will be on §7.

Section 7 imposes civil and criminal penalties on

> A state employee who has a financial interest, directly or indirectly in a contract made by a state agency, in which the commonwealth or a state agency is an interested party, of which interest he has knowledge or has reason to know. . .

This ban is broad in order to prevent public employees from gaining private benefit from such arrangements as a result of their public positions, and to protect the state from improvident bargains which might result from the improper influence of any insider.[15]/ It does not depend on whether the state employee appears to be in a position to have influenced the making of the second contract.[16]/ Rather, the rule is prophylatic. Because it is impossible to articulate a standard to distinguish between employees in a position to influence and those who are not in such a position, all are treated as though they have influence.[17]/ The concept of prohibiting these arrangements is neither new nor unique. Section 7 is a recodification of a statute which, in one form or another, has been a part of Massachusetts law since 1872.

Specifically applied, §7 does not allow a DMH employee to also work for a state vendor and receive state funds. The financial interest of the state employee in the vendor need not be proprietary, but can be seen to exist whenever the employee receives compensation from the contracting agency which is attributable to its contracts with the state. This standard was reiterated by Commissioner Okin in a May 8, 1978 memo to the State Advisory Council on Mental Health and Mental Retardation. The barred financial interest may be direct or indirect, and may be related to a state contract or state grant.[18]/ The reasonableness of the amount is irrelevant.[19]/ Although in one opinion the Attorney General stated that §7 was directed toward proprietary

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[13]/Attorney General Conflict Opinion No. 796.
[14]/See, e.g., Attorney General Conflict Opinions Nos. 835, 670, 617.
[15]/Buss, supra n. 11, at 368.
[16]/Id. at 372.
[17]/Id. at 374.
[18]/Attorney General Conflict Opinion No. 798.
[19]Buss, supra n. 11, at 372.

interests, that opinion stated.

> there may be instances where a state employee with only an income or salary interest in a contract between a private corporation and a state agency may . . . receive such a direct financial benefit from the contract that his interest would constitute a "financial interest" within the purview of §7.[20]/

The prohibition, as applied by the Attorney General and the State Ethics Commission, attaches when (1) the employee is compensated for duties which are related to the contract with the state;[21]/ or (2) the compensation, whether paid directly out of a state account or out of a vendor's own account, derives from funds paid by the state.[22]/ The vendor's contract need not emanate from DMH; §7 prohibits interest in a contract with *any* state agency, and §4 prohibits interest in a contract with a county agency.

The §7 ban applies irrespective of opportunity for the exercise of influence or the use of inside knowledge. Moreover, many of the DMH situations present serious questions about **actual** self-dealing: they involve second jobs under contracts made by one's own agency. It is unclear whether they are advertised at all outside the agency; even if so, it is easy to see how a DMH employee could have unfair advantage by virtue of early notice of an opening and/or acquaintance with the people involved in hiring decisions. Although you have stressed that use of DMH employees in these situations is essential, from examples you have provided it appears that some of the positions involve no unique knowledge or aptitude. More importantly, it appears that there have, in fact, been instances of self-dealing and irregular awarding of such contracts for services with DMH. Because actual and potential abuses are present in such arrangements, the conflict of interest law does not permit them, except for the narrow exceptions which follow.

A vendor's payment of a state employee on a second job might be permissible if the compensation came out of a vendor's account whose funds were neither received from nor reimbursed by DMH or another state agency.[23]/ Receipt of non-state compensation, however, would still possibly jeopardize a state employee under §4, if it were in relation to a particular matter in which the state had a direct and substantial interest or was a party. The employee's actions for the state vis-a-vis the vendor might also still be restricted under §6. Also, payment out of a separate account would not in and of itself be determinative, without further inspection. There is the very real danger that vendors may use multiple accounts and transfers of funds among them to obscure the actual source of payments.

Section 23 may also be applicable to some of the practices in question. Specifically, §23(a) which states

> [No state employee shall] accept other employment which will impair his independence of judgement in the exercise of his official duties

is particularly relevant in those situations where an individual's state assignment involves work at (or concerning) the same agency which employs him or her after hours. And §23(d), which states

> [No state employee shall] use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others

clearly applies to state employees who use inside information to find extra work or use their knowledge and expertise gained in state service to further the interests of non-state parties (e.g. in tailoring their program or budget proposals to fit state needs and plans). The likelihood of this occurring in some of the situations you have outlined cannot be ignored. Finally, §§23(e) and (f), which deal with the public's perception of state employees' activities, makes clear that even the appearance of impropriety is not only to be avoided, but subject to discipline.

For purposes of §7, it generally will make no difference if the individual is designated a special state employee. Although §7 contains two exemptions for "specials", they are limited in scope. The first [§7(d)] relates to special state employees who do not participate in or have official responsibility for any of the activities of the contracting agency (DMH) and who file a disclosure statement with the Ethics Commission. The second [§7(e)] requires not only disclosure to the Commission but the approval of the Governor with the advice and consent of the Executive Council. Even if either of these exemptions apply,

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[20]/Attorney General Conflict Opinion No. 746.

[21]/Attorney General Conflict Opinion No. 617.

[22]/Attorney General Conflict Opinions No. 798, 797, 628; EC-COI-79-5.

[23]/See EC-COI-79-5.

other sections, such as §§4, 6 or 23, might still restrict the employee's activities.

It is clear that some of these arrangements have existed for many years, and that a large number of employees are currently involved. In discussions between our offices, it has appeared that these employment contracts were brought to your attention and systematically reviewed when the Ethics Commission implemented a temporary moratorium on issuing conflict of interest opinions based on §7 of Ch. 268A, and you institutionalized an internal monitoring system using §23 (the supplemental standards of conduct) as a standard.

From copies of Departmental memoranda which you have provided to us, it is clear that, prior to the moratorium, DMH acknowledged that these arrangements were prohibited. Commissioner Okin's memo of March 21, 1980 (to the executive staff, vendors and others] states that, according to the Deputy Commissioner's memorandum of November 9, 1978,

> 01 or 02 employees were prohibited from receiving consultant funds under 03 or 07 contracts except in emergency circumstances involving full-time employees for whom a waiver was granted by the Deputy Commissioner after a review by the Legal Office.

The weight of Attorney General's opinions was in support of this prohibition. It is unclear under what authority the Department felt enabled to waive the statutory proscription.

In any case, from at least March, 1980 through early 1981, a number of DMH employees were permitted such arrangements. The reason for the moratorium of the State Ethics Commission (namely, uncertainty about pending amendments to §7) became moot when §7 was amended in June of 1980 to only allow state employees to teach part-time in state educational institutions. At that time, the Commission resumed issuance of opinions based on the remaining §7 prohibitions. Now that a year has passed, the Commission must go forward in actively enforcing the law with respect to DMH. To do otherwise would risk the appearnce that the Commission sanctions some violations and not others, and would cause a serious loss of respect for the law.

While, as noted above, the Commission is sensitive to the Department's need to provide extensive coverage and service to its client population, Chapter 268A embodies an overriding and longstanding policy against self-dealing and against the existence of relationships which put conflicting pressures on state employees. The Commission's position here is consistent with sixteen years of opinions of four Attorneys General. The legislature has recognized that public confidence in the disinterested and loyal service of state employees may be undermined by potential evils as well as existing ones, and the Commission is bound by that view.

STATE ETHICS COMMISSION

ROBERT V. GRECO
General Counsel

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

Commission Adjudicatory
Docket No. 146

IN THE MATTER
OF
DAVID L. DRAY

DISPOSITION AGREEMENT

This Agreement is entered into between the State Ethics Commission ("Commission") and David L. Dray ("Mr. Dray") pursuant to Section 11 of the Commission's **Procedures Covering the Initiation and Conduct of Preliminary Inquiries and Investigations.** The parties agree that this Agreement constitutes a consent to final order of the Commission enforceable in the Superior Court of the Commonwealth, pursuant to Section 4(d) of General Laws Chapter 268B.

On May 20, 1981, the Commission initiated a Preliminary Inquiry, pursuant to Section 4(a) of General Laws, Chapter 268B, into possible violations of the Conflict-of-Interest Law, Chapter 268A, involving Mr. Dray, former Executive Director of and legal counsel to the Hull Redevelopment Authority and former Hull Town Counsel.

The Commission has concluded its investigation into Mr. Dray's involvement in the matters set forth herein and has found reasonable cause to believe that Mr. Dray has violated Section 20 of Chapter 268A. The parties agree to the following findings of fact and conclusions of law relating to Mr. Dray's involvement in the matters set forth herein.

1. The Hull Redevelopment Authority (HRA) is a public agency established pursuant to General Laws Chapter 121B for the purposes of carrying out urban renewal projects, and as such is a municipal agency as defined in Section 1(f) of Chapter 268A.

2. The HRA is made up of five members, four of which are elected and one of which is appointed by the Department of Community Affairs, and has the authority to employ legal counsel, an executive director, and such other staff necessary to carry out its responsibilities.

3. Mr. Dray served under contract as legal counsel to the HRS from December 1974 until April 4, 1978 in a part-time capacity.

4. In November 1977, Mr. Dray became Acting Executive Director to the HRA at an annual salary of $15,600, and was a municipal employee as defined in Section 1(g) of Chapter 268A.

5. During the period of November 1977 to April 1978, while Mr. Dray was the Acting Executive Director of the HRA, he received $3,915 in fees under his legal services contract with the HRA.

6. Mr. Dray's continuation under contract as legal counsel to the HRA, and his receipt of fees under that contract after November 1, 1977 when he became Acting Executive Director of the HRA violates Section 20 of Chapter 268A, in that Dray, as a municipal employee, had a financial interest in a contract with the same municipal agency by which he was employed from November 1977 through April 1978.

WHEREFORE, 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 representations, terms and conditions hereby made and agreed to by David L. Dray:

1. That he pay the State Ethics Commission the sum of $3,915 forthwith as recoupment of the salary received by him under contract as legal counsel to the HRA while he was also the Acting Executive Director to the HRA;

2. That he pay the State Ethics Commission the sum of $1,000 forthwith as civil penalty for violating Section 20 of Chapter 268A; 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 related administrative or judicial proceedings.

DATE: August 19, 1981

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 147

IN THE MATTER
OF
HERBERT E. RISSER, JR.

DISPOSITION AGREEMENT

This Agreement is entered into between the State Ethics Commission ("Commission") and Herbert E. Risser, Jr. ("Mr. Risser") pursuant to Section 11 of the **Commission's Procedures Covering the Initiation and Conduct of Preliminary Inquiries and Investigations.** The parties agree that upon its execution, this Agreement shall constitute an assented to final order of the Commission enforceable in the Superior Court under §4(d) of G.L. c. 268B.

On May 4, 1981, the Commission initiated a Preliminary Inquiry into possible violations of the conflict-of-interest law, G.L. c. 268A, involving Mr. Risser, the Registrar of the Registry of Vital Records and Statistics ("the Registry"), a division of the Department of Public Health. The Commission had concluded its Preliminary Inquiry into Mr. Risser's involvement in the matters set forth herein, and makes the following findings of fact to which the parties hereto agree:

1. Mr. Risser has been employed by the Registry since 1963. He was appointed Acting Registrar in 1974, and Registrar in 1976.

2. The Registry serves as the central depository for all birth, marriage, and death records in the Commonwealth. Some of its employees work with vital records to compile statistics, and others provide copies of certificates to the public upon request and payment of a fee.

3. Each year, the Registry processes thousands of requests for certified copies of birth, death, and marriage certificates. In addition to requests from the general public, requests came from institutions and organizations seeking uncertified copies for research purposes. Up until the Spring of 1981, certified copies were furnished upon payment of a $2 per copy fee; uncertified copies were furnished at $.35 per copy. The fees were designed to cover the cost of indexing, searching, and copying original records.

4. Because of high demand for records and short supply of staff, the Registry has, on occasion,

faced serious backlogs in furnishing requested documents. As a matter of both policy and practice, priority has always gone to meeting over-the-counter requests from the general public, resulting in delays of up to three months for research institutes and organization who request large numbers of certificates. On occasion some of these organizations have supplied their own personnel to index and search out the records in order to speed up the process.

5. Two organizations needing prompt service for their certificate requests hired Mr. Risser to work overtime at the Registry to meet their demands. Between 1976 and 1980, Risser received $440 from the Monsanto Company and $230 from John Hopkins University to speed up the processing of their record requests. Mr. Risser received a $1 private fee for every certificate that he indexed himself for these two organizations. This private fee would cover the cost of indexing each name listed on a requisition form from either Monsanto or John Hopkins. Once he had located the required records, he would notify the institution, which would pay the Commonwealth $.35 per available record, in addition to the $1 private fee.

6. All the work for which Mr. Risser was privately paid was done at the Registry after normal working hours.

7. Mr. Risser was the only employee at the Registry to maintain this type of private working arrangement during the years 1976-1980. However, in 1970, a similar arrangement had been negotiated between then Registrar Edward Kloza and the National Cancer Institute whereby three Registry employees, including Mr. Risser, were selected to work overtime indexing records at an hourly rate paid by the Institute.

8. Mr. Risser's working arrangements with Monsanto and John Hopkins were initiated by employees of those organizations. In 1976, a representative from John Hopkins asked Mr. Risser if John Hopkins could hire someone from the Registry to work at the Registry indexing their record requests. Recalling the arrangement of 1970, Mr. Risser agreed to enter into this private working relationship with John Hopkins. In 1979, an employee from Monsanto called Mr. Risser to ascertain the reason for the delay in processing records it had requested. When Mr. Risser informed Monsanto that the Registry faced a backlog of two to three months, Monsanto asked if someone could be hired to work overtime to circumvent the backlog. Mr. Risser agreed to do so.

9. Mr. Risser did not charge or receive private fees from these organizations during periods when their requests were not backlogged and could be handled without substantial delay by the Registry staff.

Based on the facts as set out in paragraphs 1-9 above, the Commission has concluded, and the parties agree, that by receiving private fees from John Hopkins and Monsanto for processing their certificate requests, which processing involves official acts within Mr. Risser's responsibility as Registrar, Mr. Risser violated Section 3 of G.L. c. 268A.

WHEREFORE, 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 hereby made and agreed to by Mr. Risser:

1. Mr. Risser will cease and desist from receiving private fees for any official act performed by the Registry;

2. Mr. Risser will pay to the State Ethics Commission the amount of $670 as recoupment of monies received in violation of G.L. c. 268A; and

3. Mr. Risser will pay to the State Ethics Commission the amount of $250 as civil penalty for violating G.L. c. 268A.

DATE: August 27, 1981

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory
Docket No. 137

IN THE MATTER
OF
GEORGE A. MICHAEL

Appearances:

Robert J. Cordy, Esq.: Counsel for Petitioner, State Ethics Commission

John P. White, Jr., Esq: Counsel for Respondent, George A. Michael

Commissioners:

Vorenberg, Ch.; Kistler, Bernstein, Brickman, McLaughlin

DECISION AND ORDER

I. Procedural History

The Petitioner filed an Order to Show Cause on January 6, 1981 alleging that the Respondent, George A. Michael, had violated Sections 3(b), 6, 23(d), 23(e) and 23(f) of M.G.L. Chapter 268A, the Conflict-of-Interest Law, Section 7 of M.G.L. Chapter 268B, the financial disclosure law. The Respondent filed an Answer which denied any violation of the aforementioned provisions and which, in addition, raised defenses based on the asserted unconstitutionality of the Commission's organization and procedures.

On or about March 26, 1981, Respondent filed in Superior Court a Complaint for Declaratory Judgment and requested issuance of a preliminary order against the Commission's proceedings, asserting the constitutional rights included in his Answer. The Request was denied by the Superior Court (Ronan, J.) on March 30, 1981 and this was affirmed on April 3, 1981 by the Appeals Court (Armstrong, J.).

Pursuant to notice, evidentiary hearings were conducted on April 1, 6, 8, 10, and 28 and June 23, 24, and 30[1]/ before the Commission Vice-Chairman, Linda H. Kistler, a duly designated presiding officer. See, M.G.L. c. 268B, §4(c). The parties thereafter filed post-hearing briefs on July 31 and August 4, 1981. In rendering this Decision and Order, each member of the Commission has heard and/or read the evidence and arguments presented by the parties.

II. Findings of Fact

1. George A. Michael ("Mr. Michael") was employed as the Director of the Mass. Division of Food and Drug from 1953 to 1981.

2. The Division of Food and Drug is a division within the Department of Public Health established by M.G.L. c. 17, §4. It has regulatory and inspection authority over the manufacturing, wholesale and retail sale of most foods, beverages, drugs, cosmetics, bedding and upholstered furniture in Massachusetts. See, M.G.L. c. 94 and 94B. It has the authority to embargo and seek condemnation of merchandise it finds to be misbranded, adulterated, or otherwise unfit for human consumption, to order destroyed any article of bedding or upholstered furniture it finds to be contaminated in any way, to grant and suspend certain licenses, to seek criminal complaints, and to order the closure of certain businesses which do not comply with the sanitary requirements of the law. See, M.G.L. c. 94, 94B; 105 CMR 590.027, 590.126, 590.127 and 620.005.

3. The Division of Food and Drug is responsible for inspecting and approving or disapproving for sale to the public all food, drugs, cosmetics, beverages, tobacco products, bedding and upholstered furniture which have been exposed to contamination by fire, flood, or other disaster and which are being reconditioned for sale to the public ("salvage merchandise"). M.G.L. c. 94, §§189, 276, 307.

4. Building 19, Inc. ("Building 19") is a Massachusetts corporation formed in 1964 by Harry Andler, Gerald Elovitz and one other individual; it is engaged primarily in the business of buying, reconditioning and retailing to the public salvage merchandise.

5. Salvage merchandise owned by Building 19 has been subject to regular and frequent inspections by the Division of Food and Drug since 1964. Some of these inspections were conducted by Mr. Michael personally, and others were conducted by other inspectors from the Division of Food and Drug at Mr. Michael's direction.[2]/

6. On numerous occasions, the President of Building 19, Gerald Elovitz, discussed with Mr. Michael and received advice from him on the salvageability of merchandise which had not yet been purchased by Building 19; on some occasions, the Division of Food and Drug tested such merchandise for Building 19.

7. Since at least 1972, Mr. Michael personally participated in the evaluation of salvage merchandise from Building 19. In addition, on numerous occasions he told inspectors whether to release embargoed merchandise, what had to

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[1]/Additional hearing dates were scheduled for May and early June, but were continued at the request of Respondent's counsel due to the ill health of Respondent.

[2]/Although there was testimony which indicated that inspectors sometimes received their assignments from individuals other than Mr. Michael, in the Commisison's view there was sufficient testimonial and documentary evidence to support a finding that, on some occasions, inspectors were assigned their duties specifically by Mr. Michael. In addition, the Commission finds it reasonable to infer from Mr. Michael's occupancy of the position of Director that he also had some degree of general responsibility for allocating the personnel resources of his Division, although the Commission does not consider this inference to be indispensable to finding the fact stated above.

be done to merchandise before it could be released for sale, and when it had to be destroyed.[3]/

8. During the period from approximately 1964 through 1980, Mr. Michael accepted discounts, ranging up to sixty percent, on merchandise he purchased at Building 19 on numerous occasions, which discounts were not and are not extended or available to Building 19's regular customers.[4]/

9. During the period from approximately 1964 through and including 1980, Mr. Michael accepted charge account privileges from Building 19, which privileges were not and are not extended or available to Building 19's regular customers.

10. During the period from approximately 1975 through and including 1980, Mr. Michael obtained discounts and charge privileges for others, including members of his family and staff at the Division of Food and Drug, from Building 19.[5]/

11. During the period from 1975 through and including 1980, Mr. Michael bought and charged merchandise, for himself and members of his immediate family and staff, from Building 19, which would have cost an ordinary customer approximately $7,000, but on which Mr. Michael received discounts, most of which ranged between 30 and 60 percent; in 1976 through 1980, inclusive, the discounts received by Mr. Michael totalled at least $100 each year.[6]/

12. Gerald Elovitz, the President of Building 19 who, for the past five years, has been responsible for extension of discounts and charge privileges, became acquainted with Mr. Michael exclusively in the context of business and regulatory dealings between Building 19 and the Division of Food and Drug, and had no independent social or familial relationship or friendship with him.

13. The maintenance of a cooperative working relationship with the Division of Food and Drug is and has been important to Building 19's business; in particular the availability of inspectors to check Building 19's merchandise promptly is and has been of benefit to the business.

14. The discounts and charge privileges noted in paragraphs 8 through 11 above, were extended to and received by Mr. Michael, at least in part, for or because of acts within his official responsibility performed or to be performed by him, as set out in paragraphs 5 through 7 above; specifically, they were extended to him in appreciation for the guidance and counsel given to the management of Building 19 by

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[3]/In his oral argument, Counsel for Mr. Michael pointed out that, under M.G.L. c. 94, §189A, either the Commissioner of Public Health or his agent could release embargoes, and thus any testimony to the effect that Mr. Michael directed the release of all embargoes was misleading and not binding. However, the Commission finds no inconsistency here: the law clearly permitted Mr. Michael, as an agent of the Commissioner of Public Health, to release embargoes; in addition, Inspectors O'Hearn, Babineau and Chin of the Division of Food and Drug all testified that, as a matter of practice, embargoes were only released after Mr. Michael so directed.

[4]/In cross-examination, counsel for Mr. Michael elicited testimony which showed that discounts on *damaged* merchandise were available to the general public and that the prices paid by Mr. Michael to Building 19 were sufficient to cover the seller's cost of the merchandise. Nevertheless, the Commission concludes from a fair reading of all the evidence that a significant number of the discounts received by Mr. Michael were not for damaged merchandise, and thus, not generally available; and that the discounted prices he paid, even if sufficient to cover costs, were substantially lower than those paid by others for the same merchandise.

[5]/Although the record is not free from doubt on the identity of those for whom Mr. Michael obtained discounts and charge privileges, the Commission finds ample evidence to conclude that he obtained them. This finding is supported by the testimony of Gerald Elovitz, Thomas Connelly, Peter Stamper, Loretta Pongonis, and Robert Mahoney and various exhibits in evidence. The Commission notes in particular that the testimony indicated that these discounts were given to others only if Respondent accompanied them. As to the identity of the recipients, the Commisison finds the evidence sufficient to infer that Mr. Michael obtained discounts and charge privileges for his sister (or sister-in-law) Libby Michael, his daughters, and his secretary/assistant, Diane Hurley. The Commission considers the evidence insufficient to warrant such a finding with respect to purchases which may have been made by a Michelle Kasinski. The Commission also declines to find that the discounts and charge privileges from Building 19 received by George T. Michael, Respondent's son, were obtained for him by Respondent, since there was testimony which suggested that the son had an independent relationship with the store's founder and that the son dealt with the store directly rather than through his father.

[6]/Although there was credible testimony to the effect that Mr. Michael made purchases prior to 1975, the witnesses did not put a dollar value on those purchases, and no documentation of these sales was introduced into evidence; therefore, the Commission makes no finding with regard to the number of value of pre-1975 purchases.

Regarding the 1975-1980 purchases, because in some instances the amount actually paid or the regular price per item is uncertain (due to purchases being aggregated, and to informal record-keeping) and because of the volume of documentation, the Commission considers it expedient to express the discounts received in terms of a range of percentages.

It should be noted that, for reasons explained at the end of footnote 5, purchases made and discounts received by George T. Michael are not included in this finding and not attributed to his father, the Respondent.

Respondent, and the prompt inspections performed by the Division of Food and Drug at Building 19.[7]/

15. Pursuant to the requirements of M.G.L. c. 268B, Mr. Michael was designated a "public employee" as defined in Section 1(o) of that chapter, and was required to file and did file Statements of Financial Interests with the Ethics Commission for calendar years 1978 and 1979.

16. M.G.L. c. 268B requires the disclosure of gifts received by "public employees" which aggregate more than $100 in the calendar year and which come from individuals or businesses which have a direct interest in a matter or matters before the governmental body by which the public employee is employed.

17. Building 19 had a direct interest in matters before the Division of Food and Drug during 1978 and 1979.

18. Building 19 extended discounts to Mr. Michael which exceeded $100 in aggregate value in both 1978 and 1979.

19. Mr. Michael did not disclose the discounts he received from Building 19 in 1978 and 1979 in the Statements of Financial Interests which he filed with the Ethics Commission for 1978 and 1979.

20. The Bargain Center, Inc. ("Bargain Center") is a Massachusetts company, formed in 1937, and engaged in the business of buying, reconditioning and retailing to the public salvage merchandise.

21. From at least 1972 through and including 1980, Mr. Michael and other Division of Food and Drug inspectors inspected on a regular and frequent basis and at the times requested by the Bargain Center, salvage merchandise owned and proposed for sale by the Bargain Center.[8]/

22. From at least 1972 through and including 1980, Mr. Michael regularly and frequently advised the principals of the Bargain Center on how to handle and recondition its salvaged products, and approved, both directly and indirectly, such merchandise for sale to the public.[9]/

23. From at least 1976 through and including 1980, Mr. Michael accepted discounts of 15 to 25 percent on merchandise purchased at the Bargain Center, which discounts were not extended or available to the Bargain Center's regular customers; further, Mr. Michael availed himself of these discounts approximately ten times a year during that period and, on at least one occasion in 1979, the value of the discount exceeded $50.[10]/

24. On at least one occasion in 1980, Mr. Michael obtained a discount for a Diane Hurley, whom he represented to be his assistant, on merchandise she purchased at the Bargain Center; the value of the discount was $145.[11]/

25. The maintenance of a cooperative working relationship with the Division of Food and Drug is and has been important to Bargain Center's business; in particular, the availability of inspectors to check Bargain Center's merchandise promptly is and has been of benefit to the business.

26. The discounts noted in paragraphs 23 and 24, above, were extended to and received by Mr. Michael, at least in part, for or because of acts within his official responsibility performed

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[7]/Although Elovitz testified that, in extending these privileges to Mr. Michael, he was doing so, in part, to continue a practice initiated by his predecessor, Mr. Andler, he also testified that he extended them for the reasons given in this finding. The Commission is not persuaded by Mr. Michael's contention that the privileges were extended wholly or primarily out of friendship, for the following reasons: (a) the record contained no evidence of the purported friendship between Andler and Michael; (b) in the absence of such evidence, it would be improper to infer that the "tradition" of extending these privileges, started by Mr. Andler, was based on friendship with Mr. Michael, just as it would be improper to infer any other rationale, absent evidence to support it; (c) Mr. Elovitz testified to the reasons included in paragraphs 12-14, and his testimony was both credible and uncontradicted on these points.

[8]/Because there was no specific testimony or documentary evidence introduced which related to inspections at the Bargain Center prior to 1972, the Commission limits this finding to 1972 and subsequent years. Also, because there was no evidence in the record which would suggest that Mr. Michael specifically assigned the other inspectors to perform inspections at the Bargain Center, the Commission does not specifically find that the other inspectors were acting at Mr. Michael's direction, as alleged.

[9]/The record contains specific evidence that Mr. Michael personally contacted Mr. VanDam of the Bargain Center to approve the sale of merchandise, and the Commission finds this evidence to be persuasive of the fact that Mr. Michael directly approved certain merchandise; on his indirect approval, the comments in footnote 5 are equally applicable here.

[10]/Maxwell VanDam, President of the Bargain Center, testified that he and his associates have extended discounts to Mr. Michael since VanDam because president in about 1976, continuing a policy set by his predecessor, a Mr. Koppelman. Because not testimony was given regarding how much prior to 1976 this practice occurred, nor any pre-1976 sales documentation introduced into evidence, the Commission limits its finding to 1976 through 1980, inclusive.

[11]/As noted in footnote 6, the record was not free from doubt as to the identity of the person Mr. Michael introduced as Diane Hurley, but again the Commission considers the evidence sufficient to sustain this finding. Mr. VanDam testified that Mr. Michael came in with the person, had introduced her to VanDam, indicated that the merchandise was for her and was present while VanDam made the sale.

or to be performed by him, as set out in paragraphs 21 and 22 above.[12]/

27. Value Village, Inc. ("Value Village") is a Massachusetts company, formed in 1968, and engaged in the business of buying, reconditioning and retailing to the public salvage merchandise.

28. From at least 1973 through and including 1980, Mr. Michael, and other Division of Food and Drug inspectors at his direction, on a regular and frequent basis and at times requested by Value Village, inspected salvage merchandise owned by Value Village.

29. On at least one occasion, Mr. Michael personally advised the president of Value Village as to how to recondition products. On another occasion, three days before Easter in 1976, Mr. Michael directed two other inspectors to accompany him on the inspection of a shipment of Easter candy, owned by Value Village. The candy could not be sold until it was inspected and approved by the Division of Food and Drug, and Mr. Michael released it for sale the same day.[13]/

30. From approximately 1968 through and including 1980, Mr. Michael received a 10 to 15 percent discount on merchandise he purchased at Value Village.

31. From approximately 1968 through and including 1980, Mr. Michael purchased at least $200-$300 worth of merchandise at Value Village, on which he received discounts.[14]/

32. The discounts set out in paragraphs 30 and 31 above were extended to and received by Mr. Michael because of the prompt service which the Division of Food and Drug provided to Value Village, which service was of importance and benefit to Value Village.[15]/

33. D.G.M. Consultants ("DGM") is a food testing and consulting company doing business in Massachusetts. It is owned and operated by Dr. George T. Michael, the son of George A. Michael, the Respondent.

34. Cumberland Farms, Inc. ("Cumberland Farms") is a company doing business in Massachusetts, engaged in the business of manufacturing, processing and retailing food products. It employs DGM as a technical analytical consultant for its products at a fee of approximately $500 per month.

35. On March 13, 1979, a major ammonia leak occurred in the Cumberland Farms ice cream processing plant in Canton, Massachusetts. Inspectors Babineau and Luke from the Division of Food and Drug went to the plant that same day, placed an embargo on the Cumberland Farms ice cream processing and storage facilities and on all ice cream raw materials and products then held in those facilities.

36. On March 13, and 14, 1979, Inspectors Babineau and Luke, of the Division of Food and Drug, took samples of the ice cream products which had been exposed to the aforementioned ammonia leak and brought the samples to Mr. Michael's office at the Division of Food and Drug in Jamaica Plain.

37. On March 13, and 14, 1979, Mr. Michael personally participated, with others, in the testing of the ice cream samples from the Cumberland Farms plant.

38. During the period from March 13, 1979, through approximately April 30, 1979, Mr. Michael personally participated in the Cumberland Farms matter by assigning Division of Food and Drug personnel to work on the matter, by testing the aforementioned ice cream product samples, by participating in decisions on the reconditioning of some of the Cumberland Farms products which had been embargoed after the ammonia leak, and by personally contacting the management of Cumberland Farms with regard to the matter.

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[12]/Maxwell VanDam testified that he extended the discount to Mr. Michael as a continuation of the policy established by his predecessor, Mr. Koppelman (now deceased). There is no evidence in the record of a friendship or personal social acquaintance between Mr. Michael and either Mr. VanDam or Mr. Koppelman. Mr. VanDam testified that he gives discounts to people the store does business with, as a "good business practice"; and he gives them to Mr. Michael and other Division of Food and Drug employees as a token of appreciation for their prompt service and advice, and because he wants to continue receiving their prompt service and professional advice. The Commission considers this testimony sufficient to support its finding.

[13]/With regard to the actual inspection of Easter candy, the record is unclear as to the degree of Mr. Michael's participation; but based on the testimony of Melvin VanDam, William Babineau, and the documents in evidence, the Commisison finds that VanDam contracted Michael, who initiated the inspection and gave a final release on that same day; the Commission leaves open the question of whether Michael inspected the merchandise himself either before or after the arrival of other inspectors.

[14]/Mr. VanDam testified that the purchases totalled perhaps $200-$300, but also said that he probably told a staff investigator the purchases amounted to $100 per year; because the discrepancy was not resolved by the introduction of any documentation or further testimony, the Commisison restricts its finding to the lower figure.

[15]/Again, the Commission notes that no other evidence, of either friendship or social relationship between Michael and Melvin VanDam, was introduced which would suggest any other basis for the discount.

39. On or about March 13, 1979, Dr. George T. Michael, the owner of DGM and son of Mr. Michael, the Respondent, was asked by the management of Cumberland Farms to evaluate, test and provide professional advice on reconditioning of the ice cream exposed to ammonia by the March 13, 1979 ammonia leak.

40. During the period from March 13, 1979 through approximately April 30, 1979, Dr. George T. Michael tested and evaluated this ice cream on behalf of Cumberland Farms, provided professional advice concerning the reconditioning of this product, in return for compensation, and had a financial interest in the resolution of this matter.

41. During the period from March 13, 1979 through approximately April 30, 1979, the Respondent, Mr. Michael knew that his son, Dr. George T. Michael, was being compensated by Cumberland Farms for testing and evaluating the aforementioned ice cream products and for providing professional advice on the reconditioning of those products.[16]/

42. DeMoulas Supermarkets, Inc. ("DeMoulas Markets") is a company doing business in Massachusetts, and is engaged in the business of retailing food products to the public.

43. DeMoulas Markets employs DGM as a food consultant.

44. On or about February 2, 1977, all foods in the DeMoulas Markets' warehouse located in Tewksbury, Massachusetts, were seized by the U.S. Food and Drug Administration due to rodent infestation; a consent decree was subsequently entered and a bond posted by DeMoulas Markets.

45. On or about February 4, 1977, DeMoulas Markets hired DGM to develop and implement a reconditioning program in order to secure the release of the bond which had been posted pursuant to the aforementioned seizure, and DGM, therefore, had a financial interst in the matter.

46. During the period from February 4, 1977 through at least March, 1977, the Respondent, Mr. Michael, initiated and participated in several official actions intended to accelerate the release of the bond which had been posted by DeMoulas Markets, pursuant to the seizure and consent decree. In particular, he personally visited the DeMoulas Markets warehouse on February 5, 1977 and told a federal inspector that he had given "them" a clean bill of health and asked how the reconditioning process could be expedited; he spoke with the Acting District Director of the U.S. Food and Drug Administration on February 7, 1977, at which time the Respondent agreed to assist federal officials in the DeMoulas matter; he assigned inspectors from the state Division of Food and Drug to inspect DeMoulas Markets' retail outlets and warehouse, and to monitor the reconditioning process, and had documentation of the latter sent to federal authorities shortly before the end of the seizure and release of the bond on March 4, 1977.[17]/

47. In its decision to release the bond on the DeMoulas Markets' warehouse contents and end the seizure on March 4, 1977, the federal

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[16]/The only individuals who could give definitive testimony on this point were the Respondent and his son; the Respondent did not take the witness stand in these proceedings. His son testified that, during the time period at issue, he may have had a general discussion with the Respondent about absorption principles and time lapse for ammonia dissipation, but he recalled no specific mention of Cumberland Farms at that time. He also testified that his memory on earlier events would be better in 1979 than in 1981. Capt. Agnes testified that he interviewed both the Respondent and his son (separately) in October, 1979, and that in the course of those interviews, the Respondent said that he and his son had discussed the ice cream, namely, the kinds of tests the Division of Food and Drug was performing on it; and that Respondent also said his son was a consultant for Cumberland Farms but he (Respondent) didn't know exactly when he (the son) started. Agnes testified that during an interview, George T. Michael told Agnes that he had had a conversation with his father concerning the Cumberland Farms ice cream in question, particularly on whether aeration was a good reconditioning mechanism, and that the conversation took place during the period at issue.

The Commission finds the testimony of Capt. Agnes to be the more persuasive for the following reasons: (a) taken as a whole, the testimony of George T. Michael was often unresponsive and obfuscatory; (b) on this particular issue, he could have had strong motivation, namely, loyalty to his father, not to be completely forthcoming in his answers; (c) by his own admission, his memory on facts and issue was clearer in 1979; and (d) even accepting George T. Michael's version of the facts, namely, that there was a conversation about ammonia absorption and dissipation generally, it strains credulity to maintain that during such a specialized conversation, Respondent would not have realized, if he was not told outright, that the reason his son was inquiring about these principles was that he was professionally involved in the matter.

The Commission acknowledges that this finding is based largely upon hearsay introduced through Captain Agnes. However, the Commission considers his testimony to be reliable; and the only person who could refute the testimony (the Respondent) did not take the stand. Even if the Commission were bound by the Rules of Evidence, which it is not, the statements would have been admissible as exemptions to the hearsay rule, as admission of a party-opponent.

[17]/Much testimony centered upon Mr. Michael's comment during the February 5th conversation that he had given "them" a clean bill of health, and whether "them" referred to the retail stores or the warehouse. The Commission sees no relevance in making this distinction, since in either reading of the comment, Mr. Michael's assertion was questionable.

Food and Drug Administration relied, in part, on the results of the state Division of Food and Drug investigation, conducted at the initiation and direction of Mr. Michael, the Respondent.[18]/

48. During the period from February 5, 1977 through approximately March 1, 1977, the Respondent, Mr. Michael, knew that DGM had been retained by DeMoulas Markets to help secure the release of the warehouse from federal custody, and that his son had a financial interest in the matters.[19]/

49. Seamark Corporation ("Seamark"), is a company doing business in Massachusetts which is engaged in the business of importing and wholesaling seafood products.

50. Seamark has retained DGM to test its seafood imports since approximately 1977; among the services it performs, DGM tests shrimp for Seamark.

51. On or about April 18, 1978, Purity Supreme Supermarkets of North Billerica, Massachusetts, purchased and took delivery at its warehouse of a shipment of MarcaMar brand shrimp from Seamark.

52. On or about April 21, 1978, after a problem with MarcaMar brand frozen shrimp had arisen in a retail store in Walpole, a Division of Food and Drug seafood inspector visited the Purity Supreme warehouse in North Billerica, visually examined and embargoed 110 cases of MarcaMar shrimp at the warehouse and took samples for testing.

53. Tests on the shrimp samples from the previously mentioned retail outlet and from the Purity Supreme Warehouse were not completed by the Division of Food and Drug until April 24, 1981, at which time they were found to have a strong odor.

54. On the same day that the aforementioned samples were collected from the embargoed shrimp at the warehouse, April 21, 1978, and prior to completion of tests on these samples by the Division of Food and Drug, the Respondent directed and lifting of the embargo on the shrimp at the warehouse, and the inspector lifted the embargo.[20]/

55. The investigations unit of the staff of the State Ethics Commission conducted the investigation into the subject matter of this proceeding. That unit is headed by Robert J. Cordy ("Mr. Cordy"), Associate General Counsel for Investigation and Enforcement, who directed the inquiry.

56. On October 16, 1980, Mr. Cordy filed with the Commission a written recommendation, based on evidence referred to the Commission by the Department of the Attorney General, that the Commission authorize a Preliminary Inquiry into the actions of George A. Michael. The Commission authorized the inquiry on that date.

57. On December 1, 1980, Mr. Cordy filed with the Commission a report on the Preliminary Inquiry in the Matter of George A. Michael, summarizing the information developed during the inquiry and recommending that there was sufficient factual basis to support a finding of "reasonable cause" to believe that Mr. Michael had violated M.G.L. c. 268A and 268B.

58. Based upon the Preliminary Inquiry Report, the Commission voted, on December 1, 1980, to find that there was reasonable cause to

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[18]/According to the record, Davis of the FDA told Michael that the state's documentation of reconditioning was necessary to release of the bond; and the bond was released the day after the documentation was received. Robert Crowell of the FDA, who was the compliance officer in charge of the DeMoulas matter, also testified that he relied, in part, on these documents in deciding that the purpose of the seizure had been fulfilled.

[19]/The Commisison bases this finding upon: (a) the testimony of Capt. Agnes, which recounted Mr. Michael's statement to Agnes in an October, 1979 interview that, during his February 5, 1977 visit to the DeMoulas warehouse, Mr. Michael learned from Michael DeMoulas that George T. Michael was a consultant for DeMoulas; (b) during the same interview, Agnes testified, Respondent said he had had a conversation with his son about the unsatisfactory pesticide procedures at the DeMoulas warehouse, but Respondent didn't say when this conversation occurred; (c) George T. Michael testified that he and his father may have had a general conversation on the "concept of the problem" during the time the son was working on the matter; and (d) according to Capt. Agnes' testimony, George T. Michael told him in an October, 1979 interview that about 2 or 3 weeks after the federal seizure he had a follow up conversation with his father (the Respondent) on the DeMoulas matter. The Commission, in viewing this testimony as a whole, considers it sufficient to support the finding, and makes the same observations on George T. Michael's testimony and on the use of hearsay evidence as in footnote 16.

[20]/The Commission notes that the evidence on this issue is sketchy, but finds it sufficient in several respects to support the finding that Mr. Michael released the embargo: (a) The embargo slip, identified by its maker, Frederick Hanna, bears the notation in his writing, "Released By G.A.M. on 4/21/78 P.M."; (b) Hanna testified that he asked Chief Inspector Murphy to explain the release but Murphy told him Mr. Michael had released it, and didn't explain further and this gave rise to the aforementioned notation; (c) Several Division of Food and Drug inspectors testified that as a matter of Division practice, embargoes were not released unless Mr. Michael so directed.

In crediting Murphy's explanation in (b), above, the Commission is aware that such an assertion by Murphy might be of questionable use in a court because of the hearsay rule. However, as stated in footnote 16, the Commission considers Captain Agnes' testimony to be reliable, and the Respondent chose not to testify on this or any other issue; in any event, even if the Commission were bound by the Rules of Evidence, which it is not, the statements probaby would have been admissible under an exemption to the hearsay rule, since Murphy is now dead.

believe that Mr. Michael had violated the aforementioned laws, and authorized the staff to conduct a full investigation and, at its conclusion, initiate adjudicatory proceedings.

59. Following the above-mentioned authorization, Mr. Cordy drafted and filed an Order to Show Cause why Mr. Michael should not be found in violation of M.G.L. c. 268A and 268B, on January 6, 1981. The text of that Order was not reviewed by the Commission.

60. Mr. Cordy appeared as Counsel for the Petitioner, the State Ethics Commission, during the adjudicatory proceedings in this matter.

61. The members of the State Ethics Commission have acted as triers of fact and law in the instant proceeding, and have made findings of fact and conclusions of law as set forth in this Decision and Order.

III. Decision

The Respondent has been charged with violating M.G.L. c. 268A, §§3(b), 6, 23(d), (e) and (f) and c. 268B, §7. We will address these charges separately. First, however, the Commission addresses certain constitutional issues raised by Respondent.

A. Constitutional Issues

1. Combination of Investigatory, Prosecutorial and Adjudicatory Functions.

In his Answer, Respondent contends that his due process rights under the federal and Massachusetts constitutions are violated by virtue of the organization and procedures of the State Ethics Commission, in which investigatory, prosecutorial and adjudicatory functions are combined, in one agency. He also alleges that this combination of functions, in and of itself, impermissibly deprives him of an impartial factfinder.

The Commission finds no merit in Respondent's constitutional argument. The constitutional validity of such a combination has been upheld both by the United States Supreme Court, in **Withrow v. Larkin**, 421 U.S. 35 (1975), and by the Massachusetts Appeals Court in **School Committee of Stoughton v. Labor Relations Commission,** 4 Mass. App. Ct. 262 (1976). In addition, **Withrow** has been cited and applied by the Massachusetts Supreme Judicial Court in the case of **Dwyer v. Commissioner of Insurance,** 376 N.E. 2d 826 (1978), in which the court affirmed the authority of the Commissioner of Insurance to conduct a dismissal hearing after having directed a subordinate to investigate the matter and reviewing the investigative results. **Withrow** was also cited by the Massachusetts Superior Court (Ronan, J.) in **George A. Michael v. State Ethics Commisison,** Superior Ct. No. 47401, the action in which the Respondent unsuccessfully attempted to obtain injunctive relief against the Commission's hearing prior to their commencement. That court also cited the **Opinion of the Justices,** 375 Mass. 795 (1978), an opinion which was rendered to the Massachusetts Senate prior to the passage of M.G.L. c. 268B (the statute which created the Commission), and which noted no constitutional defect in the statutory scheme.

2. Alleged Disqualification of Commission

Respondent also contended in his Answer that the Commission members were disqualified from sitting in judgment on this matter by virtue of their prior exposure to evidence in the matter, their *ex parte* communications with Counsel for Petitioner relative to the matters in issue, their vote authorizing the filing of an Order to Show Cause, and their issuance of press releases relative to the matter.

The only evidence introduced by Respondent in support of this contention is an affidavit from Counsel for the Petitioner, setting forth the activities of the Commission and its staff with regard to this matter prior to the issuance of the Order to Show Cause, and copies of the Preliminary Inquiry Recommendation and Report reviewed by the Commission during that period.

The Commission, in reviewing this record, finds no support for the Respondent's argument that the Commission is disqualified as a matter of law from adjudicating this matter. Rather, the Commission calls attention to: (a) M.G.L. c. 268B, §4(a), which mandates that the Commission initiate a preliminary inquiry upon receipt of evidence which it deems sufficient -- thereby assigning to the Commission the duty of evaluating the sufficiency of evidence at an early stage; (b) M.G.L. c. 268B, §4(c), which permits the Commission to vote to initiate proceedings if a preliminary inquiry indicates reasonable cause for belief that c. 268A or 268B has been violated -- again, an authorization for the Commission to review the sufficiency of evidence be-

fore proceeding to the next phase of a matter; and (c) the **Dwyer** and **Stoughton** cases, cited above, which find no disqualification by virtue of prior exposure to evidence in an *ex parte* administrative context, or by prior issuance of a complaint in a matter, respectively.

3. Applicability of Ex Post Facto Prohibition to Commission's Adjudication and Penalization of Conduct Which Occurred Prior to the Commission's Creation

The Respondent maintains that the Commission is constitutionally prohibited from penalizing those whom it finds to have violated M.G.L. c. 268A prior to the enactment of c. 268B, i.e., prior to the Commission's creation and its assumption of enforcement powers over such violations.

The Commission rejects this contention by noting that the *ex post facto* prohibition is only applicable to criminal or penal statutes, **Calder v. Bull,** 3 (U.S.) Dall., 386 (1798); **Bankers Trust v. Blodgett**, 260 U.S. 647 (1923); **Reale v. Judges of the Superior Court,** 265 Mass. 135 (1928) and not to the imposition of additional civil or regulatory sanctions on past conduct, **Helvering v. Mitchell,** 303 U.S. 391, 399 (1938); **Flemming v. Nestor,** 363 U.S. 603 (1960). In **Opinion of the Justices,** 375 Mass. 795 (1978), the Supreme Judicial Court stated that the imposition of a $1,000 penalty by the State Ethics Commission, envisioned by M.G.L. c. 268B, was not to be imposed where there was a criminal violation, was not intended to punish the commission of a crime, was not a "capital or infamous punishment", and was a familiar device conferred upon administrative bodies to assist them in the performance of their duties. The Commission considers these elements sufficient to characterize its enforcement powers as civil rather than criminal, thus negating any application of the *ex post facto* prohibition to its regulatory activities.

B. Jurisdiction

Both parties agree that Respondent was, at all times relevant to the matter at issue, a state employee within the meaning of M.G.L. c. 268A, §1(q) and thus subject to the proscriptions of that chapter. The parties also agree that Respondent was designated a "public employee", as defined in M.G.L. c. 268B, §1(o) and was required to file (and did in fact file) Statements of Financial Interests with the Commission for Calendar years 1978 and 1979, pursuant to that chapter.

C. Chapter 268A Allegations

1. Building 19

a. Section 3

The Petitioner contends that Mr. Michael violated M.G.L. c. 268A, §3(b) by receiving discounts and charge privileges from Building 19 as tokens of appreciation for the prompt service and guidance that his Division provided the store. The Commission agrees.

> Section 3(b) prohibits a state employee
>
> otherwise than as provided by law for the proper discharge of official duty, directly or indirectly . . . [to] receive anything of substantial value for himself for or because of any official act or act within his official responsibility performed or to be performed by him.

The record is abundantly clear that Mr. Michael received the discounts and charge privileges from 1964 through 1980.[21]/ It is also clear from the sales receipts in the record that discounts received by Mr. Michael from 1976 through 1980, inclusive, totalled more than $100 each year, and often considerably more. The Commission finds that these discounts constitute something of "substantial value" received by Respondent.[22]/ See, **Commonwealth v. Famigletti,** 4 Mass. App. 584, 354 N.E. 2d 890 (1976). The record contains no evidence that the discounts and charge privileges were provided by law for the proper discharge of official duty, and thus the Commission concludes that they were not, and that Respondent violated Section 3(b) in 1976 through 1980, inclusive.

Mr. Michael argues that there was no "quid pro quo" involved here, and thus no violation of

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[21]/The Commission considers it unnecessary to find, as alleged, that Mr. Michael requested the discounts; it does so because Section 3 is violated whether the person solicits or accepts [anything of substantial value] and it has found that Mr. Michael accepted the discounts.

[22]/The Respondent also argued that because the prices he paid for the merchandise he purchased at Building 19 covered the store's cost of the items, he did not receive anything of substantial value but rather paid an amount equal to or greater than value of the merchandise. The Commission rejects this argument and finds that, because the prices he paid were substantially lower than those charged to ordinary customers, Respondent did receive something of substantial value. With few exceptions, the discounts were not given because the merchandise was damaged, in which case a discount might have been generally available.

Chapter 268A. However, a Massachsuetts court has held that, to find a violation under Section 3(b), corrupt intent need not be shown, and it is enough that a defendant requested or received something of substantial value for or because of an official act already performed or to be performed by him. **Commonwealth v. Dutney,** 4 Mass. App. 363, 375, 348 N.E. 2d 812 (1976). The Ethics Commission has followed this ruling, and has found Section 3 to be violated when extra compensation was received by a public employee for doing the job she was required to do by virtue of her public employment. See **In the Matter of the Collector-Treasurer's Office of the City of Boston, et al.,** Commission Disposition Agreement (March 2, 1981).

A public employee need not be impelled to wrongdoing as a result of receiving a gift or gratuity of substantial value, in order for a violation of Section 3 to occur. Rather, the gift may simply be a token of gratitude for a well-done job or an attempt to foster goodwill. All that is required to bring Section 3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited. To allow otherwise would subject public employees to a host of temptations which would undermine the impartial performance of their duties, and permit multiple remuneration for doing what employees are already obliged to do - a good job. Sound public policy necessitates a flat prohibition since the alternative would present unworkable burdens of proof. It would be nearly impossible to prove the loss of an employee's objectivity or to assign a motivation to his exercise of discretion. If public credibility in government institutions is to be fostered, constraints which are conducive to reasoned, impartial performance of public functions are necessary, and it is in this context that Section 3 operates.

Thus the Commission disagrees with Respondent's contention that, because he performed his official duties as provided by law, his receipt of discounts and charge privileges was not illegal. The record contains adequate evidence for the Commission to find that the extension of the privileges was in return for past cooperation and prompt service by Respondent's Division, and to ensure the continuation of such service. In so finding, the Commission notes that it is probably rare to find an explicit expression or open acknowledgement of such a mutual "understanding," and thus it is to be expected that such a finding will ordinarily have to be drawn by inference, as is done here, if Section 3 is to be given a sensible reading.

b. Section 23

The Commission finds that Respondent violated Section 23(d), which prohibits "use [of] official position to secure unwarranted privileges or exemptions for himself or others." The record contains adequate evidence to find that, from at least 1975 through and including 1980, Respondent obtained discounts for himself, his sister (or sister-in-law) and his secretary/assistant. The Commission finds most of these discounts to have been "unwarranted" to the extent that they were not generally available to the public, not given for reason of merchandise damage in most cases, not the result of personal, social acquaintance or family relationships with Building 19's owner, not provided for by law, and thus in violation of Section 23(d).

The Commission also finds that Respondent violated Section 23(e), which prohibits a state employee

> by his conduct [giving] reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties. . .

In sustaining the violation, the Commission notes that the record shows that Respondent advised Building 19's owner as to whether or not to purchase certain shipments of salvage merchandise, and occasionally had such merchandise inspected before Building 19 decided to purchase it. Such advice, even if not improperly given, nevertheless indicates that Respondent at times was particularly accommodating towards Building 19. This, coupled with his receipt of the discount and charge privileges, provides reasonable basis for the impression that Respondent was influenced in the performance of his duties with respect to Building 19 because of the privileges.

2. Bargain Center

a. Section 3

Petitioner asks the Commission to find that Respondent violated M.G.L. c. 268A, §3(b) by

receiving discounts for himself and others from the Bargain Center which were given for or because of acts within his official responsibility performed or to be performed by him.

There is sufficient evidence in the record to support the assertion that Respondent received discounts of 15 to 25 percent on his purchases from the Bargain Center. There is also sufficient evidence to find that these discounts were extended for or because of acts within his official responsibility: Maxwell Van Dam, president of Bargain Center, testified that his reasons for providing the discounts were his appreciation for the prompt service and advice by the Respondent's Division, and Van Dam's desire to continue to receive such prompt service and advice.

With respect to whether or not the discounts from the Bargain Center were of "substantial" value, the Commission finds that they were, on at least two occasions: (a) In 1979, the Respondent received a discount of over $50 on the purchase of linoelum; and (b) in 1980, Respondent obtained a discount of $145 on a piece of furniture purchased by Diane Hurley. Accordingly, the Commission finds that Respondent violated Section 3(b) on these two occasions.

b. Section 23

The Commission finds that Respondent also violated M.G.L. c. 268A, §23(d) and (e) by his receipt of discounts from the Bargain Center.

With respect to Section 23(d), the Commission is pursuaded that Respondent used his position to obtain these discounts for himself and for Diane Hurley, and that, at least in the case of the linoleum purchase, the discount was unwarranted. The Commission makes no such finding with respect to the discount received by Diane Hurley since there was evidence in the record to the effect that the merchandise she purchased was damaged; absent any specific information as to the extent of the damage, the Commission is unable to determine to what extent the discount may have been warranted.

With respect to Section 23(e), the Commission finds that the Respondent did, by his conduct, give reasonable basis for the impression that Bargain Center could unduly enjoy his favor in the performance of his official duties. Specifically, the Commission finds that Respondent personally performed inspections of merchandise at Bargain Center and, in doing so, disregarded the procedures set forth in M.G.L. c. 94 and in the Department of Public Health regulations. According to Maxwell Van Dam's testimony, Respondent, on at least one occasion in 1980, looked over a shipment of tuna, took an entire case as a sample without leaving a receipt or a copy of his inspection report, and never communicated with Van Dam any test results; it was Van Dam's understanding that if he didn't hear from Respondent, he could sell the tuna. By his disregard for established procedures in his official dealing with a store which afforded him discounts, Respondent gave reasonable basis for the impression that Bargain Center could unduly enjoy his favor in the performance of his official duties, in violation of Section 23(e).

3. Value Village

a. Section 3

The Petitioner contends that, by receiving discounts on merchandise he purchased at Value Village, Respondent violated M.G.L. c. 268A, §3(b). The Commission deems the record insufficient to support such a finding.

Although Melvin Van Dam, President of Value Village testified that he extended a 10 to 15 percent discount to Respondent, he was certain as to the value of merchandise purchased by Respondent; in his testimony, he estimated total purchases of $200-$300 by the Respondent, and was uncertain if this was correct, or a higher figure he may have quoted during an interview. Because the uncertainty was unresolved, and because a 10-15% discount on purchases of $200-$300 is arguably not substantial, the Commission declines to rule that Respondent's conduct here violated Section 3.

b. Section 23

Petitioner alleges that Respondent used his official position to secure unwarranted privileges for himself or others, in violation of Section 23(d). The Commission finds that, by accepting discounts which were extended to him in part because of the prompt service his Division rendered to Value Village, Respondent used his official position to secure unwarranted privileges for himself, and thus violated Section 23(d).

The Commission also finds that Respondent violated Section 23 (e), by accepting discounts from a business he regulated (Value Village), and by taking personal action to expedite the

inspections necessary to that business on an occasion when the commercial value of the merchandise to be inspected depended on its quick approval for sale. With respect to the latter, the Commission points to the findings of fact, paragraph 29.

4. Building 19, Bargain Center, Value Village

a. Section 23(f)

Petitioner alleges that, by receiving discounts from businesses subject to his inspection and regulatory authority, and over which he exercised that authority for a number of years, the Respondent pursued a course of conduct which would raise suspicion among the public that he was likely to be engaged in acts that were in violation of his public trust. The Commission agrees.

The record substantiates the Respondent's regulatory authority over the three businesses in question (see, e.g. paragraphs 2 and 3 of the Findings of Fact). It also supports the findings that Respondent personally inspected and exercised other authority over these businesses. As set forth in the Findings of Fact, Respondent accepted discounts from all three businesses.

Respondent argues that, because the discounts in issue were a "private matter" between himself and the stores involved, they could in no way give rise to suspicion on the part of the public. The Commission finds this argument unpersuasive for several reasons: (a) Respondent cites no authority to support his assertion that actual public knowledge is an element of the offense here charged; he instead argues an analogy to M.G.L. c. 272 §§16 and 53, the statutes on lascivious cohabitation and lewdness, and common night walkers, respectively, into which courts have read a requirement of public involvement before a violation will be found; the Commission considers those statutes and rulings to be inapposite; (b) to read into Section 23(f) a requirement of actual public knowledge of any violation of the conflict of interest law is contrary to common sense and would render the section meaningless in almost all cases. The Commission considers a more reasonable reading of the section to require that the course of conduct, *if known,* would raise suspicion among the public that the employee is in violation of his public trust; and (c) further, the Commission deems the Respondent's conduct sufficient to have given rise to such a suspicion, in this case. Specifically, sales personnel in the stores involved were aware of his public office and of the special treatment he was afforded by the stores' management; one can infer that others were also aware. For all of these reasons, the Commission finds that Respondent violated Section 23(f).

5. Cumberland Farms

a. Section 6

Petitioner contends that Respondent violated M.G.L. c. 268A, §6 by participating in his official capacity in testing, evaluating and deciding to release ice cream products which were owned by Cumberland Farms, at a time when Respondent knew that his son had a financial interest in the handling of the same matter for Cumberland Farms. Respondent admitted his participation in the matter as alleged, but denied having known of his son's financial interest in the matter. Respondent's son confirmed in testimony that his firm was in fact on paid retainer with Cumberland Farms during the period in question.

Section 6 prohibits a state employee from participating as such in a particular matter in which *to his knowledge* a member of his immediate family has a financial interest (emphasis added). Thus, the Commission must find that Respondent knew of his son's interest in the matter at the time of his participation in order for a violation to be found.

In paragraph 41 of the Findings of Fact, above, the Commission found that Respondent did know of his son's financial interest in the matter during the period when Respondent was participatng in the matter in his official capacity. In relying on this finding, the Commission acknowledges that it is based on hearsay statements of Respondent introduced through an interviewer, Captain Agnes; however, the Commission considers these statements to be persuasive because of the strength and credibility of Captain Agnes' testimony; because, even if the Commission were bound by the Rules of Evidence in these proceedings (which it is not), the statements would be admissible as admissions of a party-opponent.

In view of the facts found, and in the absence of any evidence that Respondent satisfied any of the exceptions from Section 6, the Com-

mission finds that Respondent's participation in the Cumberland Farms matter violated Section 6.

b. Section 23(e)

The Commission finds that Respondent also violated Section 23(e) by his participation in the Cumberland Farms matter, in that he gave reasonable basis for the impression that Cumberland Farms and his son could improperly influence him or unduly enjoy his favor in the performance of his official duties.

By virtue of his participation in the testing, evaluation and decisions in the Cumberland Farms matter, and specifically by serving as a contact person between the Division of Food and Drug and the management of Cumberland Farms, Respondent did give reasonable basis for the impression that Cumberland Farms or his son could enjoy his favor in the performance of his official duties, or that he was unduly affected by the kinship of his son or the position of influence of his son or Cumberland Farms. In particular, he gave basis for such an impression on the part of his employees at the Division of Food and Drug, and those individuals at Cumberland Farms with whom he dealt personally. Had the Respondent wished to avoid any impropriety in the matter, he should have abstained from any actions in it and so advised Cumberland Farms and his son.

6. DeMoulas Markets

a. Section 6

Petitioner contends that Respondent violated M.G.L. c. 268A, §6 by participating in decisions and official actions affecting the federal seizure of the DeMoulas Markets' warehouse in 1977, while knowing that his son had a financial interest in the matter.

In paragraph 46 of the Findings of Fact, the Commission found that Respondent participated in a number of official actions with respect to the DeMoulas consent decree (a judicial proceeding which qualified as a "particular matter" within the ambit of M.G.L. c. 268A). His participation was personal and substantial, in view of the findings that he, as the Division of Food and Drug's contact with the U.S. Food and Drug Administration, offered help in the investigation, assigned the resources of his office to it, and caused to be sent to the FDA documentation from the state agency which was necessary to the release of the bond.

With regard to Respondent's knowledge of his son's financial interest in the matter, paragraph 48 of the Findings of Fact ascribes that knowledge to the Respondent. As in the findings in the Cumberland Farms matter, this is also based in part on hearsay introduced through Captain Agnes, but nevertheless would qualify under the admissions exception as discussed above.

In view of these facts, the Commission finds that Respondent violated Section 6 as alleged.

b. Section 23

Petitioner alleges that, by his conduct, Respondent violated M.G.L. c. 268A, §23(d). The Commission agrees that Respondent used his official position in the DeMoulas matter, and in one respect finds the evidence sufficient to determine that Respondent attempted to secure unwarranted privileges or exemptions for himself or others, in violation of Section 23(d). The Commission is persuaded that, in his statement to Jane Howell of the FDA on February 5, 1977, Respondent's representation that *either* the stores or the warehouse were in satisfactory condition was unwarranted (because not all retail stores had been inspected by the Division as of that date, nor had the warehouse); and that his statement to her was made in an effort to affect the actions of the federal inspectors and officers. In that respect, the Commission finds Respondent's conduct violated Section 23(d). However, with regard to Respondent's subsequent actions on the matter, the Commission finds no clear demonstration in the record that his efforts were directed towards an *unwarranted* release of the DeMoulas bond and seizure, and thus the finding of violation is confined to the incident outlined above.

The Commission also finds that Respondent violated Section 23(e), in particular by visiting the warehouse with Michael DeMoulas on February 5, 1977 and by urging the federal inspectors there to make arrangement to expedite the reconditioning process so that the DeMoulas stores could be resupplied. In doing so, he gave the federal inspectors reasonable basis for the impression that Mr. DeMoulas unduly enjoyed his favor in the performance of his official duties.

7. Seamark/Purity Supreme

a. Section 23

The Petitioner alleges that Respondent violated Section 23(d) by directing the early and unwarranted release of an embargo on frozen shrimp owned by Purity Supreme Supermarkets, which it had allegedly bought from Seamark Corporation. The Commission finds the evidence insufficient to support this allegation.

Although the record clearly demonstrates that Respondent directed the lifting of the embargo on the same day it was imposed, the Commission finds the record unclear as to whether the inspector involved imposed the embargo properly according to statutory standards, and if not, to what extent Respondent's action may have been justified. Because the Commisison is unwilling, without further evidence, to substitute its judgment on what appears to be a matter of discretion, it declines to find that the Respondent's action was unwarranted.

Petitioner also alleges that Respondent violated Section 23(e) by using his official position to secure the release of a product which was imported and sold by a company which employed his son's firm, thus giving reasonable basis for the impression that the firm could unduly enjoy his favor in the performance of his official duties. The Commission also finds the evidence insufficient to justify such a finding.

Specifically, while the record shows that Seamark and Purity Supreme used the services of DGM, the embargo documents state that the shrimp in question originated from "Sea Corp." and there remains an uncertainty as to whether the names "Sea Corp." and "Seamark" referred to the same company, either in fact or in the understanding of those using the terms. In view of this uncertainty, the Commission is not persuaded that a basis existed for an unfavorable impression of Respondent's actions in the matter.

8. Cumberland Farms, DeMoulas Markets, Purity Supreme/Seamark

a. Section 23

With respect to his participation in the Cumberland Farms and DeMoulas matters, the Commission finds that Respondent engaged in a course of conduct which would raise suspicion among the public that he was likely to be acting in violation of his public trust, as prohibited by Section 23(f). The Commission points to Respondent's communications with Cumberland Farms personnel and his own employees on the ice cream matter, and his contacts with federal inspectors at the DeMoulas warehouse, in support of this finding.

D. Chapter 268B Allegations

Petitioner has alleged that Respondent's failure to include the value of the discounts, which he received on purchases he made from Building 19 in 1978 and 1979, on his 1978 and 1979 Statements of Financial Interest violated M.G.L. c. 268B, §7, which states that

> Any person who . . . files a false statement of financial interests under Section 5 of this chapter shall be punished by a fine . . .

In paragraph 15 of the Findings of Fact, the Commission found that Respondent was extended discounts totalling over $100 from Building 19 in both 1978 and 1979. It also is undisputed that Respondent did not disclose these discounts on his Statements of Financial Interests for those years. The position of Respondent is that he was not required to do so because discounts do not fall within the definition of "gifts" which are required to be so disclosed. The Commission disagrees.

Although the definition of "gift" in the Instructions for Statements of Financial Interests in both 1978 and 1979 does not specifically include "discount," it does include "anything of value." Respondent argues that he received nothing of value in availing himself of the discounts because he gave consideration (payment) which was equal to or greater than the value of the item received in exchange. The Commission is not persuaded by this argument and finds that the amount of the discount is something of value which is included in the term "gift" and required to be reported.

In making this finding, the Commission points to an example given in the Filing Instructions for both years which discusses the filer's use of a ski chalet for a weekend, where the fair market value of the rental is $300 but the filer pays the owner $100 in whiskey. The example explains that this item is required to be listed, and does not discuss whether the use of the chalet was worth $100 or $300 or whether the amount

paid was sufficient to cover costs. The Commission finds this example to be analogous to Respondent's payment of a price less than that charged the public for merchandise he purchased at Building 19.

The Commission concludes that the example given in the instructions, even if not completely identical to Respondent's situation, was sufficiently similar to put a reasonable person on notice that he should be required to disclose the discounts. As a result, the Commission finds that his omission of this information was negligent, in that he should have either requested further clarification from the Commission, or listed the items in question.

However, the Commission considers the evidence in the record insufficient to support a finding that Respondent intentionally omitted the information. The best evidence on intent would undoubtedly have come from the Respondent himself, but due to his failure to take the witness stand, the record contains inadequate evidence to infer intentional failure to file, in the Commission's view. For this reason, the Commission finds that Respondent violated Section 7 of M.G.L. c. 268B, but will refrain from imposing the maximum penalty allowable under that section.

IV. Order

On the basis of the foregoing, the Commission concludes that George A. Michael violated M.G.L. c. 268A, §§3(b), 6, 23(d), (e) and (f), and c. 268B. §7. Pursuant to the authority granted it by M.G.L. c. 268B, §4(d), the Commission hereby orders Mr. Michael to pay the civil penalties set forth below. In arriving at these penalties, the Commission has carefully considered the differences in frequency and gravity of the offenses, as reflected in the record, and thus imposes less-than-maximum fines in some instances. Accordingly, the Commission orders George A. Michael to:

1. Pay $1,000 (one thousand dollars) to the Commission as a civil penalty for receiving discounts and charge privileges of substantial value for himself from Building 19 for each of the years 1976, 1977, 1978, 1979 and 1980, in violation of M.G.L. c. 268A, §3(b), for a total of **$5,000** (five thousand dollars).

2. Pay **$1,000** (one thousand dollars) to the Commission as a civil penalty for obtaining discounts and charge privileges for others from Building 19 in 1975, 1976, 1977, 1979 and 1980, in violation of M.G.L. c. 268A, §23(d).[23]/

3. Pay **$500** (five hundred dollars) to the Commission for the false filing of his 1978 Statement of Financial Interests in violation of M.G.L. c. 268B, §7.

4. Pay **$500** (five hundred dollars) to the Commission for the false filing of his 1979 Statement of Financial Interests in violation of M.G.L. c. 268B, §7.

5. Pay **$1,000** (one thousand dollars) to the Commission as a civil penalty for receiving discounts of substantial value for himself from the Bargain Center in 1979, in violation of M.G.L. c. 268A, §3(b).

6. Pay **$1,000** (one thousand dollars) to the Commission as a civil penalty for obtaining a discount of substantial value for another from Bargain Center in 1980, in violation of M.G.L. c. 268A, §3(b).

7. Pay **$1,000** (one thousand dollars) to the Commission as a civil penalty for receiving discounts for himself from the Bargain Center in 1976, 1977, 1978 and 1980 in violation of M.G.L. c. 268A, §23(b).

8. Pay **$1,000** (one thousand dollars) to the Commission as a civil penalty for his participation in the Cumberland Farms matter in violation of M.G.L. c. 268A, §6.

9. Pay **$1,000** (one thousand dollars) to the Commission as a civil penalty for his participation in the DeMoulas Markets matter, in violation of M.G.L. c. 268A, §6.

We order Mr. Michael to pay these penalties totalling $12,000 (twelve thousand dollars) to the Commission within thirty days of the receipt of this Decision and Order.

DATE: September 28, 1981

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[23]/The Commission possesses the authority under M.G.L. c. 268B §4(d) to assess civil penalties of up to $1,000 per violation of M.G.L. c. 268A §23 for actions which occurred either prior to our subsequent to the Commission's creation in 1978. Although the Commission's power to do so was not established and therefore known to those subject to §23 prior to 1978, those individuals were on notice by virtue of the language of §23 that administrative sanctions, which could include financial loss (such as an unpaid suspension from public employment), could be imposed for violations of §23.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory
Docket No. 149

IN THE MATTER
OF
EDWARD BROOKS

DISPOSITION AGREEMENT

This Agreement is entered into between the State Ethics Commission ("Commission") and Edward Brooks ("Mr. Brooks") pursuant to Section 11 of the Commission's **Procedures Covering the Initiation and Conduct of Preliminary Inquiries and Investigations**. The parties agree that upon its execution, this Agreement shall constitute an assented to final order of the Commission enforceable in the Superior Court under §4(d) of G.L. c. 268B.

On June 11, 1981, the Commission initiated a Preliminary Inquiry into possible violations of the conflict-of-interest law, G.L. c. 268A, concerning Mr. Brooks' involvement as a former employee of the Boston Water and Sewer Commission ("BWSC") in matters in which he had previously participated as an employee of the BWSC.

The Commission has concluded its Preliminary Inquiry into Mr. Brooks' involvement in the matters set forth herein, and makes the following findings of fact and conclusions of law to which the parties hereto agree:

1. Mr. Brooks was employed by the BWSC as a collection clerk from January 1980, through January 2, 1981, and as such was a "municipal employee" as defined in §1(g) of G.L. c. 268A.

2. In his capacity as a collection clerk, Mr. Brooks was assigned delinquent BWSC accounts for collection.

3. During his employment at the BWSC, Mr. Brooks was assigned and personally and substantially "participated" (as that term is defined in §1(j) of G.L. c. 268A) in, the collection of the Long Bay Management account and the accounts of Port Antonio Associates, Guscott Associates, Kensington Associates, and Nazing Court Associates, all of which are affiliated with the Long Bay Management account.

4. During February and March of 1981, and after leaving the employ of the BWSC, Mr. Brooks was retained by Long Bay Management to provide it with professional services relating to its outstanding BWSC account. Mr. Brooks was paid $475 by Long Bay Management for these services.

5. This compensation related to the delinquent accounts of Long Bay Management and its affiliated companies, accounts which Mr. Brooks had worked on while employed at the BWSC.

6. By receiving private compensation as a former municipal employee in relation to these delinquent accounts, the collection of which he had handled as an employee of the BWSC, Mr. Brooks violated §18(a) of G.L. c. 268A, which restricts the activities of former municipal employees.

WHEREFORE, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings brought pursuant to G.L. c. 268B, on the basis of the following terms and conditions hereby made and agreed to by Mr. Brooks:

1. That Mr. Brooks will hereby cease and desist from receiving compensation from, or acting as agent for any party other than the City of Boston, in relation to any BWSC delinquency which was outstanding in 1980, the collection of which he personally and substantially participated in while employed at the BWSC; and

2. That he pay to the State Ethics Commission within 45 days of the execution of this Agreement, the sum of $500 as civil penalty for violating §18(a) of G.L. c. 268A.

DATE: November 13, 1981

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 143

IN THE MATTER
OF
WILLIAM G. McLEAN

Appearances:

Robert J. Cordy, Esq: Counsel for the Petitioner, State Ethics Commission
William C. Wagner, Esq: Counsel for the Respondent, William G. McLean

Commissioners:

Vorenberg, Ch., Brickman, Bernstein, McLaughlin

DECISION AND ORDER

I. Procedural History

The Petitioner filed an Order to Show Cause on July 14, 1981 alleging that the Respondent, William G. McLean, had violated §§19, 20 and 23(a) of M.G.L. c. 268A, the Conflict-of-Interest Law. The Respondent filed an Answer which denied any violation of the aforementioned provisions and which, in addition, raised certain defenses based on the asserted lack of jurisdiction of the Commission and on exemptions contained in M.G.L. c. 268A.

The parties filled Cross-Motions for Summary Decision and submitted briefs on October 26 and 28, 1981. Pursuant to notice, a hearing on the motions was conducted on November 13, 1981 before the Commission Vice-Chairman, Linda H. Kistler, a duly designated presiding officer. See, M.G.L. c. 268B, §4(c). In rendering this Decision and Order, all members of the Commission have read the evidence and arguments presented by the parties.[1]/

II. Findings of Fact

1. Mr. McLean was appointed a member of the Woburn Golf and Ski Authority (the Authority) and served in that capacity during the period of 1973 until March 7, 1981 when he submitted his resignation.

2. The Authority was established by St. 1968, c. 526. Section 5 of the Authority's enabling statute provides, in part, that "[a]ny member, agent or employee of the Authority who contracts with the Authority or is interested, either directly or indirectly, in any contract with the Authority shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both."

3. Mr. McLean was a director and officer of the Woburn Golf and Social Club (the Club) from August, 1973 until March 24, 1981 when he submitted his resignation.

4. The Authority and the Club entered into a contract in August, 1973 whereby the Club would operate an earn income from the Authority's clubhouse facilities.

5. A member of Mr. McLean's immediate family[2]/ was employed by the Club from January, 1978 through March, 1981 as its bookkeeper.

6. Mr. McLean received approximately $12,700.00 from the Club between January 1, 1974 and March 31, 1981. These funds were paid to him from the Club's income for accounting services that he performed for the Club as its Treasurer.

7. Mr. McLean participated as a member of the Authority in the initial decision in 1973 approving the contract between the Club and the Authority and in subsequent decisions to renew the contract in 1977 and 1979.

8. The Club had no other sources of income except those which it received from operating the Authority's clubhouse facilities pursuant to the contract between the Club and the Authority.

9. In February, 1981, Mr. McLean learned that the Commission was investigating his receipt of compensation from the Club as a possible violation of M.G.L. c. 268A, §20. In March, 1981, he submitted his resignations to both the Club and the Authority in order to comply, in his view, with the exemption contained in M.G.L. c. 268A, §20(a).

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[1]/Commissioner Kistler's term as a Commission member expired following the hearing.

[2]/For the purposes of M.G.L. c. 268A, "immediate family" is defined as the employee and his spouse, and their parents, children, brothers and sisters. M.G.L. c. 268A, §1(e). In this instance, Mr. McLean's son was the family member in question.

10. Thomas Higgins, Mayor of the City of Woburn since 1977, became aware of the contract between the Club and the Authority and of Mr. McLean's position as Treasurer with the Club at the time of his election.[3]/

III. Decision

The Respondent has been charged with violating M.G.L. c. 268A, §§19, 20 and 23(a). We will address these charges separately.

A. Jurisdiction under Chapter 268A

Mr. McLean contends that he was not a municipal employee within the meaning of M.G.L. c. 268A, §1(g) because the Authority is not a municipal agency within the meaning of M.G.L. c. 268A, §1(f). Although Mr. McLean raised these points as affirmative defenses in his Answer, he failed to pursue them in either his brief or oral argument in support of his Motion for Summary Decision. For the reasons stated below, we find that the Authority is a municipal agency and that Mr. McLean was a municipal employee for the purposes of M.G.L. c. 268A.

1. Authority

Section 1(f) of M.G.L. c. 268A defines a municipal agency as "any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder." On the basis of our review of the Authority's enabling statute, we conclude that the Authority complies with this definition as an instrumentality of the City of Woburn.

Under the terms of the Authority's enabling statute, St. 1968, c. 526, the Authority was created to establish, maintain and operate a ski business and golf club. The Authority was designated as a public instrumentality, the exercise of whose powers are deemed to be the performance of essential governmental functions. The members of the Authority are appointed by the Mayor of the City of Woburn, and the Authority makes an annual report of its activities for the preceding calendar year to the Mayor. We regard the interrelation between the Authority and the city of Woburn to be sufficient for the purposes of the application of M.G.L. c. 268A. Further, §5 of the Authority's enabling statute demonstrates a legislative perception of the need for standards of conduct by Authority's enabling and members which are consistent with M.G.L. c. 268A.[4]/ See, **In the Matter of Louis L. Logan,** Commission Adjudicatory Docket No. 131, Decision and Order, p. 17 (April 28, 1981).

2. Status as a Municipal Employee

Section 1(g) of M.G.L. c. 268A defines a municipal employee as follows:

> 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, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution.

Inasmuch as we have previously concluded that the instrumentality which employed Mr. McLean is a municipal agency within the meaning of M.G.L. c. 268A, §1(f), we conclude that Mr. McLean held a membership in a municipal agency on a "full, regular, part-time, intermittent or consultant basis" within the meaning of the above-cited definition of municipal employee.

B. Chapter 268A Allegations

1. Section 19

We find that Mr. McLean violated M.G.L. c. 268A, §19(a), by participating in the Authority's decision to contract with the Club in 1973 while he was an officer of the Club; (b) by participating in the Authority's subsequent decisions in 1977 and 1979 to renew its contract with the Club while he was being compensated by the Club for his accounting services, and (c) by participating in the Authority's decision in 1979 to renew its contract with the Club while his son was employed as the Club's bookkeeper.

(a) Mr. McLean admits that he voted on the Authority's initial decision to contract with

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[3]/The affidavit of the Mayor further indicated that he (the Mayor) did not view Mr. McLean's activities as a violation of M.G.L. c. 268A, §19 or of §5 of the Authority's enabling statute. The sufficiency of the affidavit as a defense will be discussed, infra.

[4]/The provision of St. 1968, c. 526 §5 appear in paragraph 2 of *the Findings of Fact*.

the Club. He also admits that he was an officer of the Club at the time that he voted on the matter and that the Club had no other source of income than that which it derived from operating the Authority's clubhouse facilities pursuant to the contracts in question. However, Mr. McLean maintains that his act of voting did not amount to "participation" within the meaning of M.G.L. c. 268A, §1(j), since his vote was not proved to be one of five that was necessary to carry any Authority activity and further, since he had no knowledge that he was in violation of the law, no violation could exist.

Section 19 of M.G.L. c. 268A prohibits a municipal employee from participating as such in a particular matter[5]/ in which to his knowledge an organization in which he is serving as an officer has a financial interest. There is no question that the Club had a financial interest in its contracts with the Authority since the contracts generated the Club's only source of income. We also find that Mr. McLean's vote as an Authority member amounted to "participation" within the meaning of M.G.L. c. 268A, §1(j), and that he possessed sufficient knowledge of the financial interest for the purposes of §19.

Under M.G.L. c. 268A, §1(j), "participation" means to "participate in agency action or in a particular matter personally and substantially as a . . . municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise." The act of voting and any number of other activities is encompassed in the above definition of participation. **Graham v. McGrail,** 370 Mass. 133, 138, 345 N.E. 2d 888, 891 (1976); Buss, **The Massachusetts Conflict of Interest Statute: An Analysis,** 45 Boston University Law Review 299, 320 (1965). Further, there is nothing in M.G.L. c. 268A, §1(j) that indicates that participation occurs only when an individual's actions, by voting or otherwise, are determinative.

The element of "knowledge" under §19 of M.G.L. c. 268A does not apply to the violation itself but to the financial interest in question. Since Mr. McLean knew as Treasurer that the Club's only source of income derived from the contracts it had with the Authority, he had to know of the Club's financial interest in the contracts.

(b) Section 19 of M.G.L. c. 268A also prohibits a municipal employee from participating as such in a particular matter in which to his knowledge he has a financial interest. Mr. McLean admits that he was compensated in the amount of $12,700.00 for providing the Club accounting services between January 1, 1974 and March 31, 1981 and that he voted on the Authority's decisions to renew its contract with the Club in 1977 and 1979. Further, the Club had no other source of income than the money it received pursuant to its contracts with the Authority. Therefore, based on our previous determination that his act of voting amounted to "participation" within the meaning of M.G.L. c. 268A, we find that Mr. McLean violated §19 by voting on the Authority's 1977 and 1979 decisions to renew its contract with the Club. We also find that Mr. McLean had sufficient knowledge for the purposes of §19 because he was clearly aware of his own financial interest in the contract.

(c) Section 19 of M.G.L. c. 268A prohibits a municipal employee from participating as such in a particular matter in which to his knowledge a member of his immediate family has a financial interest. There is no question that Mr. McLean's son had a financial interest in the 1979 contract between the Club and the Authority since the contract generated the Club's only source of income and Mr. McLean stipulated that his son was compensated by the Club as its bookkeeper from January, 1978 through March, 1981. Since Mr. McLean worked for the Club and the Authority when his son was also employed by the Club, he clearly knew of his son's financial interest in the contract. Mr. McLean also admits that he voted on the Authority's 1979 decision to renew its contract with the Club. Therefore, based on our determination that voting amounts to participation within the meaning of M.G.L. c. 268A, we find that Mr. McLean violated §19 in approving the contract renewal. Our previous analysis of the element of knowledge under §19 also applies in this instance.

Mr. McLean submitted an affidavit of the Mayor of the City of Woburn to support his additional contention that because the Mayor

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[5]/For the purposes of M.G.L. c. 268A, "particular matter" is defined as 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. M.G.L. c. 268A, §1(k). (Emphasis added.)

had condoned his activities, Mr. McLean did not know he was in violation of the law. However, we have consistently held that condonation by one's appointing official or superior does not exempt an employee from the prohibitions of M.G.L. c. 268A. See, **In the Matter of Louis L. Logan, supra,** at 29; **In the Matter of the Collector-Treasurer's Office of the City of Boston, et al.,** Commission Disposition Agreement, p. 8 (March 2, 1981). Moreover, the United States Supreme Court has reached a similar conclusion in interpreting comparable Conflict-of-Interest Laws covering federal employees. In **United States v. Mississippi Valley Generating Co.,** 364 U.S. 520, 561, 81 St. Ct. 294, 315 (1961), the Supreme Court held that government employees could not claim exemption from a conflict of interest statute simply because their superiors did not discern the conflict. In order for Mr. McLean to have qualified for the exemption with §19, he would have had to comply with the specific disclosure requirements of that section in each instance. Prior to any participation, a municipal employee must file a written statement with his appointing official, of the circumstances and the interest at stake. Additionally, the appointing official must exempt the employee in writing by finding that the financial interest is not so substantial as to be deemed likely to affect the integrity of the employee's services. See, M.G.L. c. 268A, §19(b). Mr. McLean did not comply with the disclosure requirements of §19(b), and the affidavit of the Mayor did not fulfill this exemption requirements. Furthermore, since the Mayor did not take office until 1977, his affidavit could have no bearing on Mr. McLean's initial participation in the Authority's decision to contract with the Club in 1973.

2. Section 20

The Petitioner contends that Mr. McLean had a prohibited financial interest in the contract between the Club and the Authority when he received $12,700.00 from the Club between January 1, 1974 and March 31, 1981 for accounting services he performed as the Club's Treasurer. Mr. McLean responds that the Petitioner must prove that he "substantially influenced" the Authority to contract with the Club. He also maintains that since the Club's by-laws provided that members be compensated for their services, his salary did not amount to a direct or indirect financial interest in a municipal contract. On the basis of our review of the record, we find that Mr. McLean had a prohibited financial interest in a municipal contract in violation of M.G.L. c. 268A, §20.

Initially, we have no doubt that Mr. McLean's salary constituted a direct or indirect financial interest in a municipal contract. Mr. McLean admitted that the Club had no other source of income than that which it derived pursuant to the contracts it had with the Authority to operate the latter's clubhouse facilities. He also admitted that he received $12,700.00 from the Club for performing accounting services. It follows, therefore, that the Club would not have been in a position to compensate Mr. McLean had it not contracted with the Authority, notwithstanding the fact that the Club's by-laws provided that members be compensated for their services. Since the income Mr. McLean received from the Club can be directly attributed solely to the contracts the Club had with the Authority, we find that Mr. McLean had a prohibited indirect financial interest in a municipal contract in violation of M.G.L. c. 268A, §20. In analyzing §20, it is the *source* of the compensation and the *existence* of the financial interest that are the crux of the violation. The fact that the Club's by-laws provide that members be compensated for their services does not supersede M.G.L. c. 268A, nor does it matter whether Mr. McLean "substantially influenced" the parties to enter into contract. "Because it is impossible to articulate a standard by which one can distinguish between employees in a position to influence and those who are not, all are treated as though they have influence." Buss, **supra,** at 374. While it may be true that in order to prove a violation of M.G.L. c. 268A, §21, one must show that the employee "substantially influenced" the action taken by the agency, this is not the case with respect to §20. Compare, **Charbonnier v. Amico,** 367 Mass. 146, 324 N.E. 2d 895 (1975).

Section 20(a) of M.G.L. c. 268A provides that it shall not be a violation for a municipal employee to have a direct or indirect financial interest in a contract if he "in good faith and within thirty days after he learns of an actual or prospective violation of this section makes full disclosure of his financial interst to the contracting agency and terminates or disposes of the interest." Mr. McLean argues that he fulfilled

the exemption provided in M.G.L. c. 268A, §20(a) because he resigned within 30 days of learning from the Commission in 1981 that his relationship with the Club and the Authority might be in violation of §20. He also maintains that he fulfilled the "good faith" requirement in §20(a) because he had no knowledge that he was in violation of the law. The Petitioner responds that the thirty-day time period is triggered at the time that a municipal employee learns of his financial interest in a contract, not when he learns that such an interest violates the law. Furthermore, the Petitioner argues that Mr. McLean does not fulfill the "good faith" requirement of the §20(a) exemption because it only applies to those employees who have no "day-to-day knowledge" of the activities of organizations with which they are affiliated and which also contract with the municipality. According to the Petitioner, the thirty-day time period started to run when Mr. McLean received his first check from the Club in 1974 and, since he was Treasurer of the Club, he had "day-to-day knowledge" of the organization and could not have fulfilled the "good faith" requirement of §20(a). For the reasons stated below, we find that Mr. McLean did not fulfill the requirements of the §20(a) exemption.

Initially, we find substantial evidence which weighs against the contention that Mr. McLean met the "good faith" requirement of M.G.L. c. 268A, §20(a). Mr. McLean provided services for the Club while he was a member of the Authority. He knew the Club was paying him with funds it received pursuant to its contracts with the Authority, and, as a member of the Authority, he voted on establishing the contracts between the two entities. One of the purposes of §20 is to prohibit municipal employees from acquiring a financial interest in subsequent municipal contracts which they may have become aware of through their official positions. The exemption provided in §20(a) accommodates those instances where an employee belatedly discovers his interest and allows him to dispose of it promptly without any penalty. This principle does not apply to those employees who are involved in the daily activities of companies which also have contracts with the employee's municipal employer.

In the instant case, we find that Mr. McLean did not fulfill the "good faith" requirement provided in M.G.L. c. 268A, §20(a). As the Club's Treasurer, not only did he have "day-to-day knowledge" of the Club's activities, but, as a member of the Authority voting on the contracts between the two entities, he could not have belatedly discovered his financial interest in the contracts. Even if we were to find that Mr. McLean fulfilled the thirty-day time period, the fact that he participated in the awarding of the contracts to the Club demonstrates a lack of "good faith". See, Braucher, **Conflict of Interest in Massachusetts, in Perspectives of Law,** Essays for Austin Wakeman Scott 3 (1964). On the basis of the evidence, we find that where Mr. McLean was instrumental in obtaining a financial interest in a municipal contract for himself, he could not fulfill the requirement of §20(a) and qualify for the exemption therein.

Additionally, if we were to accept Mr. McLean's position with respect to when the thirty-day time period starts to run, the enforcement of §20 would be virtually impossible since an employee could terminate his interest upon learning of a Commission investigation, no matter how long he had actually been in violation of the law. Mr. McLean's position renders the enforcement of §20 a nullity and gives this section of the statute an unworkable meaning. See, **Graham v. McGrail, supra,** at 140.

Lastly, ignorance of the law is no defense to a violation of M.G.L. c. 268A. **In the Matter of Louis L. Logan, supra: In the Matter of C. Joseph Doyle,** Commission Adjudicatory Docket No. 109, Decision and Order, p. 7 (June 18, 1980). See also, **Scola v. Scola,** 318 Mass. 1, 7, 59 N.E. 2d 769, 772 (1945). Mr. McLean was responsible for being aware of any statutes or regulations which governed his behavior as a municipal employee including M.G.L. c. 268A and the Authority's enabling statute, St. 1968, c. 526. We find that both statutes put Mr. McLean on notice that municipal employees are prohibited from having a financial interest in contracts made by an agency of the same municipality.[6]/ See, **Conley v. Town of Ipswich,** 352 Mass. 201, 224 N.E. 2d 411 (1967).

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[6]/We reiterate the fact that the Mayor's condonation of Mr. McLean's situation does not eliminate the violation, but may be a mitigating factor to be considered when determining sanctions.

3. Section 23(a)

The Petitioner finally contends that Mr. McLean violated §23(a) of M.G.L. c. 268A by holding the position of Treasurer with the Club and accepting compensation for services he performed in this office. Mr. McLean argues that he did not violate §23(a) because he was not an "employee" of the Club, but was an officer performing duties under and being compensated pursuant to the by-laws of the Club. We find that Mr. McLean violated §23(a) by receiving compensation as the Club's Treasurer while maintaining his membership on the Authority.

Section 23(a) of M.G.L. c. 268A prohibits a municipal employee from "accept[ing] other employment which will impair his independence of judgment in the exercise of his official duties." It is undisputed that Mr. McLean received $12,700.00 in private compensation from the Club while he served as its Treasurer. The fact that Mr. McLean characterizes himself as an "officer" rather than "employee" does not prevent the enforcement of the law in this case. We cannot accept Mr. McLean's characterization as it is a distinction without a difference under M.G.L. c. 268A. Moreover, it would unduly hamper the enforcement of §23(a) to give the employment relationship such a narrow interpretation. As the Club's Treasurer, Mr. McLean prepared the Club's financial records, and, as a member of the Authority, he reviewed these same records. By simultaneously holding positions with the Club and the Authority, Mr. McLean had divided loyalties - those he owed the Club in his private capacity and those he owed the public as a member of the Authority. His independence of judgment was impaired because he was on both sides of any issue concerning the Club's financial records. We find that this is precisely the situation which §23(a) was designed to prohibit. See, EC-COI-81-133; 81-73.

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On the basis of the foregoing, we conclude that William G. McLean violated M.G.L. c. 268A, §§19, 20 and 23(a). Pursuant to our authority under M.G.L. c. 268B, §4(d), we hereby order Mr. McLean to pay the civil penalties as set forth below. In arriving at these penalties for violations of M.G.L. c. 268A, we have carefully considered certain mitigating factors raised by Mr. McLean, particularly the fact that the Mayor of the City of Woburn apparently condoned Mr. McLean's dual employment arrangement, and the fact that Mr. McLean may have been unaware that his activities were in violation of the law. While these factors do not excuse Mr. McLean's violations of M.G.L. c. 268A, they do furnish a basis for our decision to impose less-than-maximum penalties in this case. Accordingly, we order William G. McLean to:

1. Pay $500.00 (five hundred dollars) to the Commission as a civil penalty for participating by voting on a contract involving the Club for which he served as an officer; for participating by voting on a contract in which he had a financial interest, and for participating by voting on a contract in which a member of his immediate family had a financial interest in violation of M.G.L. c. 268A, §19.

2. Pay $250.00 (two hundred fifty dollars) to the Commission as a civil penalty for acquiring a financial interest in a contract made by the Authority in violation of M.G.L. c. 268A, §20.[7]/

We order Mr. McLean to pay these penalties totalling $750.00 (seven hundred fifty dollars) to the Commission within thirty days of receipt of this Decision and Order.

DATE: January 8, 1982

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

March 9, 1982

The Honorable Kevin H. White
Mayor, City of Boston
City Hall
Boston, MA

Compliance Letter 82-2

Dear Mayor White:

As you are aware, the Commission has conducted a Preliminary Inquiry concerning possible violations of the state's conflict of interest law,

[7]/Since we have already assessed penalties under §§19 and 20 for conduct which also forms the basis of a violation of §23(a), we find no need to impose a separate penalty for Mr. McLean's violation of §23(a). See, In the Matter of James J. Craven, Jr., Commission Adjudicatory Docket No. 110, Decision and Order (June 18, 1980).

G.L. c. 268A, arising out of a birthday party planned in honor of your wife, Kathryn, by members of her family for March 27, 1981 at the Museum of Fine Arts. That Inquiry focused on allegations that City employees and private individuals who did business with the City were solicited to contribute monetary gifts to that affairs.

Having concluded its Inquiry, the Commission finds reasonable cause to believe that in connection with that party you failed to take actions required by Sections 23(d) and 23(e) of G.L. c. 268A as those provisions are interpreted by the Commission. The Commission has determined that an adjudicatory hearing is unnecessary in this case because there appears no substantial dispute about the facts essential to the rulings made herein. Therefore, the Commission has directed that this letter be sent to you and made public in order to insure future compliance with the law by you and other elected officials and public employees. That determination was made primarily in view of the cancellation of the party and return of the monetary gifts. The Commission also took into consideration the extent to which prior rulings might not have given you sufficient notice that your conduct in this matter violated the conflict of interest law.

The Commission's Investigative Findings

The Commission's investigation of the circumstances surrounding the planning of a birthday party for Kathryn White which was scheduled for March 27, 1981, revealed the following:

1. In January 1981, initial plans and arrangements were made to hold a birthday party in honor of Kathryn White on March 27, 1981. The individual primarily responsible for the party's organization and planning was Carolyn Connors, the sister of Kathryn White and a former consultant to the Kevin White Committee. The impetus for the party came from the Galvin family, of which Carolyn and Kathryn are members. You were informed of the plan to hold a birthday party for your wife during the initial stages of its organization, and expressed your view that a hotel was not an appropriate site.

2. On or about January 30, 1981, Mrs. Connors and Peggy Dray, a close friend of your family, made arrangements with the Museum of Fine Arts in Boston, to use their facilities for the March 27th party. At the time that these arrangements were made, the Museum was advised that approximately 800-1,000 guests would be attending the affair.

3. During the first two weeks of February of 1981, Mrs. Connors and Mrs. Dray arranged to purchase and print 1,500 invitations together with reply cards and printed envelopes. Those reply cards included a statement which read "If you wish to contribute to the birthday gift celebration, make your check payable to the Birthday Celebration Committee." The name "Birthday Celebration Committee" (BCC) was adopted by Carolyn Connors. The BCC address was listed as 49 Monument Avenue, Charlestown, which is the residence of Mr. and Mrs. William Galvin, Sr., the parents of Carolyn Connors and Kathryn White. Mr. and Mrs. William Galvin, Sr. were not present in Massachusetts during the months of January through March of 1981. Reply cards and contributions mailed to that address were picked up by Carolyn Connors. Theodore Anzalone, Sr., a close friend of your family, and at that time the Manager of the Hynes Auditorium Commission, paid for the invitations.

4. Carolyn Connors mailed invitations to the party during the last week in February and the first week in March of 1981. One of the documents used by the BCC to draw up the guest list was a 100 page listing of campaign contributors to the Kevin White Committee filed with the City Clerk on September 17, 1979, by William J. Galvin, Sr., as campaign treasurer of the Kevin White Committee.

5. At precinct captain meetings in the City two ward coordinators announced that they could obtain "tickets" to the birthday party for anyone who did not receive a printed invitation and that invitees could contribute whatever amount they wished. Further, an undetermined number of individuals who did not receive invitations contacted your office to obtain invitations and/or "tickets" to the affair. Those individuals were referred by your office to the BCC and/or the Galvin family.

6. Prior to the cancellation of the party on March 26, 1981, the BCC had received at least $122,000 in contributions from 401 contributors.[1]/ Approximately $110,000 of these funds were received from 167 contributors who gave in amounts of $200 or more. Of the $122,000 in contributions collected by the BCC, $75,000 was received from 275 contributors who were City employees or members of their families.[2]/ An additional $35,000 came from 75 individuals and businesses which either did business with or were otherwise licensed or regulated by the City.[3]/

7. Approximately 100 of the major contributors (those contributing over $200) to the BCC were interviewed during the course of the Commission's investigation. Fifty percent of those major contributors interviewed were City employees. Most of those City employees held non-civil service positions in City departments under the supervision and control of your Office, were not personal friends of your wife, had never attended or been invited to any other parties or similar functions held in the past for her, and had never given her any gifts in the past. None of the City employees interviewed stated that they were pressured by anyone to make a contribution to the BCC.

Of the 50 private individuals and businesses who made major contributions to the BCC, and were interviewed during the investigation, most did not characterize themselves as personal friends of your wife, had never attended or been invited to prior birthday parties or similar functions held for her, and had never given her any gifts in the past. Many acknowledged that their only connection with your wife was their relationship with you and the City, either as a contractor or licensee, and/or their relationship as contributors to your past election campaigns.

8. On March 10, 1981, Kathryn White and Carolyn Connors selected and ordered 500 thank you notes for use after the party.

9. On March 10, 1981, articles appeared in the **Boston Herald American** and the **Boston Globe** citing unnamed sources alleging that as many as 1,500 City employees and businessmen who did business with the City of Boston had been invited to the birthday party, and that some pressure was being brought to bear on City employees for contributions. On March 17, 1981, you responded to the media attention which had focused on this affair, and stated to news reporters that you had not heard any credible evidence that City employees were being pressured to contribute, and that if any such evidence were brought to your attention "heads would roll." You have testified that no one ever came to you with information or a complaint about such pressure. However, you made no attempts to find out from the BCC any details concerning who was being invited to this affair, how those individuals were being invited, who was involved in the invitation process, or who was soliciting or accepting contributions on behalf of the BCC.

10. On March 26, 1981, the party was cancelled by the BCC at your request due to public reports of planned demonstrations and possible violence at the Museum of Fine Arts. At the time of the cancellation you announced on behalf of the Galvin family that the contributions made to the party would be returned. Substantially all of the $122,000 in funds known to have been contributed to the BCC, was returned during the period May 1, 1981 - June 30, 1981.

11. The Commission's investigation did not reveal any evidence that you had direct knowledge of the specific individuals who were invited to this party and/or who were making contributions to it; nor was there any evidence that you had any personal or substantial role in the planning and organization of the party. You testified under oath, during the course of the investigation, that you were generally aware that the event was going to be held and of the size of the event, and that people were contributing or making gifts to the party. Other than that, you testified that your only personal involvement in the planning and organization of the party was your advice at

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[1]/ $122,000 in contributions can be documented through bank records and partial records of the BCC which were obtained by the Commission during its investigation. However, several individuals interviewed during the investigation made contributions which were returned to them in the form of their own unnegotiated checks - after the party was cancelled. These individuals were not listed on the BCC records as contributors, nor were their contributions reflected in any bank records. The number of these contributors would be virtually impossible to determine.

[2]/ 92 of these individuals made contributions in amounts of $200 or more, totalling $66,000. Twenty-one Department heads and members of your staff were invited to the party and made contributions to the BCC.

[3]/ 54 of those individuals and businesses contributed in amounts of $200 or more, totalling $35,000.

an early stage concerning an appropriate site, and your involvement at the end when you stepped in to cancel the party because of the public safety problems that arose. You testified that you did not know who specifically was invited and who had contributed. You also testified that you did not ask Carolyn Connors or anyone else anything about who was being invited or was contributing to this affair, and never discussed with her who should or should not be invited to the party.

The Conflict Law

Section 23 of the conflict of interest law G.L. c. 268A sets forth standards of conduct for all public employees and officials. The provisions of Section 23 establish general guidelines and principles for the conduct of public servants and impose certain obligations not generally imposed on private citizens. Since 1978, when the Commission assumed administrative and civil jurisdiction over the conflict of interest law, the Commission has actively interpreted and enforced the provisions of §23 at all levels of government.

With respect to this matter, the Commission finds that your course of conduct regarding the birthday party planned for your wife was prohibited by Sections 23(d) and (e). Section 23(d) prohibits a public official from "us[ing] or attempt[ing] to use his official position to secure unwarranted privileges or exemptions for himself or others." Section 23(e) prohibits a public official from "by his conduct giv[ing] reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties."

You have testified that you were not involved in the details of the plannng of the party, that you had no specific knowledge of who was invited or what they contributed, and that you did not direct that anyone in particular be invited. However, you also testified, you "[were] aware the event was going to be held and the size of the event." You noted that it was "common knowledge" that "people were contributing or making gifts to the party." You were certainly aware that this was not going to be a private social gathering in someone's home. At an early stage in the planning of the party, you knew it would be held in a public place. In fact, you expressed your view to the planners of the party that you did not think a "hotel" was an "appropriate site." You also participated in decisions concerning the "security issues" surrounding the party. Moreover, there were other indications from which you should have realized the size and scope of the party. Your wife purchased 500 thank-you notes before the party. Employees at City Hall with whom you would be expected to have daily contact were planning to attend or had contributed. The party had been the subject of much media attention. Indeed, this attention focused on the question as to whether City employees were being pressured to attend and contribute.

Based on the knowledge that you clearly did have, §§23(d) and (e) imposed certain affirmative obligations on you with respect to the fundraising aspects of this affair. The Commission holds:

> No public official who controls the jobs of large numbers of employees and the awarding of important contracts with vendors can permit a large event to be planned that will raise money for him or any members of his family[4]/ without making every reasonable effort to insure that there is neither direct solicitation of these employees or vendors nor pressure, either implicit or explicit, on such employees or vendors to attend and contribute. In addition, public officials must instruct those planning such an event that even unsolicited contributions from employees or vendors should not be accepted unless the circumstances make it clear that family or personal relationships are the motivating factors.

For a public official to do otherwise results in the "use of his official position to secure unwarranted privileges . . . for himself or [his family]." In the Commission's view, people will be likely to contribute because of the importance of the official's position rather than any personal relationship with the family member. Moreover, the official creates, "a reasonable basis for the impression" that people attending and contributing would "unduly enjoy his favor". The impression is created that contributors will be rewarded and non-contributors may even be penalized in their dealings with government.

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[4]/The Commission's ruling here, of course, does not relate to legitimate political fundraisers. Such events are regulated by other laws. See General Laws Chapter 55.

Indeed, the very abuses that §23 seeks to avoid were realized in this case. The party was viewed by many as a fundraiser. In fact, the guest list was drawn, in part, from the 1979 campaign contributors' list. The amount of money collected was dramatically inconsistent with the party's being a private social or family affair. Individuals who never met your wife gave amounts greater than they would be expected to give their own wife or their own mother, and, indeed, in some occasions gave the equivalent of almost a month's salary. Someone holding a major position of trust in public life must be charged with sufficient political acumen to realize that such occurrences are inevitable, and must affirmatively act to see that they do not occur.

It is simply not enough to say that you kept away from direct involvement in the event and that no one complained to you that they felt pressured. Such pressure is implicit in the situation. The same pressure that would lead to their contributions would preclude their complaining about it. The kind of "hands off" approach you took is unacceptable and insensitive to the special obligations imposed on a person in your position.

Disposition

Based on its review of the evidence gathered during the course of this Preliminary Inquiry, and its application of the conflict-of-interest law to that evidence, the Commission has decided that further enforcement proceedings as regards your conduct are not required. Rather, the Commission has determined that its interpretation of §23 of G.L. c. 268A, as applied to the facts set out above, should be disseminated in the form of a public compliance letter to serve as notice to you and to all other public officials and employees throughout the Commonwealth of the law's requirements. Any future actions by you or other public officials or employees inconsistent with the Commission's rulings set out in this letter will lead to enforcement proceedings, including, where appropriate, imposition of civil penalties.

This matter with respect to your conduct is now considered close by the Commission. However, please note that the issuance of a Compliance Letter by the Commission does not preclude any other agency with jurisdiction over this matter from taking any action it finds appropriate. Furthermore, the Commission's determinations in this regard are based upon the evidence currently before it. This matter may be reopened at any time if substantial evidence of other conduct inconsistent with this letter is brought to its attention.

STATE ETHICS COMMISSION

Robert Greco
General Counsel

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 152

IN THE MATTER
OF
HENRY A. BRAWLEY

DISPOSITION AGREEMENT

This Agreement is entered into between the State Ethics Commission ("Commission") and Henry A. Brawley ("Mr. Brawley") pursuant to Section 11 of the Commission's **Procedures Covering the Initiation and Conduct of Preliminary Inquiries and Investigations.** The parties agree that upon its execution this Agreement shall constitute a final order of the Commission, enforceable in the Superior Court of the Commonwealth, pursuant to Section 4(d) of G.L. c. 268B.

On December 22, 1981, the Commission initiated a Preliminary Inquiry into possible violations of the Conflict-of-Interest Law, G.L. c. 268A, involving Mr. Brawley's conduct as Chairman of the Hull Sewer Commission. The Commission has concluded its Inquiry into Mr. Brawley's involvement in the matters set forth in this Agreement, and makes the following findings of fact and conclusions of law to which the parties hereto agree:

1. Mr. Brawley was the Chairman of the Permanent Hull Sewer Commission from May 21, 1980 until his resignation on July 17, 1981. He was also a

member of the Hull Zoning Board of Appeals, and the Hull Town Surveyor through July of 1981. In addition, Mr. Brawley has for many years operated a private surveying business D/B/A Brawley Associates.

2. On or about March 5, 1981, the Town of Hull entered into a contract with R. J. Delmonico Inc., General Contractors, for emergency sewer construction and repair work. The original amount of that contract was $10,711.

3. The emergency construction work was performed by the Delmonico company during the months of March through May of 1981. Because of difficulties encountered in that work, and the need for repair work beyond the scope of the original contract, change orders to this contract amounting to over $40,000 were approved by all the members of the Sewer Commisison, including Mr. Brawley, during the term of this contract.

4. During the aforementioned construction, Mr. Brawley acted as liaison between the Sewer Commisison, the Board of Selectmen and the contractor. He was often at the construction site monitoring the progress of the work, and participating in decisions relating to the amount and scope of the work necessary to complete the project.

5. During the period March through May of 1981, Brawley Associates was retained by J. R. Delmonico, Inc., to do two surveying jobs for it. The first job took one day in March to complete and Mr. Brawley received a $200 fee for his work. The second job took approximately three days in May for Mr. Brawley and an associate to complete. In return for his surveying company's work on this second job, J. R. Delmonico, Inc., provided Mr. Brawley with a newly paved driveway at no charge.

6. By accepting surveying work from J. R. Delmonico, Inc., at a time when that company was performing services under a contract which was being supervised by the Hull Sewer Commission, Mr. Brawley violated §23(a) of the Standards of Conduct set out in G.L. c. 268A. Section 23(a) prohibits municipal employees and officials from accepting private employment which would impair their independence of judgment in the performance of their official duties.

7. By participating in decisions of the Sewer Commission affecting the financial interests of J. R. Delmonico, Inc., such as change orders, at a time when he was performing or had an agreement to perform private surveying work for that same company, Mr. Brawley violated §19 of G.L. c. 268A. Section 19 prohibits municipal employees and officials from participating in decisions which affect the financial interests of businesses for which they are working, or with whom they are negotiating for work.

WHEREFORE, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings brought on its behalf pursuant to G.L. c. 268B, on the basis of the following terms and conditions hereby made and agreed to by Mr. Brawley:

1. That Mr. Brawley will pay to the State Ethics Commission the sum of $1,000 as civil penalty for violating §§23(a) and 19 of G.L. c. 268A; and

2. That Mr. Brawley waives all rights to contest findings of fact and conclusions of law in this or any related judicial or administrative proceedings in which the State Ethics Commission is a party.

DATE: March 16, 1982

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss: Commission Adjudicatory
Docket No. 154

IN THE MATTER
OF
GEORGE CUNNINGHAM

DISPOSITION AGREEMENT

This Agreement is entered into between the State Ethics Commisison ("Commission") and George Cunningham ("Mr. Cunningham") pursuant to Section 11 of the Commission's **Procedures Covering the Initiation and Conduct of Preliminary Inquiries and Investigations.** The parties agree that upon its execution this Agreement shall constitute a final order of the Commission, enforceable in the Superior Court of the Commonwealth, pursuant to Section 4(d) of G.L. c. 268B.

On November 10, 1981, the Commission, pursuant to §4 of G.L. c. 268B, initiated a Preliminary Inquiry into possible violations of the Conflict-of-Interest Law, G.L. c. 268A, involving: (a) Mr. Cunningham's role as a member of the Billerica Conservation Commission ("BCC"), in the 1981 award of a

BCC contract to the J&G Construction Company; and (b) Mr. Cunningham's financial interest in a construction company which may have done subcontract work on this same BCC contract. The Commission has concluded its Inquiry into Mr. Cunningham's involvement in the matters set forth in this Agreement, and makes the following findings of fact and conclusions of law to which the parties hereto agree:

1. Mr. Cunningham was a member of the BCC from December, 1975, to November 18, 1981, when he resigned from the position.

2. At all times relevant to this Agreement, Mr. Cunningham was the owner of the Greenbriar Construction Company, a sole proprietorship.

3. On September 27, 1980, Mr. Cunningham married Caren Carbone, who was at that time, and at all times relevant herein, a partner in the J&G Construction Company (J&G). J&G was founded in the Spring of 1980, and as of December 31, 1980, had not entered into any contracts under that name.

4. During the period from August 27, 1980, through March 4, 1981, Mr. Cunningham participated in BCC discussions and decisions relative to the award of a BCC contract to J&G for the removal of sediment from the Nuttings Lake disposal basin. The original contract was awarded to Middlesex Disposal Services, Inc. Middlesex Disposal defaulted in the performance of its agreement with BCC. On March 4, 1981, Mr. Cunningham moved, and the BCC voted to award this contract to J&G. The BCC also decided at that meeting not to require J&G to immediately post a $10,000 cash bond as would otherwise have been required.

5. Subsequent to the award of this BCC contract to J&G, Mr. Cunningham acted on J&G's behalf to negotiate the rental by J&G of trucks and other heavy equipment from Vinal Construction Company, for use on the BCC contract. During the period from approximately May 4 - June 19, 1981, Mr. Cunningham was frequently at the job site supervising the work for J&G and signing, on J&G's behalf, trucking slips which acknowledged the number of loads of sediment removed by Vinal's equpment from the site. Vinal's bills for the rental of its equipment to J&G were sent to George Cunningham at his mailing address in Billerica.

6. Also during the period of this contract, and commencing on or about May 15, 1981, Greenbriar performed subcontract work on this BCC contract at J&G's request. Payments totalling $5,387.77 were made by J&G to Greenbriar for this work.

7. On or about June 19, 1981, and continuing through July 14, 1981, Greenbriar subcontracted with J&G to remove gravel from the Nuttings Lake basin. J&G had received permission from the BCC to remove gravel from the basin floor in order to increase its capacity. Pursuant to its agreement with J&G, Greenbriar removed gravel from the Nuttings Lake basin and sold it to the Atom Contracting Corporation (Atom) for $20,855. Greenbriar paid J&G $5,000 and incurred substantial excavation and hauling expenses in the removal of the gravel. The BCC was not advised by J&G of the subcontract agreement with Greenbriar regarding the gravel.

8. By participating as a member of the BCC in the award of a contract to J&G, at a time when his wife was a partner in that company, Mr. Cunningham violated §19 of G.L. c. 268A.

9. By performing work through his company, Greenbriar, on the BCC contract, as a subcontractor to J&G, Mr. Cunningham had a financial interest in a BCC contract in violation of §20 of G.L. c. 268A.

WHEREFORE, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings brought on its behalf pursuant to G.L. c. 268B, on the basis of the following terms and conditions hereby made and agreed to by Mr. Cunningham:

1. That Mr. Cunningham will pay to the State Ethics Commission the sum of $2,000 as civil penalty for violating §§19 and 20 of G.L. c. 268A; and

2. That Mr. Cunningham waives all rights to contest the findings of fact and conclusions of law in this or any related judicial or administrative proceedings in which the State Ethics Commission is a party.

DATE: May 6, 1982

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory
Docket No. 132

IN THE MATTER
OF
JOHN P. SACCONE
AND
EDMUND W. DELPRETE

Appearances:

John H. Cunha, Jr., Esq.: Counsel for Petitioner, State Ethics Commission
Donald L. Conn, Esq.: Counsel for Respondent, Edmund W. DelPrete
Robert H. Quinn, Esq.: Counsel for Respondent, John P. Saccone

Commissioners:

Vorenberg, Ch.; Bernstein, Brickman, McLaughlin, Mulligan.

DECISION AND ORDER

I. Procedural History

The petitioner filed an Order to Show Cause on October 1, 1980, alleging that the Respondent John P. Saccone had violated Sections 2(b), 3(b), 23(d), 23(e) and 23(f) of M.G.L. Chapter 268A, the conflict of interest law, and that the Respondent Edmund W. DelPrete had violated Sections 2(a) and 3(a) of the same statute. The Respondents filed Answers which denied any violation of the aforementioned provisions, and Respondent Saccone raised defenses based on state and federal constitutional grounds and other legal grounds.

Pursuant to notice, evidentiary hearings were conducted on 27 days starting February 9, 1981 and ending on November 23, 1981,[1]/ before Rev. Bernard P. McLaughlin, a member of the Commission duly designated as presiding officer. See M.G.L. c. 268B, §4(c). The parties thereafter filed post-hearing briefs on February 3, 4 and 8, 1982, and orally argued the case on February 16, 1982 before the full Commission. In rendering this Decision and Order, each member of the Commission has heard and/or read the evidence and arguments presented by the parties.

II. Findings of Fact

1. John P. Saccone ("Mr. Saccone") was at all times relevant herein employed by the Massachusetts Department of Public Safety as a Senior Civil Engineer assigned to the Life Safety Code Inspection Unit, and as such was a state employee within the meaning of Section 1(q) of M.G.L. chapter 268A.

2. Edmund W. DelPrete ("Mr. DelPrete") was at all times relevant herein the President of North River Nursing Home, Inc., a Massachusetts business corporation, which owns and operates the North River Nursing Home located at 35 Washington Street, Pembroke, Massachusetts.

3. The North River Nursing Home at all times relevant herein has been licensed by the Massachusetts Department of Public Health as an Intermediate Care Facility and has had to comply with the Federal Life Safety Code and State Physical Environment Standards (hereinafter collectively referred to as the "State and Federal Standards").

4. Mr. Saccone's official duties as an employee of the Life Safety Code Inspection Unit include conducting periodic surveys of nursing homes to ensure compliance with the State and Federal Standards, and filing reports that detail whether each nursing home surveyed is in compliance with those Standards.

5. The Life Safety Code Inspection Unit has existed since September, 1973.

6. State Building Inspector Thomas J. Carr conducted the first survey of North River Nursing Home on March 11 and 12, 1975. This initial survey cited the home for numerous violations of the State and Federal Standards.

7. Sometime between March 12, 1975 and May 12, 1975, Mr. Saccone was assigned responsibility for surveying the North River Nursing Home.

8. On or about May 12, 1975, the Life Safety Code Inspection Unit received a form entitled "Statement of Deficiencies and Plan of Correction," signed by Mr. DelPrete, in which he requested that the Massachusetts Department of Public Health waive violations of a State Standard that were cited by Inspector Carr in his survey report on March 11 and 12, 1975.

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[1]/Hearing dates were February 9 and 10, March 23, 25 and 31, April 13 and 21, May 1, 11, 21 and 26, June 2, 3, 18 and 19, July 30 and 31, August 13, 14 and 24, September 18 and 24, October 14 and 15, and November 19, 23 and 25.

9. On May 12, 1975, Mr. Saccone, in an official document, recommended that the Massachusetts Department of Public Health grant the waiver requested by Mr. DelPrete.[2]/

10. On July 7 and 8, 1975, Mr. Saccone surveyed the North River Nursing Home.

11. Subsequent to his survey of July 7 and 8, 1975, Mr. Saccone filed reports with the Life Safety Code Inspection Unit, which reports purportedly detailed the compliance or non-compliance of North River Nursing Home with the State and Federal Standards.

12. In the reports he filed subsequent to his survey of July 7 and 8, 1975, Mr. Saccone reported that the North River Nursing Home had complied with several of the State and Federal Standards when in fact material violations of those Standards existed. Specifically, he reported that corridor widths and smoke barriers were in compliance with Federal Standards of Fire Safety, and that the facility provided adequate dining facilities in accordance with State Standards for Physical Environment, when such was not the case.

The Commission bases this finding primarily upon the January, 1975 survey reports of Mr. Carr, the July, 1975 survey reports of Mr. Saccone, the December, 1979 survey reports of Stanley Grass, and the testimony of Stanley Grass and John Chleapas.

Mr. Carr's 1975 fire safety survey report noted in a general way that corridors were not the required 48" wide, and Mr. Grass' 1979 survey noted 5 specific areas in which this deficiency existed. Mr. Chleapas, an expert witness, testified that in his opinion there were improper corridor widths in 1980 and that in his opinion some of them had existed from 1975 to 1980 (when he saw the facility). While the Commission acknowledges that some of the deficiencies seen by Mr. Chleapas in 1980 may have occurred subsequent to Mr. Saccone's inspection of July, 1975, namely when the nursing home was renovated and a new corridor created, there is sufficient evidence in the record to support a finding that at least one of these deficiencies existed when Mr. Saccone inspected the nursing home in July, 1975. Further, the Commission notes that this requirement was material in that it related in a crucial way to fire safety, specifically to whether a corridor's width would accommodate the convenient removal of non-ambulatory persons carried on stretchers or on mattresses serving as stretchers in the event of a fire.

Similarly, the absence of an adequate smoke barrier was noted by Mr. Carr in early 1975, by Mr. Grass in 1979 and by Mr. Chleapas in 1980. The Commission finds support in the record to infer that some type of smoke barrier was erected after Mr. Carr's survey; however, Mr. Chleapas testified that there was no evidence of such a barrier ever having existed in interstitial spaces or in the attic area and thus the barrier, if one existed, still did not satisfy federal fire safety requirements. Again, the existence of this feature was not simply a physical amenity but a necessary component to prevent fire spread, and thus it was material.

With respect to the lack of a dining area, both Mr. Carr's earlier physical environment report and Mr. Grass' 1979 report state there was no dining room provided, and even Mr. Saccone's January, 1976 report stated that this requirement was not met. The Commission, considering the entire record, finds that the nursing home claimed to use an enclosed, unheated, approximately 6-foot wide porch as a dining facility at times, and that it fell short of the State Standards; and that although the "multipurpose" room may also have been used as a dining facility, it nevertheless also fell short of State Standards, based on the testimony of Messrs. Grass and Chleapas and related exhibits.[3]/

13. From October 3, 1975, to October 12, 1975, Mr. Saccone and Mr. DelPrete traveled to Rome, Italy, with other members and guests of the Ancient and Honorable Artillery Company (the "Company"), of which Mr. DelPrete was a member, on a Company-sponsored trip.

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[2]/However, the rooms included in the waiver recommended by Mr. Saccone did not completely correspond to those cited by Mr. Carr. The waiver recommendation will be further discussed in the Decision Section, infra, III(C)(l).

[3]/In making these findings, and similar ones regarding later survey reports, the Commission acknowledges that evidence was presented on many more alleged unreported deficiencies. However, the findings are confined to those here enumerated for several reasons: (a) they are those which the Commission considers among the most material; (b) they are generally not the subject of arguably shifting standards or, if so, they did not meet any of the standards applied; (c) there is substantial evidence in support of them, while evidence on other alleged deficiencies is less persuasive; and (d) the Commission considers it unnecessarily cumulative to include in its findings every possible instance of misreporting.

Because of the substantial evidence supporting these findings and a desire to avoid further cumulative evidence of questionable relevance, the Commission denies Petitioner's motion to admit the 1981 surveys of the North River Nursing Home into evidence.

14. On January 13 and 14, 1976, Mr. Saccone again surveyed the North River Nursing Home.

15. Subsequent to his survey of January 13 and 14, 1976, Mr. Saccone filed reports with the Life Safety Code Inspection Unit, which reports purportedly detailed the compliance or non-compliance of North River Nursing Home with the State and Federal Standards.

16. In the reports he filed subsequent to his survey of January 13 and 14, 1976, Mr. Saccone reported that the North River Nursing Home had complied with several of the State and Federal Standards when in fact material violations of those Standards existed. Specifically, he reported that corridor widths and smoke barriers were in compliance with Federal Standards of Fire Safety when such was not the case.

The Commission bases this finding primarily upon the January, 1975 fire safety report of Mr. Carr, the January, 1976 fire safety report of Mr. Saccone, the 1979 fire safety report of Mr. Grass, and the testimony of Messrs. Grass and Chleapas. As in Finding No. 12, the Commission deems there is sufficient evidence to support a finding that these deficiencies existed when Mr. Saccone inspected the nursing home in January, 1976, and that these deficiencies were material.

17. On or about July 15, 1976, Mr. DelPrete paid $400 by check to the Company as a down payment for himself and Mr. Saccone for a Company-sponsored trip to Rio de Janeiro, Brazil.

The Commission bases this finding primarily on a cancelled check written by Mr. DelPrete, dated 7/9/76, in the amount of $400, payable to the Company; on the ledger page of the Company's account book which contains entries documenting payments received on 7/15/76, and includes consecutive entries showing $200 each received on behalf of Messrs. DelPrete and Saccone on that date as first payment for the trip; on the testimony of Lewis Whittemore, the Company's Executive Secretary, who made the aforementioned entries and testified that Mr. DelPrete gave him the deposit and would have given him Mr. Saccone's name in connection therewith in order for it to be entered; and on the testimony of Donald Dunbar, vice president and keeper of the records of Plymouth Home National Bank, on which the cancelled check was drawn, which testimony authenticated the check and verified its payment.

Neither Mr. Saccone nor Mr. DelPrete testified; their most direct statements in the record on this point are their interrogatory answers, which were admitted as exhibits. The Commission is not persuaded by Mr. DelPrete's statement, that the payment in question was made for himself and a Fr. Repole, since it is clearly controverted by the Company's ledger, and was also rebutted by Fr. Repole on the stand. Although it is unnecessary in view of the evidence just described, the Commission would also be warranted in drawing an inference, unfavorable to Respondents, based on their failure to testify.

18. On or about September 7, 1976, Mr. DelPrete paid $1,348 by check to the Company, of which $599 was for his own and $749 was for Mr. Saccone's final payment for the trip to Rio de Janeiro, Brazil.

The Commission bases this finding primarily on copies of a cancelled check written by Mr. DelPrete, dated 9/8/76, in the amount of $1,348, to the Company; on the ledger page of the Company's account book which contains entries documenting payments received on 9/7/76, and includes consecutive entries showing $599 received on behalf of Mr. DelPrete and $749 received on behalf of Mr. Saccone on that date, by way of one check, as second payment for the trip; on the testimony of Joseph Kreas, Paymaster of the Company, who made the aforementioned entries and testified that one check covered both of them; and on the testimony of Donald Dunbar, who authenticated the cancelled check and verified its payment.

In his interrogatory answer 5(e), Mr. DelPrete admitted that this payment was made on behalf of himself and Mr. Saccone.

19. Mr. Saccone did not fully repay Mr. DelPrete for the trip to Rio de Janeiro, Brazil.

The Commission is not persuaded by Mr. Saccone's statement to investigator Karen Schwartzman, to which she testified, that he repaid Mr. DelPrete $550 in cash out of a Plymouth Savings Bank savings account withdrawal of $705 in October, 1976[4]/; rather, the Commission credits the testimony of Robert Tracy, assistant treasurer and keeper of the records of

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[4]/He also told Ms. Schwartzman that he had paid Mr. DelPrete $250 in cash several weeks before this transaction, according to Ms. Schwartzman's testimony. The Commission finds it unnecessary to determine the truth of Mr. Saccone's statement on this point. See III(C)(2), infra.

that bank, who testified that $505 of that withdrawal was used to purchase traveler's checks and only $200 was taken by Mr. Saccone in the form of cash. A withdrawal order and receipts from the purchase of traveler's checks, produced and authenticated by Mr. Tracy, document the transactions to which he testified and refute Mr. Saccone's statement. In part because of this refutation, the Commission also does not credit Mr. Saccone's interrogatory answer to the effect that he paid Mr. DelPrete for the trip in cash from time to time in August and September, 1976, on bingo nights and [at] social functions, with cash he had on hand or cash from his savings account. A copy of the relevant pages of the savings account passbook, produced by Mr. Saccone and admitted into evidence, shows no other withdrawals during the relevant period besides that testified to by Mr. Tracy. The Commission also draws an inference unfavorable to Mr. Saccone because of his failure to testify, and the inconsistencies in his statements.

The Commission is likewise unpersuaded by statements of Mr. DelPrete on this issue. Investigator James F. Sullivan testified that Mr. DelPrete told him that he (DelPrete) paid for Mr. Saccone's trip and his own in cash and that Mr. Saccone repaid him in cash. The first part of that statement was contradicted by the evidence outlined in Findings No. 17 and 18, and also by Mr. DelPrete's own interrogatory answer to the effect that he paid for the trip by check. The Commission also rejects Mr. DelPrete's interrogatory answer with respect to the form of Mr. Saccone's repayment to him, namely that Mr. Saccone gave him $410 cash on 8/12/76 and $321 cash on 8/27/76, both of which Mr. DelPrete said he (DelPrete) desposited in account no. 207541-5 at the Plymouth Home National Bank. The Commission instead credits the testimony of Mr. Dunbar of that bank. He testified that the deposits made to that account on those two dates consisted of checks, not cash, and he produced copies of the deposit tickets and some of the deposited checks, none of which bore Mr. Saccone's name. In addition to the internal contradictions in Mr. DelPrete's statement and their refutation by Mr. Dunbar, the Commission's finding is justified by an unfavorable inference to be drawn as a result of Mr. DelPrete's failure to testify.

20. Mr. DelPrete paid, in whole or in part, for Mr. Saccone's 1976 trip to Rio de Janeiro, Brazil, for or because of official acts performed or to be performed by Mr. Saccone, namely Mr. Saccone's surveys, survey reports and recommendations for the certification of the North River Nursing Home.

The Commission bases this finding upon compelling inference. In doing so, it rejects the argument of Respondents' counsel that the motivation for the joint trip was a longstanding friendship between Messrs. Saccone and DelPrete. Not only was *no* direct testimony of such friendship introduced, but the Respondents' descriptions of their social relationship, contained in their interrogatory answers, were inconsistent with each other. They did agree however that they had never before exchanged gifts, nor traveled together until 1975.

The Commission's inference here derives from (a) the lack of evidence of friendship; (b) the inconsistent statements of Respondents on that issue; (c) their failure to testify; (d) the unquestionable fact that, as of May, 1975, when the exchange of official documents between Messrs. Saccone and DelPrete relating to North River Nursing Home began, they were each aware that Mr. Saccone had regulatory authority over North River Nursing Home, and that this authority continued until at least 1978, when Mr. Saccone made his last survey visit to the home; and (e) the fact that their trips together started the same year that Mr. Saccone assumed this regulatory authority.

21. From September 28, 1976, until October 9, 1976, Messrs. Saccone and DelPrete traveled to Rio de Janeiro, Brazil with other members and guests of the Company, on a Company-sponsored trip.

22. Mr. Saccone performed additional surveys of the North River Nursing Home on December 15 and 16, 1976, December 21 and 22, 1977, and December 27 and 28, 1978.

23. Subsequent to his surveys of December 15 and 16, 1976, December 21 and 22, 1977, and December 27 and 28, 1978, Mr. Saccone filed reports with the Life Safety Code Inspection Unit, which reports purportedly detailed the compliance or non-compliance of North River Nursing Home with the State and Federal Standards.

24. In the reports noted above in paragraph 23, Mr. Saccone reported that the North River Nursing Home had complied with several of the

State and Federal Standards when in fact material violations of those Standards existed.

Specifically, in his report on the December 15 and 16, 1976 survey, he reported that corridor widths and smoke barriers were in compliance with Federal Standards for Fire Safety, when such was not the case. The Commission bases this finding on Mr. Saccone's fire safety survey report and on the same evidence recited in Findings No. 12 and 16. Similarly, in his reports on the December 21 and 22, 1977 and December 27 and 28, 1978 surveys, Mr. Saccone reported that corridor widths and smoke barriers were in compliance with Federal Standards for Fire Safety, when such was not the case; he also reported that there were adequate dining facilities to meet State Standards when in fact there were not.

III. Decision

Respndent DelPrete has been charged with violating M.G.L. c. 268A, §§2(a) and 3(a). Respondent Saccone has been charged with violating M.G.L. c. 268A, §§2(b), 3(b) and 23(d), (e) and (f). These charges will be addressed separately. First, however, the Commission will address certain constitutional and other legal issues raised by the Respondents.

A. Constitutional Issues

1. Combination of Investigatory, Prosecutorial and Adjudicatory Functions

In the course of these proceedings, Respondents have alleged that their due process rights under the federal and Massachusetts constitutions are violated by virtue of the organization and procedures of the State Ethics Commisison, in which investigatory, prosecutorial and adjudicatory functions are combined in one agency. The Commission rejects this argument as one which is well settled in both federal and Massachusetts case law. As the Commission has previously stated, in its opinion **In the Matter of George A. Michael,** Commission Adjudicatory Docket No. 137 (issued September 28, 1981), the constitutional validity of such a combination has been upheld by both the United States Supreme Court, in **Withrow v. Larkin,** 421 U.S. 35 (1975), and by the Massachusetts Appeals Court in **School Committee of Stoughton v. Labor Relations Commission,** 4 Mass. App. Ct. 262 (1976); in addition, **Withrow** has been cited and applied by the Massachusetts Supreme Judicial Court in the case of **Dwyer v. Commissioner of Insurance,** 375 Mass. 227 (1978). In **George A. Michael v. State Ethics Commission,** Superior Ct. No. 47401 (Ronan, J.), affirmed, Mass. App. Ct. No. 81-0077-CV (April 3, 1981, Armstrong, J.), the Superior Court cited with approval the **Withrow** decision, in refusing to grant injunctive relief to a Respondent then before the Commission; both upper and lower courts also cited the **Opinion of the Justices,** 375 Mass. 795 (1978), an opinion which was rendered to the Massachusetts Senate prior to the passage of M.G.L. c. 268B (the statute which created the Commission), and which noted no constitutional defect in the statutory scheme under the Massachusetts constitution.

2. The Characterization of these Proceedings as Civil, Quasi-Criminal or Criminal, and the Constitutional Protections Afforded Thereby.

Respondents have argued that the proceedings in this matter are quasi-criminal or criminal, and thus that they warrant a higher standard of proof than "preponderance of the evidence," and other safeguards such as **Miranda** warnings and the exclusionary rule.

The Commission affirms the characterization of these proceedings as civil in nature. In doing so, it notes that it has the power to assess only civil or regulatory sanctions under M.G.L. c. 268B §4(d). The form of Commission proceedings is clearly administrative and civil, as well. In the **Opinion of the Justices,** supra at 819, the Supreme Judicial Court ruled that the imposition of the contemplated penalties by the State Ethics Commission would not violate Article 12 of the Massachusetts Constitution, because it did not appear that a purpose of the proposed law was to punish the commission of a crime through the imposition of a penalty. Rather, with the enactment of M.G.L. c. 268B, the legislature created a civil remedy to enforce the regulatory aims of M.G.L. c. 268A, and entrusted the Commission with such enforcement; the Attorney General remains responsible for enforcing the punitive sanctions.

The Commission finds that the Respondents' reliance upon **Addington v. Texas,** 441 U.S. 418 (1979), as support for engrafting a higher burden of proof onto these proceedings, is misplaced.

In that case, the proceeding involved the involuntary commitment of a person to a state mental institution for an indefinite period of time; the degree to which such person's liberty could be curtailed as a result of that proceeding is clearly distinguishable from the sanctions which may be invoked in these proceedings. The Commission therefore maintains that the standard of proof appropriate to these proceedings is that used in other civil cases, namely, a preponderance of the evidence.

Where, as here, the proceedings and possible sanctions are clearly civil, the Commission is not required to follow the procedures outlined in **Miranda v. Arizona,** 384 U.S. 436 (1966) and give warnings to those under investigation. Further, even if these proceedings were quasi-criminal or criminal, it is well settled that the **Miranda** decision only applies where interrogation occurs during custody or while an individual's freedom of action is curtailed. See, e.g., **Beckwith v. United States,** 425 U.S. 341 (1976); **United States v. Mueller,** 510 E2d 1116 (CA5 1975) (statements made by defendant to investigator during "informal conversation"); **United States v. Carollo,** 507 E2d 50 (CA5 1975), reh den (CA5) 510 F.2d 1407 and cert den 423 U.S. 874 (statements made by defendant at his place of business); **Taglianetti v. United States,** 398 F.2d 558, 566 (CA1 1968) affirmed on another ground, 394 U.S. 316 (1969). In this case, neither Respondent was ever in custody nor under any constraint when giving information which was later used at the hearing. Mr. Saccone voluntarily came to the Petitioner's offices to be interviewed informally, and also produced documents voluntarily; Mr. DelPrete was at his own place of business when he spoke with a Commission investigator who had come there to serve a summons for records, and voluntarily produced documents and gave other information forthwith rather than waiting until the return date on the summons. Neither federal nor Massachusetts courts have extended the **Miranda** requirements to such situations. See **Commonwealth v. Rawlins,** 352 Mass. 293 (1967).

Because these proceedings are civil, not criminal, in nature, the exclusionary rule is likewise inapplicable. Simply because the Commission is authorized to refer to the Attorney General evidence which may be used in a criminal proceeding, suppression of evidence is not warranted in this proceeding. Rather, a motion to suppress might be appropriate in the context of a criminal proceeding which resulted, were the allegedly tainted evidence to be introduced in that forum. The case at issue here is further distinguishable in that it has been testified that the material turned over to the Attorney General during the investigation of this case related not to the charges here, but to a separate matter.

Although the **Miranda** decision is inapplicable to these proceedings, the Commission acknowledges that a standard of fairness should guide its investigations and proceedings. Such a standard must necessarily be analyzed in light of the particular circumstances of each case. In this case, given that the allegedly "tainted" evidence was obtained through a voluntary interview of Mr. Saccone, and from information voluntarily disclosed by Mr. DelPrete at his own place of business during the service of a summons, the Commission finds that the introduction of such evidence was not unfair.

3. Other Constitutional Issues

Respondent Saccone raised several other constitutional defenses in his Answer which he did not pursue further in his brief, namely that M.G.L. c. 268A is unconstitutionally vauge and that the proceedings are fundamentally unfair. The Commission rejects these contentions.

With respect to the alleged vagueness, the Commission considers the substantive provisions of M.G.L. c. 268A (§§2-22) to be adequately specific to put Respondents on notice as to what behavior is proscribed. In particular, Sections 2 and 3, under which Respondents have here been charged, are closely patterned after federal conflict of interest laws, 18 U.S.C.A. §§201(b), (c)(1), (f) and (g), which have been upheld against allegations of vaugeness. See e.g., **United States v. Irwin,** (CA2 1965) 354 F.2d 192, 196-197, cert den 383 U.S. 980 (1978) (interpreting §201(f)). M.G.L. c. 268A, §23(a-f) states in the abstract the standards of conduct which the rest of the statute attempts to accomplish by laying down concrete prohibitions; yet the section ranges beyond what is specifically prohibited elsewhere in the act. Buss, **The Massachusetts Conflict of Interest Statue: An Analysis,** 45 B.U.L. Rev. 299, 307 (1965). The fact that the prohibitions are stated generally is not fatal; the vagueness

doctrine should not be used to convert into a constitutional delimma the practical difficulty of drawing a statute both general enough to take into account a variety of human conduct and sufficiently specific to issue fair warning that certain kinds of conduct are prohibited. **Colten v. Kentucky,** 407 U.S. 104 at 110 (1972). A Respondent cannot seek to prove vaugeness by suggesting hypothteical cases taken from the peripheral areas of a statute's scope, but must show that, as applied to his own case, the statute was so vauge and uncertain that he was not presented with an ascertainable standard of guilt. **United States v. Irwin,** supra, at 196. Here, Mr. Saccone has failed to do so.

With respect to the alleged fundamental unfairness of the proceedings, the Commission refers to the rulings made elsewhere in this Decision section and by the presiding officer at the hearing as dispositive of those specific issues raised by Mr. Saccone relating to the issue of fairness. To the extent that his claim may relate to other unspecified instances not pursued by his brief, the Commission declines to rule on them further.[5]/

B. Other Legal Issues

1. Statute of Limitations

In his Answer, Respondent Saccone raised the statute of limitations as a defense to this action, without further specifying what he considered to be the applicable limitation period, nor in what respect he considered it to have expired. The Petitioner did not affirmatively respond to this defense in any supplemental pleading, nor introduce any evidence specifically directed toward it, and none of the parties addressed the issue in briefs or during oral argument before the full Commission. Because of the potential importance of the issue, during its deliberations the Commission requested that the parties submit memoranda of law on the question of which statute of limitation should be applied to this proceeding.[6]/

Since the adoption of M.G.L. c. 268B in 1978, the Massachusetts courts have not had occasion to rule on the question of which statute of limitations applies to adjudicatory proceedings before the Commission. However, in 1979 the Supreme Judicial Court issued an opinion in **Nantucket v. Beinecke**, 1979 Mass. Adv. Sh. 2623, which gives some guidance on the issue. That case involved a civil action brought under M.G.L. c. 268A, §21, by the Town of Nantucket, to recover real property which had been conveyed by several town officials, allegedly in violation of c. 268A, §§19 and 20. The defendant, to whom one of the officials had conveyed the property approximately eleven years before the suit was brought, moved dismissal of the case on the ground that the statute of limitations had run. The court rejected the plaintiff's contention that the absence of a limitation provision in c. 268A indicated that no limitatin applied. Instead, the court looked to "the gist of the action or the essential nature of the plaintiff's claim" and concluded that the particular action at bar, which concerned a violation of official duty, sounded in tort. Id. at 2626.[7]/

Looking at the "gist of the action" here, the Commission considers the conduct at issue in this case, i.e., the misuse of official position, to be a breach of duty, sounding in tort, as well. While the relationship of a public employee to his employer is at its foundation a contractual one, the obligations assumed by the employee go beyond those in an ordinary express or implied contract and encompass a broader assumption of public trust, more analogous to a fiduciary relationship. Many judicial decisions involving misconduct by public employees similar to that alleged here have used a fiduciary analysis:

> . . . If he takes any gift, gratuity, or benefit in violation of his duty, . . . it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.
>
> The doctrine is well-established. . . The disability results not from the subject-matter but from the fiduciary character of the one against whom it is applied. **United States v. Carter,** 217 U.S. 286, 306 (1909).

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[5]/To the extent that Respondents' Motions to Dismiss, Motion to Strike, and Motions to Suppress were based on alleged constitutional deficiencies, they are hereby denied, in accordance with the conclusions reached in the foregoing section.

[6]/With his memorandum, Mr. DelPrete submitted a motion to amend his Answer to include the defense. The Commission's ruling in effect treats the issue as if raised by both Respondents.

[7]/The court acknowledged that some violations of the conflict of interest law, c. 268A, might also sound in contract, but it declined to pursue the argument. For reasons specified below, the Commission also declines such a ruling here.

See, also, **United States v. Podell,** 572 F.2d 31 (CA2 1978); **United States v. Bowen,** 290 F.2d 40 (CA5 1961); **United States v. Eilberg,** 507 F. Supp. 267 (E.D. Pa. 1980). Indeed, the conflict of interest law can be viewed as a codification of fiduciary principles applicable to public employees. For these reasons, the Commission will apply a tort statute of limitations to this action, namely three years (M.G.L. c. 260 §2A).

There are additional reasons for this conclusion. Because it views its enforcement role as civil, and not criminal or penal, the Commission declines to adopt the limitation period applicable to criminal actions[8]/ (sic years, M.G.L. c. 277 §63) or to forfeitures or penalties (two years, M.G.L. c. 260 §5) as a standard for its causes of action. While it is possible that another set of facts not now before the Commission might sound more properly in contract than tort, given the particular facts of this case, the Commission declines to use a contract theory, leaving open the possibility that a contractual analysis might be appropriate in other cases.

In applying a three-year statute of limitations, one must look to see when that period starts to run, and whether any circumstances warrant the tolling of the statute. The limitations period commences to run when the cause of action accrues, usually the completion of the last act which gives rise to the cause of action. **New Bedford v. Lloyd Investment Associates, Inc.,** 363 Mass. 112, 119 (1973). However, in causes of action which are based upon an "inherently unknowable" wrong, a discovery rule has been applied, under which the cause of action has not been held to accrue until the plaintiff learned, or reasonably should have learned, that he was harmed by the defendant's conduct. See, e.g., **Franklin v. Albert,** 1980 Mass. Adv. Sh. 2187; **Friedman v. Jablonski,** 371 Mass. 482 (1976); **Hendrickson v. Sears,** 365 Mass. 83 (1974). In the context of a civil action brought under M.G.L. c. 268A, the Supreme Judicial Court in **Beinecke** applied a discovery rule, stating

> [W]e suggest, as a general proposition, that only when those disinterested persons who are capable of acting on behalf of the town knew or should have known of the wrong, should the town be charged with such knowledge.[9]/

Besides the common law discovery rule applicable to inherently unknowable wrongs, there is also a statutory discovery rule applicable in certain situations. M.G.L. c. 260, §12 delays the start of the period in cases where

> a person liable to a personal action fraudulently conceals the cause of such action from the knowledge of the person entitled to bring it

in which case the period starts to run when the latter person discovers the cause of action. Nevertheless, this rule has been interpreted strictly by Massachusetts courts to cover only those situations where there is evidence that the concealment was accomplished "by positive acts done with the intention to deceive . . . [by] active steps taken . . . not merely constructive concealment [but] active fraud of a kind calculated to conceal the truth."[10]/ The fraud cannot be presumed[11]/ and ordinarily a defendant's mere silence or failure to inform a plaintiff of the facts is not fraudulent concealment.[12]/ An exception, in which the courts construe silence about one's wrongdoing to be active fraud and thus gounds for tolling the statute of limitations, has been made where the wrongdoer's relationship to the wronged is one of a trust or fiduciary nature and there is a great disparity in expertise or knowledge which would render plaintiff's discovery of the wrong nearly impossible, or where there is some other specific duty to disclose the matter.[13]/

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[8]/Cf. **Commonwealth v. Canon,** 373 Mass. 494 (1977) (assumes the six-year limit is applicable to criminal prosecutions under M.G.L. c. 268A).

[9]/1979 Mass. Adv. Sh. at 2628. That case applied a discovery rule because Town Counsel, who would ordinarily bring suit on the town's behalf, was one of the wrongdoers involved. In some cases, the running of the statutory period is affected by the existence of a "continuing violation," see, e.g. **United States v. Hare,** 618 F.2d 1085 (CA4 1980), but the Commission considers that theory inapplicable here.

[10]/**Savoie v. Anezis,** 55 Mass. App. Dec. 55 (1974), citing, in part, **Connelly v. Bartlett,** 286 Mass. 311 (1934).

[11]/**Maloney v. Brackett,** 275 Mass. 479 (1931).

[12]/**O'Brien v. McSherry,** 222 Mass. 147, 150 (1915).

[13]/**Hendrickson v. Sears,** supra (lawyer hired to perform title search owes client a full and fair disclosure of facts, i.e., clouds on title, material to the client's interests); **Stetson v. French,** 321 Mass. 195 (1947) (businessman who employed two illiterate younger brothers had duty to account to them for withheld wages). Compare **Friedman v. Jablonski,** supra (sale of land is arm's length transaction; seller is not a fiduciary and his silence cannot constitute fraudulent concealment); **Savoie v. Anezis,** supra (plumber not required to disclose faulty work to customer).

The Commission will apply the foregoing principles to the facts found to ascertain whether Respondents in this case have violated M.G.L. c. 268A as alleged by Petitioner.[14]/

2. Alleged Failure to Comply with Discovery Motions

Respondents have moved these proceedings be dismissed based upon Petitioner's alleged failure to produce documents called for during discovery. Such alleged failures fall into several categories which will be discussed separately.

a. At the commencement of hearings on this matter, it was discovered that Petitioner intended to introduce into evidence certain documents which had not previously been provided to Respondents and which were arguably within the latters' discovery requests. The parties agreed that such non-production was inadvertent, and Petitioner supplied the documents in question to Respondents forthwith; after the production, there was a six-week recess in the hearing, in part to allow Respondents adequate time to analyze what was produced, and adjust their presentation accordingly. In view of this accommodation, the Commission does not consider Respondents to have been prejudiced by the non-production, and rules that dismissal is not warranted thereby. Even if these proceedings were governed strictly by the Massachusetts Rules of Civil Procedures (which they are not), M.R.C.P. Rule 37, which addresses failure to comply with a discovery order, does not require dismissal but states that a court may make such orders as are just, including a stay of proceedings until a discovery order is obeyed. The Commission notes that its actions in the case at hand are consonant with the purposes of such a rule.

b. In the course of discovery, certain investigative materials were not produced in their entirety, but rather with certain portions deleted. These documents were primarily interview reports and a letter of complaint. Petitioner represented to the presiding officer that the omitted material related to other investigative matters not at issue in these proceedings. The presiding officer, in turn, offered to inspect the documents **in camera** to confirm that such was the case, but such offer was refused by Respondents.

The Commission notes that under M.G.L. c. 268B, §4(a), "all commission proceedings and records relating to a preliminary inquiry shall be confidential," and that §7 provides criminal penalties for violation of such confidentiality. While Respondents would arguably be entitled to records concerning inquiry into their own actions, the Commission finds that they are not so entitled to documentation relating to alleged improprieties of others, which under the statute is privileged. In addition, even M.R.C.P. Rule 26(b)(1) limits discoverable material to that which is relevant and not privileged. In view of Petitioner's representation that the material here in question related to other investigations and was therefore irrelevant and privileged (and Respondents' refusal to allow the presiding officer the means to determine the truth of that representation), the Commission sees no reason to allow discovery of such material, and affirms the prior rulings of the presiding officer in this regard.

c. The Respondents also objected to the non-production of certain reports from interviews of individuals whom Petitioner did not call to testify. The Commission notes such non-production would be justifiable under the "work-product" exemption in M.R.C.P. 26(b)(3), and considers their non-disclosure appropriate in this administrative context as well.[15]/

3. Admissibility of Statements or Documents of One Respondent Against a Co-Respondent

These proceedings are governed by the Rules of Practice and Procedure, 930 CMR 1.01 et seq., which state that evidence is admissible if relevant, not privileged, and "the kinds of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." (930 CMR 1.01(9)(f)(2)).

In the course of the hearings, Respondents objected to the introduction of written or oral statements of one Respondent for use against both Respondents because, they maintained, no conspiratorial allegations had been made. In an effort to accord Respondents as much protection as possible, the presiding officer initially allowed such objections and limited the admissibility of

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[14]/Given the facts of this case, the Commission finds it unnecessary at this time to decide whether issuance of a Preliminary Inquiry notice or issuance of an Order to Show Cause constitutes the initiation of proceedings.

[15]/To the extent that Respondents' Motions to Strike, Motions to Suppress and Motions to Dismiss were based on alleged non-compliance with discovery, they are hereby denied.

the material. However, when in the protracted course of the proceedings the exclusions became exceedingly complicated and a barrier to the admission of clearly relevant evidence, the presiding officer declined to continue such limitation of evidence, and admitted it if relevant with the proviso that the full Commission would decide the admissibility and weight to be accorded it.

In view of the Rules which govern these proceedings, the Commission considers the evidence in question to be relevant and thus fully admissible. With respect to those written and oral statements whose admissibility was initially limited, the Commission also rules them admissible for their full probative value.[16]/ In doing so, it rejects what it considers to be an unworkable evidentiary rule in the context of an administrative proceeding.[17]/

4. Admissibility of Expert Testimony

Respondents have moved to strike the expert testimony of John Chleapas because of alleged lack of foundation, irrelevance, and its reliance upon documents not admitted against both Respondents.

The Commission rejects these arguments. With respect to the alleged lack of foundation, the Commission agrees with the presiding officer's ruling that Mr. Chleapas was qualified as an expert. In doing so, the Commission points to Mr. Chleapas's membership on professional committees of the National Fire Protection Association and the American Society for Testing and Materials which deal with building construction types as they relate to fire safety and resistance, his experience at the U.S. Department of Public Health where he monitored construction of health facilities in accordance with the Life Safety Code and state and federal physical environment requirements, oversaw the accuracy and completeness of survey reports by state inspectors, performed such surveys himself, and trained the inspectors in the very unit in which Mr. Saccone served (including Mr. Saccone). The Commission recognizes that his knowledge of the internal operations and administration of this state unit was limited, and the Commission thus accords lesser weight to that portion of his testimony, as reflected in the violations discussed below (in section III(C)(3)). However, this does not nullify his expertise and testimony on the Code, its requirements, and the construction of the North River Nursing Home, and the Commission upholds the validity and admissibility of that testimony.

On the question of the basis of Mr. Chleapas's testimony, the Commission points to its ruling above (section III(B) (3)), to the effect that the documents upon which he based his testimony were fully admissible against both Respondents. Further, to the extent that Mr. Chleapas's expert testimony was based on his personal observation of the North River Nursing Home, the Commission does not agree that the passage of time between the observations of Messrs. Saccone and Chleapas rendered the latter's findings irrelevant. Rather, the Commission notes that a trier of fact has broad discretion to decide the admissibility of such evidence,[18]/ and it affirms the prior ruling of the presiding officer which allowed the testimony and related exhibits.

5. Relevance of Original Complainant and His/Her Motivation

In the course of these proceedings, both Respondents addressed themselves at length to the asserted necessity for disclosing the identity of the individual who originally brought to the Commission's attention the allegations which led to this inquiry and the subsequent proceedings.[19]/ Briefly stated, they argued that the identity was relevant to show that (a) the individual was someone within Mr. Saccone's unit who had been accused (and censured) for dishonesty in the submission of expense vouchers, and therefore the person was not credible; and (b) the person's complaint was motivated by racial animosity, hatred and bigotry. Respondents introduced several witnesses who testified to the base motivation of the purported complainant. Respondents also objected to the Petitioner's failure to call the individual as a witness.

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[16]/To the extent that Respondents' Motions to Strike were based on the admissibility issue just discussed, they are hereby denied.

[17]/The Commission also notes that the evidence in question would also be admissible under exceptions to the hearsay rule, since it consisted of official records, business records and admissions.

[18]/M.G.L. c. 30A, §§10, 11; Western Massachusetts Bus Lines, Inc. v. Department of Public Utilities, 365 Mass. 61, 69 (1973); Town of Sudbuty v. Department of Public Utilities, 351 Mass. 214, 219-220 (1966).

[19]/The record discloses that the original allegations were made in an anonymous letter received by the Commisison. Petitioner maintained throughout these proceedings that the letter's author was unknown, at least to the Commisison; Respondents professed to know the author's identity.

At the outset, the Commission fails to see any grounds for objecting to the non-production of an allegedly incredible witness. The Commission also notes that if Respondents indeed considered it crucial to expose the individual's identity and motivation, they were entirely free to call the person as a hostile witness, which they did not.

Moreover, these arguments and objections belie a fundamental misunderstanding of the basis for Commission actions. An adjudicatory proceeding such as this is predicated upon a Commission finding that "reasonable cause" exists to believe that M.G.L. c. 268A or 268B has been violated (c. 268B, §4(C)). In finding such reasonable cause, the Commission does not rely upon the complaint alone, but rather upon independently verified information gathered by the Commission's investigative staff pursuant to the receipt of the complaint. As a matter of Commission practice, a complaint alone does not serve as the basis for such a finding, but must be independently verified. Once reasonable cause is found and proceedings commenced, it is the independently verified information and corroboration which from the crux of Petitioner's presentation; the original complaint may well be wholly superfluous.

In the case at hand, Respondents failed to show any improper reliance by Petitioner upon the original complaint; the complainant was not produced, and investigators who testified disclosed no substantial credence given to the original complaint once the case advanced beyond the preliminary stages. Therefore, the Commission rejects Respondents' arguments on this issue as irrelevant, and to the extent they form the basis for any outstanding motions to dismiss by Respondents, the motions are hereby denied.

6. Jurisdiction

All parties agreed that Respondent Saccone was, at all times relevant, a state employee within the meaning of M.G.L. c. 268A, §1(q) and thus subject to the proscriptions of that chapter.

C. Chapter 268A Allegations

1. Section 2

The Petitioner contends that, by taking Mr. Saccone on two trips abroad in 1975 and 1976, Mr. DelPrete corruptly gave him something of value with intent to influence Mr. Saccone's official acts and to induce him to do acts in violation of his lawful duty, namely to misrepresent the condition of the North River Nursing Home in his survey reports and recommendations, in violation of Section 2(a); conversely, it is alleged that Mr. Saccone corruptly received something of value in return for being so influenced and induced, in violation of Section 2(b).

The distinguishing element of §2 is the existence of a specific corrupt intent, of an understood "quid pro quo," and the Petitioner must show such corrupt intent to sustain a violation. **Commonwealth v. Dutney,** 4 Mass. App. 363 (1976). In the case at hand, Petitioner has presented no direct evidence of intent, but has argued that it is inferable from the record, particularly from the coincidence of time between Mr. Saccone's assumption of duties regarding the North River Nursing Home, and the first payment made for his trip to Rome by Mr. DelPrete.

The Commission does not find the record sufficiently complete or persuasive to give rise to such an inference. The lack of direct evidence is difficult to overcome, and here neither action alleged to have occurred on or about May 12, 1975, giving rise to a corrupt agreement, was persuasive. In particular, the waiver recommendation made on that date by Mr. Saccone concerned violations of only one Physical Environment Standard, one which had only been promulgated the month before, and under which the Life Safety Code Inspection Unit arguably had wide discretion. As for the payment made on that date by Mr. DelPrete, the documentation of that payment and its attribution to Mr. Saccone's trip was scant, and was not elaborated upon in testimony. In view of the record, the Commission declines to infer corrupt intent, and therefore finds no violation of §2 in either 1975 or 1976.

2. Section 3

Petitioner has alleged that Mr. DelPrete gave something of substantial value, to wit, a trip to Rome in 1975 and a trip to Rio in 1976, to Mr. Saccone, in violation of §3(a). Likewise, it is alleged that Mr. Saccone twice violated §3(b) by accepting these trips.

The Commission considers the evidence relating to the 1975 trip to be insufficient to give

rise to the conclusion that Mr. DelPrete paid for Mr. Saccone's expenses for that trip, and thus the Commission finds no Section 3 violation arising from that trip.[20]/ The record of payment for the 1976 trip, however, is much more complete and thus the Commission finds that Mr. DelPrete did pay for part or all of Mr. Saccone's expenses for that trip.[21]/

Nevertheless, the findings relating to the 1976 trip do not give rise to a Section 3 violation, because of the statute of limitations. Although the Commission finds that Mr. DelPrete gave, and Mr. Saccone received, part or all of the latter's expenses for the 1976 trip, there is a lapse of four years between the date of that trip and the issuance of an Order to Show Cause in this matter (October 1, 1980).[22]/ The limitation period starts to run with the receipt of the gratuity (the trip on September 27 - October 9, 1976) and not the completion of the official acts which motivated it; under Section 3, the official acts are not viewed as part of a "quid pro quo," nor need there be a showing that there were any official acts which were affected by receipt of the gratuity.[23]/

The statutory period is not tolled by the Commission's failure to discover the violation (the Commission did not exist until November, 1978), because the violation was not "inherently unknowable." Also, at the time of the offense there were in existence other "disinterested persons" capable of enforcing §3, namely the attorney general and the appropriate district attorneys. Petitioner did not show that they were unable, despite due diligence, to discover the violation earlier, nor does the record contain any showing of fraudulent concealment of the trip by Respondents.[24]/

3. Section 23(d)

The Commission finds that Mr. Saccone violated §23(d), which states

> [no state employee shall] use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others

by virtue of his having submitted survey reports on the North River Nursing Home in 1975-78, in which he omitted citing material deficiencies.

The evidence Petitioner presented on the alleged deficiencies of the North River Nursing Home was voluminous; much of it was directed toward showing that the home violated the State and Federal Standards on Physical Environment. Respondent Saccone, in turn, presented evidence to show that his actions were justifiable and warranted under the often-changing and easily-waived standards as they were actually implemented by the Life Safety Code Inspection Unit during the years in question.

The Commission, in making its findings with respect to the accuracy of Mr. Saccone's reports, wishes to avoid to the extent possible substituting its judgment, regarding acceptability under the State and Federal standards, for that of the inspectors and supervisors in the Inspection Unit. The findings reflect, therefore, an acknowledgement that some of those standards were less than constant and inflexible, and that the standards accorded considerable deference to the judgment of the inspector. For these reasons, the Commission has limited its findings to several representative deficiencies under the fire safety standards, which did not fluctuate as often as the physical environment standards.

Nevertheless, the Commission finds that Mr. Saccone's repeated failure to cite those deficiencies did in fact constitute "use [of] his official position to secure unwarranted . . . exemptions" for the North River Nursing Home. Although Messrs. Hall and Boudreau of the Life Safety Inspection Code Unit testified that inspectors commonly, and with their tacit approval, omitted citation of certain deficiencies, they did not clearly acknowledge that this was true with respect to basic fire safety features. In his testimony, Mr. Hall described an alternative method of determining fire safety. However, he admitted that this method has only officially been in use since 1979, and

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[20]/Although the Commission finds that Respondents did make this trip together, as mentioned in the previous section, documentation and testimony regarding payment for this trip was scant.

[21]/See Findings of Fact, Paragraphs 17-19.

[22]/It is arguable that the cause of action is commenced when the Commission sends notice to the subject of a preliminary inquiry that he is such a subject; however the Commission leaves this issue open, since in this case the notice was sent on June 19, 1980, still more than three years after the later trip.

[23]/See **United States v. Niederberger**, 580 F.2d 63, 69 (CA3 1978), cert den 439 U.S. 980 (1978) (interpreting 18 U.S.C. §201g); **United States v. Irwin**, supra.

[24]/Once the statute of limitations was raised as a defense, the burden rested upon Petitioner to show that it had not expired. **Teller v. Schepens**, 1980 Mass. Adv. Sh. 2199, 2200-2201; **Breen v. Burns**, 280 Mass. 222, 228 (1932).

that to the extent it was used in Massachusetts prior to that time, it still assumed that a facility's deficiencies would be accurately recorded for evaluation. Thus, the Commission considers Mr. Saccone's failure to report such deficiencies was unwarranted, and finds that he violated §23(d) on each of the five occasions on which he submitted inaccurate survey reports.[25]/

The facts found to constitute these violations fall within the statutory period for commencing these proceedings. Both Respondents admitted in their answers that Mr. Saccone's duties as a Life Safety Code Inspector include conducting periodic surveys of nursing homes to ensure compliance with the State and Federal Standards, and filing reports that detail whether each nursing home surveyed is in compliance with those Standards (see Finding of Fact no. 4, above). As mentioned in the preceding paragraph, Mr. Saccone's supervisor did expect that a facility's deficiencies would be accurately recorded. Here, then, the record clearly indicates that Mr. Saccone had an affirmative obligation to disclose the true condition of the North River Nursing Home and that he repeatedly failed to do so. Moreover, he made active misrepresentations of that condition each time he submitted a report on that facility, and related documentation. Thus, at least until Mr. Saccone signed his last survey report for the North River Nursing Home on February 12, 1979, stating that the facility met state and federal standards, he took active steps to fraudulently conceal the true condition of the home, and the statute of limitations did not start to run until then.

4. Section 23(e)

Petitioner alleges that, by submitting inaccurate inspection reports and by traveling as Respondent DelPrete's guest on two occasions, Mr. Saccone by his conduct gave reasonable basis for the impression that Mr. DelPrete could improperly influence or unduly enjoy his favor in the performance of his official duties, in violation of §23(e).

For reasons similar to those discussed in connection with §3, above, the Commission finds no violation of §23(e) by virtue of the trips taken.[26]/

The Commission declines to address the allegation that the submission of false reports by Mr. Saccone violated section 23(e), since the facts which would give rise to such a violation are the same as those which have already given rise to a violation under §23(d) above.

5. Section 23(f)

Petitioner charged that Mr. Saccone "pursued a course of conduct which would raise suspicion among the public that he was likely to be engaged in acts that were in violation of his trust," in violation of §23(f), when he traveled as Mr. DelPrete's guest on two occasions. Because the facts which would give rise to such a violation are again beyond the statute of limitations adopted for the purpose of this decision, the Commission finds no such violation.

IV. Order

On the basis of the foregoing, the Commission concludes that John P. Saccone violated M.G.L. c. 268A, §23(d). Pursuant to the authority granted it by M.G.L. c. 268B, §4(d), the Commission hereby orders Mr. Saccone to pay a civil penalty of $300 for each of the five occasions upon which he submitted inaccurate inspections reports, i.e., July, 1975, January, 1976, December, 1976, December, 1977, and December, 1978, for a total of $1,500 (fifteen hundred dollars), within thirty (30) days of the receipt of this Decision and Order.

DATE: June 1, 1982

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[25]/ The Commission considers it unnecessarily cumulative to examine whether the statute was similarly violated by each of Mr. Saccone's Statements of Deficiencies, Waiver Recommendations, and Post-Certification Revisit Reports.

[26]/ In invoking the statute of limitations, the Commission notes that, unlike the substantive sections of M.G.L. c. 268A, §23 has also been enforceable by an agency head, who may take administrative action against an employee for violations of the section. Thus, there was in 1975 and 1976 another entity capable of bringing an action against Mr. Saccone for the conduct alleged and found here, and which failed to act within the required time.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION
SUFFOLK, ss. Commission Adjudicatory
Docket No. 162

IN THE MATTER
OF
JOHN A. PELLICELLI

DISPOSITION AGREEMENT

This Agreement is entered into between the State Ethics Commission ("Commission") and John A. Pellicelli ("Mr. Pellicelli") pursuant to Section 11 of the Commission's **Procedures Covering the Initiation and Conduct of Preliminary Inquiries and Investigations.** The parties agree that upon its execution this Agreement shall constitute a final order of the Commission, enforceable in the Superior Court of the Commonwealth, pursuant to Section 4(d) of G.L. c. 268B.

On April 30, 1982, the Commission, pursuant to §4 of G.L. c. 268B, initiated a Preliminary Inquiry into possible violations of the Conflict-of-Interest Law, G.L. c. 268A, arising from Mr. Pellicelli's participation as a member of the Middleton Housing Authority in the matter in which his brother had a financial interest. The Commission has concluded its Inquiry into Mr. Pellicelli's involvement in the matters set forth in this Agreement, and makes the following findings of fact and conclusions of law to which the parties hereto agree:

1. Mr. Pellicelli is a member of the Middleton Housing Authority (MHA) and has been since 1976. He was most recently re-elected in 1981. There are five members of the Authority.

2. Mr. Pellicelli's brother, Paul, has worked for the MHA for 9 years at Orchard Circle, a 54-unit elderly housing complex, the Authority's only facility.

3. When PAUL Pellicelli was first hired, the the maintenanceman's duty was limited to outdoors ground work. As the building has aged, the job of the maintenanceman has expanded to include household maintenance (i.e., plumbing, electrical) as well.

4. On May 22, 1980, at a special meeting of the MHA, the members voted to approve its FY 1981 budget. Included in the budget was a provision that Paul Pellicelli would continue to be paid as a maintenance/laborer for 30 hours per week and as a maintenance/mechanic for 10 hours per week. Also included, however, was the provision that upon submission of documentation over a 6-month period indicating the number of hours devoted to different tasks, the members would re-evaluate the classification for suitability to the duties actually performed.

5. In December of 1980, Paul Pellicelli submitted the requested records, which indicated that he was spending more time performing tasks associated with the position of maintenance/mechanic. However, because of the opposition by two members of the Authority, no change was made in Paul Pellicelli's job title or pay at that time. John Pellicelli did not participate in that vote.

6. On July 13, 1981, Michael DiPietro of the Commonwealth's Department of Labor and Industries wrote MHA Chairman Nathan Haywood a letter in which he stated:

> During a routine inspection of your Housing Authority, the Department's field inspector Robert Lamarre has found that a Mr. Paul Pellicelli was not receiving the proper rate of pay.
>
> Rates sent to your Authority May 7, 1980 list a maintenance/mechanic for $9.39 per hour and a maintenance/laborer at$7.64 per hour. Mr. Pellicelli stated and confirmed by Ms. Alice D. Millbury that he performed maintenance/mechanic work 50% of the time and maintenance/laborer work 50% of the time.
>
> The Department is requesting that Mr. Pellicelli be paid at 50% of the time performing maintenance/mechanics work...

7. On July 23, 1981 at a meeting of the MHA, John Pellicelli moved that the MHA comply with the Department of Labor and Industries' request. Mr. Pellicelli voted in favor, along with two other members, and the motion carried. The effect of the motions, which was clearly understood, was to reclassify Paul Pellicelli's position to 20 hours as a maintenance/mechanic and 20 hours as a maintenance/laborer, retroactive to July 1, 1980. (On an annual basis, the change results in an increase of $910.20, from $16,801.20 to $17,711.20.)

8. By voting on July 23, 1981, to reclassify his brother's position, Mr. Pellicelli violated §19 of G.L. c. 268A which prohibits a municipal employee, as himself, from participating in a matter in which, among others, a member of his immediate family has a financial interest. That the vote was an effort to comply with the request of the Department of Labor and Industries did not render §19 inapplicable although it is a factor in mitigation.

WHEREFORE, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement

proceedings brought on its behalf pursuant to G.L. c. 268B, on the basis of the following terms and conditions hereby made and agreed to by Mr. Pellicelli:

1. That Mr. Pellicelli will hereby cease and desist from participating in MHA matters which affect the financial intersts of his brother;

2. That Mr. Pellicelli will pay the State Ethics Commission the sum of $250 as civil penalty for violation §19 of G.L. c. 268A; and

3. That Mr. Pellicelli waives all rights to contest the findings of fact and conclusions of law in this or any related judicial or administrative proceedings in which the State Ethics Commission is a party.

DATE: June 25, 1982

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 148

IN THE MATTER
OF
ROCCO J. ANTONELLI, SR.

Appearances:

Robert J. Cordy, Esq: Counsel for the Petitioner, State Ethics Commission
Bernard A. Dwork, Esq: Counsel for the Respondent, Rocco J. Antonelli

Commissioners Participating:

Vorenberg, Ch., McLaughlin, Bernstein, Brickman, Mulligan

DECISION AND ORDER

I. Procedural History

The Petitioner initiated these adjudicatory proceedings on October 7, 1981 by filing an Order to Show Cause pursuant to the Commission's Rules of Practice and Procedure, 930 CMR 1.01(5)(a). The Order alleged that the Respondent, Rocco J. Antonelli, Sr., had violated G.L. c. 268A, §3(b) by soliciting and accepting private loans and other accommodations from the Coolidge Bank and Trust Company (Coolidge), the Capitol Bank and Trust Company (Capitol), the U.S. Trust Company (U.S. Trust) and the Suffolk Franklin Savings Bank (Suffolk Franklin) for or because of his official acts as the Treasurer of Middlesex County. The Petitioner also alleged that the Respondent had repeatedly used or attempted to use his position as County Treasurer to secure unwarranted benefits for his private businesses at these banks, and had also given reasonable basis for the impression that these banks could improperly influence him or unduly enjoy his favor in the performance of his Treasurer duties in violation of G.L. c. 268A, §23(d) and (e).

The Respondent's Answer denied these allegations and raised several affirmative defenses asserting the Commission's lack of jurisdiction or authority to adjudicate the factual allegations. Prior to the commencement of adjudicatory hearings in this matter, the Respondent filed motions to dismiss the Order, for summary judgment on the pleadings. These pre-hearing motions were denied by Commissioner Bernard McLaughlin, who was designated as the Presiding Officer.[1]/ See, M.G.L. c. 268B, §4(c).

Hearings were conducted on twelve days between December, 1981 and February, 1982. The parties thereafter filed briefs with the Commission and presented oral argument before the full Commission on April 6, 1982. In rendering this Decision and Order, all members of the Commission have considered the testimony, evidence and arguments presented by the parties.

II. Findings of Fact

1. Mr. Antonelli was elected Treasurer of Middlesex County (County) on November 7, 1978 and took office on January 3, 1979. His responsibilities as Treasurer included the authority to decide when and with which banks the County, the County Retirement System or County Hospital would open and maintain accounts, the nature of the accounts, the amount of money to be deposited into each account, the duration of deposits in each account and when the accounts would be closed.

2. At all times material, Mr. Antonelli

[1]/The substance of these motions is discussed, infra.

either owned or had a substantial financial interest in R. J. Antonelli and Company, an accounting firm; Urban Equity Development Company (UEDC) a limited partnership which was engaged in a commercial redevelopment within Davis Square, Somerville, and the Bartlett Manor and Buchanan Nursing Homes located in Malden.

Coolidge Bank

3. In December, 1976, UEDC received a $450,000 loan from the Coolidge Bank to finance a commercial redevelopment in Davis Square, Somerville. Mr. Antonelli and Coolidge Bank subsequently became involved in litigation over whether Coolidge Bank had agreed to lend Mr. Antonelli an additional $225,000 for construction costs. During the pendency of the litigation, Mr. Antonelli ceased payments on the $450,000 loan, Coolidge Bank took possession of the commercial property, and the construction was halted.

4. Following a hearing before a court-appointed master, the master released his preliminary findings in July, 1979 which found in favor of UEDC but which left unresolved the issue of whether UEDC should be awarded damages or specific performance of its agreement. Before July, 1979, Coolidge Bank was opposed to both renegotiating its loan with Mr. Antonelli and to considering granting to him new construction financing.

5. In July, 1979, Mr. Antonelli learned that Coolidge Bank had a new president, Harry Klein, and he arranged a meeting with Mr. Klein to discuss the financing of the Davis Square redevelopment. At their first meeting in July, 1979, Mr. Antonelli requested Coolidge to refinance the loan and to put additional funds into the project. Mr. Klein's initial response was not encouraging. Mr. Klein thereafter discussed with other Coolidge officials the possibility of salvaging the loan through a refinancing whereby Coolidge would hold a mortgage over the entire Davis Square development and would "wrap around" the prior financing of other lending institutions.[2]/

6. In early August, 1979, Mr. Antonelli and Mr. Klein met once or twice and came closer to a refinancing agreement incorporating a "wrap around" concept. At one of these refinancing meetings they discussed the subject of Coolidge Bank doing business with Middlesex County. Mr. Antonelli told Mr. Klein that the County would be interested in opening accounts with Coolidge, but he did not specify a particular deposit amount. Prior to August, 1979, Coolidge Bank did little, if any, business with either Middlesex County, the County Retirement System or the County Hospital.[3]/

7. On either August 8 or 9, 1979, Mr. Antonelli directed Assistant County Treasurer James Ferretti to write a series of checks toalling $500,000 made payable to Middlesex County and to give the checks to him. On the same day, Mr. Antonelli also directed the Chief Retirement Officer of the County Retirement System, John McMahon, to write out Retirement System checks totalling $600,000 and to give the checks to him. Mr. Antonelli did not explain the purpose of these checks at that time to either Mr. Ferretti or Mr. McMahon.

8. After banking hours on August 9, 1979, Mr. Antonelli visited Mr. Klein's office in Watertown and personally handed him the County Treasurer and County Retirement System checks totalling $1.1 million for the purpose of opening accounts.[4]/ Mr. Antonelli customarily did not make personal visits to banks to open accounts or to deposit County funds. The letters signed by Mr. Antonelli and which accompanied the initial deposits into the accounts stated, "We are enclosing herewith initial deposits with your financial institution and trust that our future relationship will prove to be mutually beneficial."

9. At the time of the opening of these accounts, Coolidge Bank was agreeable to the general concept of a UEDC refinancing, but major details over the terms of the refinancing remained to be negotiated and finally ratified by the Coolidge Bank Executive Committee. On August 13, 1979, Mr. Antonelli submitted a formal refinancing proposal to Coolidge. On August 23, 1979, Coolidge Bank's Executive Committee approved the refinancing proposal with some modification, including a requirement that Mr. Antonelli acquire $600,000 in construction financing from another bank.

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[2]/The "wrap around" was a financial restructuring arrangement under which Coolidge Bank would provide Mr. Antonelli with funds to pay off his other outstanding obligations.

[3]/As of January, 1979, neither the County, County Retirement System or County Hospital had accounts with Coolidge. During Mr. Antonelli's first month in office, he received requests from Coolidge shareholders and clients to open County accounts with Coolidge, although he had not opened any such accounts through July, 1979.

[4]/Mr. Antonelli did not recall this visit during his testimony at the adjudicatory hearing. The Commission credits Mr. Klein's testimony on this point.

10. In September, 1979, John Street, the Coolidge Bank attorney who was negotiating the refinancing, wrote a message to Seta Nercessian, a Coolidge mortgage officer, instructing her to make a "low-key" call to Mr. Antonelli and see if Coolidge could help him secure financing. At the time, Mr. Antonelli was being consistently turned down by banks which did not regard offering a $600,000 construction loan, under the circumstances, to be a sound investment. In the message, Mr. Street stated that Mr. Antonelli had deposited substantial sums of County money in the bank but was under no legal obligation to keep them there and that he could in fact shift them to another bank as an inducement to lend him the construction money.

11. On October 9, 1979, Coolidge Bank agreed to a $1.95 million "wrap around" refinancing package which included lending Mr. Antonelli $575,000 in construction loans at an 11½ percent interest rate. The construction loan was to be converted into a permanent loan in 1980 at the market rate of interest at the time the permanent loan was placed. When Mr. Antonelli objected on October 11, 1979 to the "market rate of interest" provision, Coolidge agreed to set the permanent financing at a fixed interest rate of 11½ percent. The loan arrangements were finalized on the next day.

Capitol Bank

12. Prior to his becoming County Treasurer on January 3, 1979, Mr. Antonelli had been involved with the Capitol Bank in two private loan transactions as a borrower and guarantor. His accounting firm, R. J. Antonelli, Inc., also had a relatively inactive checking account which was opened in 1975.

13. Prior to 1979, neither the County Treasurer, the County Hospital nor the County Retirement System had maintained any bank accounts or investments in the Capitol Bank. Capitol was anxious to do business with the County when Mr. Antonelli took office.

14. On January 11, 1979, Mr. Antonelli received on behalf of R. J. Antonelli, Inc. an unsecured $18,000 loan for a one-month period at a rate of 13 percent (two points over prime). The loan had been requested during the previous week. During the same week in which he had requested the $18,000 loan, Mr. Antonelli invested $3.7 million of County funds with the Capitol Bank in a six-day repurchase agreement.[5]/ During the subsequent one-month period, Mr. Antonelli opened a County Treasurer's checking account ($500,000); a checking account for Hospital funds ($300,000) and a Retirement System savings accounts ($300,000) at the Capitol Bank. The $18,000 loan was received and extended and finally paid off in September, 1979.

15. On September 26, 1979, the Capitol Bank loaned Mr. Antonelli $135,000 for R. J. Antonelli, Inc. to free up funds for the Davis Square commercial redevelopment. The initial terms of the loan were for one year at two percent over prime, secured by Mr. Antonelli's accounts receivable and two second mortgages on land in Winchester and Somerville, and a reduction of the principal by $3,000 monthly. In the process of determining whether to grant Mr. Antonelli the loan, Capitol Bank was lax in reviewing the sufficiency of the collateral and the financial statements of Mr. Antonelli's payment performance at Capitol prior to granting the loan.[6]/

16. Following the execution of the loan, Mr. Antonelli complained on or about October 10, 1979 that he was being unfairly penalized by the two point over prime interest rate which he claimed was out of line with rates which other banks were offering him. The Capitol Bank Executive Committee thereupon voted at a later date in October, 1979 to reduce the interest rate from two to one point above prime.[7]/

17. On October 17, 1979, Capitol Bank received $500,000 from Middlesex County to be deposited in a County Treasurer's checking account which Mr. Antonelli had opened in January, 1979.[8]/

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[5]/The repurchase agreement was a short term investment which provided higher income potential than certificates of deposit but which was not insured by the Federal Deposit Insurance Corporation.

[6]/According to the testimony of Capitol Bank officials, Capitol's decision was made on the basis of Antonelli's relationship with them, rather than on the sufficiency of the paperwork requirements. In March, 1980, an FDIC examiner classified this loan as substandard. The principal criticism was the lack of complete, reliable paperwork to substantiate the sufficiency of Mr. Antonelli's finances or his collateral. The examiner also felt that the loan should have clearly indicated the remaining terms at the end of the one-year periodl.

[7]/The record does not reveal the precise date in October, 1979 on which the interest rate reduction decision occurred.

[8]/It is unclear from the record whether Mr. Antonelli or his assistant treasurer Mr. Ferretti decided to deposit these fund. However, Mr. Antonelli's official responsibilities as County Treasurer included decisions regarding the maintenance of accounts, and Mr. Antonelli reviewed County bank status records on a weekly basis.

18. On July 7, 1980, Mr. Antonelli directed Mr. McMahon, the Chief Retirement Officer, to deposit $300,000 into the County Retirement System savings account at Capitol thereby bringing the balance up to $400,000. The account remained idle until December 29, 1980.

19. On July 17, 1980, Mr. Antonelli requested from the Capitol Bank Executive Committee and received a six-month moratorium on the payment of $3,000 monthly principal on the loan.[9]/

20. Although the loan came due in September, 1980, Capitol continued the loan for two months because of the pending sale of the Winchester land which secured the loan. Mr. Antonelli thereafter reduced the outstanding amount by $45,000, and Capitol rewrote the loan for a new one-year period at one percent over prime on November 26, 1980.[10]/

21. On November 10, 1980, Mr. Antonelli directed that $500,000 be deposited into the County Treasurer's checking account at Capitol Bank.

22. In January, 1981, Mr. Antonelli contacted Capitol Bank and applied for an $80,000 loan for computer equipment after another bank which had previously committed itself to the loan had backed out. Thereafter, on January 12, 1981, Capitol loaned Mr. Antonelli $116,000 ($80,000 plus $36,000 interest) for a five-year installment loan secured by the computer equipment. The interest rate initially recommended by Capitol Bank loan officer Peter Lane to the Capitol Bank Executive Committee ws 18 percent. However, the final interest rate approved by the Capitol Bank Executive Committee was 16 percent.

23. On January 13, 1981, the County deposited $300,000 into the County Treasurer's checking account at Capitol where it remained idle through the end of May, 1981. On January 19, 1981, Mr. Antonelli opened a County Retirement System NOW account at Capitol with a $100,000 deposit.

24. In May, 1981, Mr. Antonelli requested and received from Capitol Bank two $7,500 short-term loans to provide working capital for his two nursing homes which were awaiting vendor payments or welfare reimbursements.

25. Mr. Antonelli's private checking account at Capitol was frequently and substantially overdrawn in 1979 and 1980, and Mr. Antonelli received accommodations from Capitol in the form of either covering the overdrafts or in not charging an overdraft penalty.[11]/

U.S. Trust

26. Prior to Mr. Antonelli assuming office in 1979, U.S. trust had not received any deposits or investments from the previous Middlesex County Treasurer.

27. At the time of Mr. Antonelli's assumption of the County Treasurer office in 1979, Mr. Quinn Sullivan was the President of U.S. Trust. Mr. Antonelli had dealt with Mr. Sullivan frequently during the previous fifteen years when Mr. Sullivan was a lending officer for BayBank.

28. On January 17, 1979, Mr. Antonelli received a $25,000 unsecured personal loan from U.S. Trust at one point above prime. The original request for the loan was made during a car ride with Mr. Sullivan during the first week of January, 1979. Shortly after Mr. Antonelli became Treasurer, Mr. Sullivan made a goodwill visit to the Treasurer's office on behalf of U.S. Trust to let Mr. Antonelli know that U.S. Trust was interested in County business and could provide favorable rates to the County. Mr. Antonelli made no commitment to deposit County funds in U.S. Trust but responded that the County would be interested if the rates were competitive. Mr. Sullivan and Mr. Antonelli left the County offices together, and Mr. Antonelli asked Mr. Sullivan to drop him off on the way home. During the car ride to Somerville, they discussed the progress of Mr. Antonelli's Davis Square project. When Mr. Sullivan asked Mr. Antonelli if he had any requirements which U.S. Trust could help him with, Mr. Antonelli responded that he needed a

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[9]/Capitol Bank officials testified at the hearings that their rationale for the moratorium included Mr. Antonelli's stature in the community, his creditworthiness, and an effort to ease Mr. Antonelli's financial difficulty at the time.

[10]/A follow-up FDIC review in 1981 continued the substandard classification of this loan.

[11]/Capitol Bank officials explained during the hearings that Capitol had no fixed customer policy on overdrafts, and accommodated Mr. Antonelli based on efforts to ease his business difficulties. However, following the FDIC substandard classification of the $135,000 loan in March, 1980, Capitol informed Mr. Antonelli that it would no longer cover his overdrafts and would charge him for each overdraft. The bank also arranged for Mr. Antonelli to have a $5,000 overdraft coverage provision through an AMEX Gold Card. Most of the overdrafts in 1980 and 1981 were due to the sequence of check clearing procedures rather than from insufficient deposits. Testimony was offered at the hearings that the sums which would have been assessed for overdraft penalties would have been less than $500.

personal loan of $25,000 to reimburse a family member. Sullivan responded that it would not be much of a problem and that his bank would be willing to lend him the money.

29. Mr. Antonelli opened up three County accounts with U.S. Trust on January 30, 1979. The initial deposits were $10,000 (County Treasurer checking account), $100,000 (Retirement System checking account) and $750,000 (Retirement System savings account).

30. Mr. Antonelli requested and received from U.S. Trust private loans of $15,000 and $35,000 in July and October, 1979.

31. Mr. Antonelli requested and received from U.S. Trust in June and July of 1980 a series of loans for his nursing homes totalling $35,000.

32. On July 7, 1980, Mr. Antonelli directed Mr. McMahon to deposit $300,000 into the County Retirement System account at U.S. Trust, where it remained idle through the end of the year.

33. On August 12, 1980, Mr. Antonelli received a short-term $75,000 loan from U.S. Trust in connection with the mortgage financing of his Davis Square, Sommerville commercial property.

34. Mr. Antonelli arranged for a deposit of $250,000 into the County Hospital maintenance account one week later on August 20, 1980. The funds remained idle through mid-1981.

35. On October 15, 1980, Mr. Antonelli received from U.S. Trust an eight-month $100,000 loan for roof work on his Somerville commercial property. The loan was secured by a second mortgage on the property. On February 12, 1981, at Mr. Antonelli's request, U.S. Trust agreed to lift its secured mortgage position to allow Mr. Antonelli to borrow an additional $25,000 from Somerset Savings Bank, the holder of a $300,000 first mortgage on the property.

Suffolk Franklin Bank

36. In November, 1971, the Suffolk Franklin Savings Bank agreed to lend to a company owned by Mr. Antonelli and which later became UEDC $500,000 for commercial redevelopment in Davis Square, Somerville. Suffolk Franklin had difficulties with Antonelli because of frequent delinquency payments, and it had authorized foreclosure proceedings on two occasions prior to 1979.

37. In August, 1979, Suffolk Franklin instructed its attorney to commence foreclosure proceedings against Mr. Antonelli and notified Mr. Antonelli that it would increase the interest rate to 11½ percent even if all of the back payments were brought up-to-date. Mr. Antonelli thereafter arranged a meeting with a Suffolk Franklin official, Mr. Charles Douglas, on August 30, 1979 to discuss whether the Bank would increase the interest rate on the loan.

38. At that meeting, Mr. Antonelli delivered a check to Mr. Douglas bringing the mortgage loan account up to date. Mr. Douglas informed Mr. Antonelli that Suffolk Franklin would rescind its rate increase if Mr. Antonelli kept his payments up-to-date. At that same meeting, after the Bank had agreed to reduce or revoke its rate increase, Mr. Antonelli advised Mr. Douglas that he was the Treasurer of Middlesex County and suggested that he could deposit County funds or would consider opening a savings account on behalf of the County at Suffolk Franklin Bank. Mr. Douglas felt that Mr. Antonelli was paving the way for leverage with the Bank in the event that the mortgage loan account went into default, again. When Mr. Douglas indicated that he did not think opening an account would be appropriate, Mr. Antonelli responded that he might open an account anyway in five or six months.[12]/

III. Decision

Mr. Antonelli has been charged with violations of G.L. c. 268A, §§3(b), 23(d) and (e). Prior to determining the merits of these allegations, the Commission will address certain constitutional and procedural issues raised by Mr. Antonelli.

A. Constitutional Issues

1. Combination of Accusatory and Adjudicatory Functions

The Respondent alleges in his Answer that the combination of the Commission's accusatory and adjudicatory functions within the same agency violates his due process and fair hearing rights under the federal and Massachusetts constitutions. The Commission rejects this argument as one which is well settled under both federal and Massachusetts law. In two recent decisions, **In the**

[12]/An examination of the County banking records does not reveal the subsequent opening of any County accounts with Suffolk Franklin.

Matter of George A. Michael, Commission Adjudicatory Docket No. 137, Decision and Order, pp. 24-25 (September 28, 1981) and **In the Matter of John P. Saccone and Edmund W. DelPrete,** Commission Adjudicatory Docket No. 132, Decision and Order, pp. 12-13 (June 1, 1982), the Commission reviewed federal and Massachusetts decisions which affirm the constitutional validity of combining accusatory and adjudicatory functions within the same agency. See, e.g., **Withrow v. Larkin,** 421 U.S. 35, 46-54, (1975). The mere authorization by the Commission of an investigation or Order to Show Cause in fulfillment of its obligation under G.L. c. 268B, §4 does not constitute a prejudgment of the merits of a case. See, **School Committee of Stoughton v. Labor Relations Commission,** 4 Mass. App. Ct. 262, 272 (1976); **Saccone and DelPrete,** Decision and Order, pp. 27-29. Moreover, the Respondent has not suggested how the combination of functions violates the federal and state constitution when applied to the facts of his case.

2. Standard of Proof

The Respondent contends that the civil "preponderance of evidence" standard which the Commission applies to its proceedings is improper and constitutionally defective inasmuch as G.L. c. 268A and c. 268B do not prescribe a preponderance standard.

The Commission reiterates that it is a civil enforcement agency which possesses the authority to assess only civil or regulatory sanctions. See, G.L. c. 268B, §4(d). The Attorney General and District Attorneys remain responsible for enforcing the criminal provisions which may result in punitive sanctions, including imprisonment. Commission proceedings have been consistently characterized as civil in nature and are therefore not subject to the constitutional standards applicable to criminal proceedings. See, **Opinion of the Justices, supra,** at 819; **Saccone and DelPrete,** at 13. **In the Matter of James J. Craven, Jr.** Commission Adjudicatory Docket No. 110, Decision and Order pp. 10-12 (June 18, 1980) aff'd sub nom. **Craven v. Vorenberg,** Suffolk Superior Court Civil Action No. 43269, (further appeal pending) the Commission determined that the preponderance of evidence standard, rather than a higher standard of clear and convincing proof or proof beyond a reasonable doubt, was applicable to Commission adjudicatory proceedings. In rejecting the adoption of these higher standards, the Commission reasoned that its potential sanctions were not sufficiently severe to warrant departure from the traditional preponderance standard applicable to civil administrative proceedings. The Commission has applied the preponderance standard to every adjudicatory proceeding under G.L. c. 268A and G.L. c. 268B since **Craven** and believes that these decisions provide sufficient notice of its standard of proof to Respondents such as Mr. Antonelli.[13]/

3. Vaugeness

The Respondent further asserts that G.L. c. 268A is unconstitutionally vague, overbroad and ambiguous. In **Saccone and DelPrete** pp. 16-17, the Commission fully responded to similar contentions and finds no reason to repeat those responses in their entirety here. In summary, the Commission regards the provisions of G.L. c. 268A to be adequately specific to put Respondents on notice as to what behavior is proscribed. See, **United States v. Brewster,** 506 F.2d 62 (D.C. Cir. 1974); **United States v. Irwin,** 354 F.2d 192, 196-197, (2nd Cir., 1965), cert den. 383 U.S. 967 (1966); **Colten v. Kentucky** 407 U.S. 104, 110 (1972).[14]/

4. Other Constitutional Issues

The Respondent alleges in his Answer that the Commission has exceeded its statutory and constitutional authority by adjudicating matters during the pendency of a criminal investigation of these same matters by another agency. In the absence of any evidence in the record verifying the pendency of other investigations, the Commission finds no need to address this contention

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[13]/The Commission regards the statutory scheme of G.L. c. 268B, §4, as applied in this case, to be sufficient to satisfy amply due process requirements. Moreover, the Respondent chose not to pursue his constitutional arguments following the filing of his Answer and has offered no precedent to support his contention.

[14]/The standards of conduct appearing in §23 have been enforced and interpreted by the Commission on hundreds of occasions since 1980. These standards, and in particular the provisions under which Mr. Antonelli has been charged, are sufficiently clear to satisfy constitutional standards, see, **Tenney v. State Commission on Ethics** 395 So.2d 1244 (Fla. 2nd D.C.A., 1981) and are commonly employed to enforce the principles of conflict of interest statutes. See, i.e., Presidential Executive Order 11222, §201(c) (1965); 5 C.F.R. 735.201(a) (1976); N.Y. Public Officers law, §74 (3) (F) (McKinney Supp. 1981); Del Code Ann Tit. 29, §5855(d), (g) (Supp. 1974); Michigan Stat. Ann., §15.275.

in any detail. However, even assuming that the record confirmed such an investigation, the Commission finds no basis for either dismissing or delaying the adjudication of the Petitioner's allegations in the Order to Show Cause. The Commission's statutory scheme clearly anticipates that the Commission may act concurrently with criminal investigations by other agencies. See, G.L. c. 268A, §9, 15(b); G.L. c. 268B, §4(a). Moreover, delaying the Commission's adjudication of alleged violations of G.L. c. 268A would be contrary to the legislative goal of a speedy Commission determination, see, G.L. c. 268B, §4(c), and would effectively bar the Commission from proceeding in cases for which the statute of limitations is a relevant factor. See, **Saccone and DelPrete,** pp. 17-21.

The Respondent also alleges that the adjudication of this case results in an arbitrary and selective enforcement. However, there is no evidence in the record to support his general contention, and the Commission finds no basis for concluding that the Petitioner has abused its broad enforcement discretion. See, **Bordenkircher v. Hayes,** 434 U.S. 357, 365 (1978); **Oyler v. Boles,** 368 U.S. 448, 456 (1962); **Commonwealth v. King,** 374 Mass. 5, 20 (1977); see, generally, 2 K. Davis, Administrative Law Treatise, 2nd ed., §§9.1-9.22 (1979).

B. Procedural Issues

Prior to the commencement of the adjudicatory hearings, the Presiding Officer ruled on a series of procedural motions. For the reasons set forth below, the Commission affirms each ruling.

1. Sufficiency of Evidence

The Respondent contends that the evidence surrounding Capitol Bank's granting of overdraft accommodations to him was not sufficient to warrant inclusion of this allegation in the Order to Show Cause. **In the Matter of John R. Buckley,** Commission Adjudicatory Docket No. 108, Decision and Order, pp. 7-14 (May 7, 1980), the Commission fully articulated the well-established principle that the sufficiency and adequacy of evidence which forms the basis of a Commission Order to Show Cause is not subject to prehearing challenge. See, **Buckley,** at pp. 11-14 and cases cited therein. Any prejudice which may have accrued to the Respondent by defending those allegations is outweighed by the requirement that the Petitioner prove the sufficiency and adequacy of the evidence through the adjudicatory hearing process.[15]/

2. Discovery

The Respondent urges dismissal of these proceedings on the grounds that the Petitioner has failed to provide transcriptions of pre-hearing conversations and interviews of witnesses who were not appearing at those interviews pursuant to a subpoena. However, G.L. c. 268B, §4(c) requires the Commission to record and preserve the testimony of witnesses only where the witnesses have testified pursuant to a subpoena. Inasmuch as there is no requirement that Commission investigators record their conversation or interviews with witnesses who are not under oath or who voluntarily testify, the Commission was under no obligation to provide transcriptions of such conversations or interviews.

3. Signature on Order to Show Cause

The Respondent also urges dismissal of these proceedings on the grounds that the Order to Show Cause was signed by the Associate General Counsel for Enforcement. However, the fact that the Order to Show Cause was issued by the Associate General Counsel for Enforcement rather than the General Counsel does not warrant the dismissal of the proceedings. Both the Commission and General Counsel possess the authority to delegate the power to sign Orders to Show Cause and to initiate adjudicatory proceedings on behalf of the Commission. See **Commission Rules of Practice and Procedure,** 930 CMR 1.01(1)7. This authority was properly delegated to the Associate General Counsel for Enforcement. Moreover, the purpose of the issuance of an Order to Show Cause is to notify a Respondent of the facts and law upon which the adjudicatory proceeding will be conducted. The fact that this purpose has been substantially satisfied in this case outweighs whatever prejudice the Respondent may have incurred by receiving an Order to Show Cause signed by the Associate General Counsel for Enforcement.

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[15]/Even if the sufficiency and adequacy of the evidence forming the basis of the Commission's allegations in the Order to Show Cause could be independently adjudicated in a pre-trial proceeding, the allegations in the Order to Show Cause related to the Capitol overdraft accommodations were within the scope of the Petitioner's preliminary inquiry report which was presented to the Commission.

4. Duration of Full Investigation

The Respondent also seeks dismissal of the Order to Show Cause on the grounds that the Commission based its September 22, 1981 vote for an adjudicatory proceeding on the same evidence upon which its earlier September 2, 1981 vote finding reasonable cause to believe that violations of G.L. c. 268A had occurred and authorizing a full investigation into this matter had been based. In essence he alleges that he has been deprived of the benefits of a full investigation. However, the Commission fails to see how the duration of a full investigation can furnish a basis for dismissing an Order to Show Cause or for otherwise examining the sufficiency or adequacy of evidence presented to the Commission during the investigative stage of these proceedings. See, **Buckley, supra.** The Commission reiterates that the sufficiency and adequacy of evidence is measured through the adjudicatory hearing process.

C. G.L. c. 268A Allegations[16]/

1. Coolidge Bank

The Commission concludes that Mr. Antonelli solicited and accepted something of substantial value from Coolidge Bank in 1979 for or because of his official acts as County Treasurer in violation of G.L. c. 268A, §3(b).[17]/

> Section 3(b) prohibits a county employee
>
> otherwise than as provided by law for the proper discharge of official duty, directly or indirectly [from] . . . solicit-[ing], accept[ing] [or] receiv[ing] anything of substantial value for or because of any official act or act within his official responsibility performed or to be performed by him.

To establish a violation of §3(b) the Petitioner need not demonstrate either a corrupt intent in an employee's conduct or an understood "quid pro quo" between the receipt of the thing of substantial value and the performance of official acts. **Commonwealth v. Famigletti,** 4 Mass. App. 584, 587 (1976); **Commonwealth v. Dutney,** 4 Mass. App. 363, 375 (1976); **Michael, supra,** at p. 29.[18]/ Further, there need be no showing that the performance of any official acts was in fact influenced by the receipt of the thing of substantial value. Under §3(b) the Petitioner must establish a relationship between the solicitation or receipt of the thing of substantial value and the performance of an employee's official acts. **Commonwealth v. Dutney, supra.** "All that is required to bring §3 into play is a nexus between the motivation for the gift and the employee's public duties." **Michael, supra,** at p. 31. The purpose of statutes such as §3(b) is to reach any situation in which the judgment of a government official might be clouded because of the receipt of gifts or other things of substantial value. "Even if corruption is not intended by either the donor or the donee, there is still a tendency in such a situation to provide conscious or unconscious preferential treatment of the donor by the donee, or the inefficient management of public affairs." **United States v. Evans, supra,** at 480. On the basis of these principles, the Commission makes the following findings with respect to the Coolidge Bank allegations.

a) "Something of Substantial Value"

The Commission finds that the terms of the refinancing and other loan requests which Mr. Antonelli made to Coolidge Bank on behalf of UEDC in 1979, whether examined individually or as part of a single ongoing transaction between August and October, 1979, were "something of substantial value" within the meaning of §3(b). When viewed in terms of the dollar value involved, the $1.95 million refinancing package, which included a new $575,000 construction loan, is something of substantial value. Compare, **Commonwealth v. Famigletti, supra** [$50 constitutes something of substantial value]. Further, the refinancing which Mr. Antonelli requested was intended to salvage a commercial development which was at a construction standstill and for which other banks were refusing to lend additional funds. Mr. Antonelli was therefore seeking a refinancing which would allow completion of the

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[16]/As an elected County official, Mr. Antonelli is a "County employee" within the meaning of G.L. c. 268A, §1(d).

[17]/These same facts also constitute a violation of §23(e) which prohibits a County employee from, "by his conduct giv[ing] reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties or that he is unduly affected by the kinship, rank, position or influence of any party or person." See discussion of §23, infra.

[18]/See, also United States v. Niedberger, 580 F.2d 63, 69 (3rd Cir. 1978), cert. den. 439 U.S. 980 (1978), United States v. Evans, 572 F.2d 455, 480 (5th Cir., 1978); United States v. Irwin, 354 F.2d 192, 196 (2nd Cir. 1965), which reach the same conclusins under comparable federal provisions. See, 18 U.S.C. §201(g).

construction and which would necessarily result in substantial benefit to him.[19]/

b) 'Official Acts Performed or to be Performed"

Mr. Antonelli decided to open the County and County Retirement accounts with the Coolidge Bank and to deposit initially funds totalling $1.1 million in these accounts on August 9, 1979. These decisions were official acts which Mr. Antonelli performed as County Treasurer.

c) "For or Because of"

The facts amply support the allegation of a relationship or nexus between Mr. Antonelli's solicitation and receipt of the refinancing package from Coolidge Bank and his official acts in opening County Treasurer and County Retirement System accounts with Coolidge Bank in August, 1979:

1. The opening of the County Treasurer and County Retirement System accounts and the deposit of funds occurred during an important stage of UEDC negotiations with Coolidge Bank in which major details of the terms of the refinancing package had not yet been worked out.

2. Mr. Antonelli chose that particular period to open accounts and to deposit funds into a bank which had done little, if any, previous business with the County.

3. The initial deposits made with Coolidge on August 9, 1979 exceeded $1 million.

4. The facts surrounding Mr. Antonelli's interaction with Messrs. McMahon and Ferretti prior to opening the accounts, and Mr. Antonelli's actions in personally appearing after banking hours to open the accounts and to deposit the funds suggest an urgency to make the deposits while UEDC negotiations were ongoing.

5. In the week prior to the opening of the accounts, Mr. Antonelli had discussed with Mr. Klein the possibility of opening County accounts with the Coolidge Bank. This discussion occurred during a meeting whose subject was Mr. Antonelli's UEDC refinancing request. Mr. Antonelli personally delivered the County checks to Mr. Klein the following week.

The "for or because of" determination is a question which must be resolved in light of the facts of each case. Compare, **Michael, supra,** at p. 29; **Saccone and DelPrete, supra,** at p. 10. The Commission has carefully considered Mr. Antonelli's explanations for opening County accounts and for depositing large sums in Coolidge during this period but finds these explanations unpersuasive. In particular, Mr. Antonelli's testimony that he wished to deposit funds in banks with several branches located within Middlesex County does not rebut the strong inferences supporting a relationship.

d) "Otherwise than as Provided by Law for the Proper Discharge of Official Duty"

The Commission finds that the solicitation and acceptance by Mr. Antonelli of the UEDC refinancing requests and loan from Coolidge Bank was not provided by law for the proper discharge of his official duties.[20]/

Capitol Bank

The Commission concludes that Mr. Antonelli violated §23(e) in his dealings with the

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[19]/See, Final Report of the Special Commission on Code of Ethics, 1962 House Doc. No. 3650 at 11 upon which the provisions of §3 were based. ("Significant in these subsections is the provision that the thing given must be of 'substantial value.' The Commission concluded that this was a standard to be dealt with by judicial interpretation in relation to the facts of the particular case and that it was more desirable than the imposition of a fixed valuation formula.") In his Answer, Mr. Antonelli admitted that the refinancing was something of substantial value to Coolidge Bank.

[20]/The Commission does not agree with the Respondent's contention that his activities prior to the passage of St. 1981, c. 293 were implicitly lawful under G.L. c. 268A. In 1981, the Legislature amended G.L. c. 35, §10 to prohibit county officials from accepting loans or other things of value from an institution or business where they have invested or committed county funds as part of their official duties. See, St. 1981, c. 293. Nothing in the language or legislative history of the amendment suggests that the Legislature intended to confer immunity on county officials for prior violations of other statutes such as G.L. c. 268A. Moreover, the Commission's findings of violations of G.L. c. 268A in this matter do not rest merely on Mr. Antonelli's dual status as a County Treasurer and businessman.

Capitol Bank during the period of January, 1979 through May, 1981.[21]/

Under §23(e) a county employee may not "by his conduct give reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is unduly affected by the kinship, rank, position or influence of any party or person." A major purpose of §23(e) is to prohibit an employee from engaging in conduct which will raise questions over the credibility and impartiality of his work as a public employee. The Commission has consistently applied the §23(e) prohibitions whenever a public employee has had private financial dealings with the same parties with whom he deals as a public employee. See, e.g. **In the Matter of William L. Bagni, Sr.,** Commission Adjudicatory Docket No. 124, Decision and Order (January 29, 1981) [state inspector violates §23(e) by repeatedly soliciting private work from businesses over whom he has official responsibility]; **In the Matter of Louis L. Logan,** Commission Adjudicatory Docket No. 131, Decision and Order (April 28, 1981) [state employee violates §23(e) by advancing his personal funds to a company while the company is applying for a large loan which the employee will review in his state position]; EC-COI-81-134 [state official violates §23(e) by taking a foreign charter trip which is paid for by private individuals whom the official regulates in his official capacity.]

In reviewing Mr. Antonelli's public and private dealings with Capitol Bank during the period of January, 1979 through May, 1981, the Commission finds a troublesome pattern of decisions either made by Mr. Antonelli or within his official responsibilities as County Treasurer to open County accounts or to deposit and retain large amounts of County funds in Capitol Bank during the same period in which he was either seeking or receiving private loans from Capitol Bank. For example, Mr. Antonelli requested an $18,000 loan from Capitol Bank during the same week in which he invested $3.7 million in county funds at Capitol Bank; within one month, he had opened three County accounts at Capitol Bank. On October 17, 1979, three weeks after Mr. Antonelli received a $135,000 loan from Capitol Bank, $500,000 was deposited into the County Treasurer's checking account at Capitol Bank. Further, Mr. Antonelli received a $116,000 loan from the Capitol Bank on January 12, 1981. On the following day $300,000 was deposited into the County Treasurer's checking account at Capitol Bank where it remained idle through the end of May, 1981. The Commission finds that the time pattern of Mr. Antonelli's public and private dealings with Capitol Bank during the period of January, 1979 through May, 1981 gives a reasonable basis for the impression that Capitol Bank could improperly influence him or unduly enjoy his favor in the performance of his official duties as County Treasurer, in violation of §23(e). While the facts also reveal other violations of §23(e) as well, the Commission believes that the three aforementioned fact patterns exemplify the kind of conduct which §23(e) was designed to prohibit and therefore finds that the consideration of additional violations would be unnecessarily cumulative.[22]/

The Commission has carefully considered the merits of the Petitioner's allegation of a §3(b) violation with respect to Mr. Antonelli's public and private dealings with Capitol Bank. While the facts present a clear pattern of §23(e) violations, the Commission is not persuaded that the inferences from the coincidence of Mr. Antonelli's

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[21]/Contrary to the Respondent's pre-hearing assertion, the Commission possesses the authority under G.L. c. 268B, §4 to investigate, adjudicate and impose penalties for any violation of G.L. c. 268A, including the six standards of conduct contained in G.L. c. 268A, §23. The reference in G.L. c. 268B, §3(i) to the Commission's status "as the primary civil enforcement agency for violations of c. 268A, as specified in §§9 and 15 of that chapter . . ." is not inconsistent with G.L. c. 268B, §4. G.L. c. 268A, §§9 and 15 authorize the Commission to initiate an additional action for the recovery of damages on behalf of the Commonwealth or county where a party's violation of c. 268A has resulted in an economic advantage. The Commission's authority to initiate such civil enforcement actions can only be reasonably read as a supplement to, rather than a limitation on, the Commission's broad authority under G.L. c. 268B, §4. See, **Graham v. McGrail,** 370 Mass. 133, 140 (1976) [G.L. c. 268A must be given a workable meaning.]

The Commission's policy of adjudicating violations of G.L. c. 268A, §23 has received judicial approval. See, **Craven v. Vorenberg, supra.** While it is true, as the Respondent suggests, that the Commission could have chosen to exercise its authority over §23 in a different manner, for example, by merely reporting previously investigated violations of §23 to an employee's appointing official rather than by initiating adjudicatory proceedings, the policy which the Commission has adopted is a permissible exercise of its discretion under G.L. c. 268B, §4. Moreover, the adoption of the Respondent's alternate suggestion would render §23 ineffective in cases involving elected officials such as Mr. Antonelli who do not have an appointing official who can exercise disciplinary authority over them.

[22]/For the same reasons, the Commission does not reach the issue of whether the same facts which form the basis of the §23(e) violations would also violate §23(d).

public and private dealings with Capitol Bank, without more, establish facts sufficient for a violation of §3(b). Compare, **Michael, supra,** at p. 34; **Saccone and DelPrete, supra,** at pp. 10-11; discussion of Coolidge Bank violations, **supra,** at pp. 29-30.

U.S. Trust

The Commission similarly concludes that Mr. Antonelli violated §23(e) in his dealings with U.S. Trust during the period of January, 1979 to May, 1981.

A review of Mr. Antontelli's public and private dealings with U.S. Trust during this period again reveals, as with Capitol Bank, a troublesome pattern of decisions by Mr. Antonelli to open County accounts or to deposit and retain large amounts of County funds in U.S. Trust during the same period in which he was seeking or receiving private loans from U.S. Trust. In particular, the Commission finds that Mr. Antonelli's solicitation or receipt of three specific loan transactions during the same period in which he opened County accounts and deposited County funds exemplify conduct which violates §23(e).

Within two weeks after Mr. Antonelli had received an initial $25,000 personal loan from U.S. Trust, he opened three County accounts, including a Retirement System savings account of $750,00. Additionally, a series of U.S. Trust loans to Mr. Antonelli's nursing homes in June and July, 1980 totalling $35,000 occurred during the same period in which Mr. Antonelli directed a $300,000 deposit into a County Retirement System account at U.S. Trust where it remained idle through the end of the year. Further, within one week after Mr. Antonelli received a $75,000 loan in August, 1980, he arranged for a deposit of $250,000 in the U.S. Trust County Hospital account where it remained idle through the middle of 1981.

For the reasons expressed in the discussion of Capitol Bank, the Commission finds that the time pattern of Mr. Antonelli's public and private dealings with U.S. Trust during the period of January, 1979 to May, 1981 gives a reasonable basis for the impression that U.S. Trust could improperly influence him or unduly enjoy his favor in the performance of his official duties as County Treasurer in violation of §23(e).[23]/

Suffolk Franklin Bank

The Commission concludes that Mr. Antonelli violated §23(e) on August 30, 1979 by offering to either open a County account or deposit County funds in the Suffolk Franklin Bank. The facts warrant no extended discussion. Mr. Antonelli's offer occurred at a meeting with a Suffolk Franklin Bank official who had agreed during the meeting to rescind an interest rate increase on a $500,000 UEDC private loan account which was delinquent. The Commission finds that the timing of Mr. Antonelli's offer created a reasonable basis for the impression that Suffolk Franklin would unduly enjoy Mr. Antonelli's favor in the performance of his official duties in violation of §23(e).[24]/

IV. Order

On the basis of the foregoing, the Commission concludes that Mr. Rocco J. Antonelli, Sr. violated G.L. c. 268A, §§3(b) and 23(e). Pursuant to its authority under G.L. c. 268B, §4(d) the Commission hereby orders Mr. Antonelli to pay the civil penalties set forth below. In arriving at these penalties, the Commission has carefully considered the differences in the gravity of the offenses. Accordingly, the Commission orders Mr. Antonelli to:

1. Pay **$1,000** (one thousand dollars) to the Commission as a civil penalty for soliciting and accepting something of substantial value from the Coolidge Bank in violation of G.L. c. 268A, §3(b).[25]/

2. Pay $750 (seven hundred and fifty dollars) to the Commission as a civil penalty for each of the three violations of G.L. c. 268A,

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[23]/The three cited fact patterns are merely examples of violation of §23(e) and are not a complete recitation of all such violations within the record. For the reasons stated previously, the Commission finds no need to either accumulate additional violations of §23(e) in this case or adjudicate further violations of §23(d) based upon those same facts.

The Commission also notes that it is not persuaded that the inferences from the coincidence of Mr. Antonelli's public and private dealings with U.S. Trust establish facts sufficient for a violation of §3(b).

[24]/The Petitioner did not pursue the allegation of a §3(b) violation from these facts in its post-hearing brief. See, Brief of Petitioner at p. 43. The Commission does not find a sufficient "relationship" to warrant a §3(b) violation. The Commission also finds that the consideration of additional violations under §23(d) would be unnecessarily cumulative.

[25]/The Commission finds no need to impose a separate penalty for Mr. Antonelli's violation of §23(e) for Coolidge Bank since the same facts form the basis of both violations.

§23(e) relating to the Capitol Bank, for a total of $2,250 (two thousand two hundred and fifty dollars).

3. Pay $500 (five hundred dollars) to the Commission as a civil penalty for each of the three violations of G.L. c. 268A, §23(e) relating to the U.S. Trust, for a total of $1,500 (fifteen hundred dollars).

4. Pay $500 (five hundred dollars) to the Commission as a civil penalty for his violation of G.L. c. 268A, §23(e) relating to the Suffolk Franklin Savings Bank.

The Commission orders Mr. Antonelli to pay these penalties totalling $5,250 (five thousand two hundred and fifty dollars) to the Commission within thirty days of the receipt of this Decision and Order.[26]/

DATE: June 29, 1982

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 167

IN THE MATTER
OF
WILLIAM J. HULBIG

DISPOSITION AGREEMENT

This disposition agreement ("agreement") is entered into between the State Ethics Commission ("Commission") and William J. Hulbig ("Mr. Hulbig") pursuant to Section 11 of the Commission's **Procedures Covering the Initiation and Conduct of Preliminary Inquiries and Investigations.** The parties agree that this agreement constitutes a consented to final order of the Commission enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(d).

On June 1, 1982, 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, involving Mr. Hulbig, Building Commissioner of the Town of Westwood. The Commission has concluded that preliminary inquiry and, on July 19, 1982, found reasonable cause to believe that Mr. Hulbig has violated G.L. c. 268A, §19. The parties now agree to the following findings of fact and conclusions of law:

1. At all times material herein, Mr. Hulbig was Building Commissioner of Westwood, and as such was a municipal employee as defined in G.L. c. 268A, §1(g).

2. As Building Commissioner, Mr. Hulbig was responsible for issuing building permits upon submission of plans which complied with state and local codes and laws, and for conducting inspections of work done pursuant to those permits.

3. General Laws, Chapter 268A, §19 provides in pertinent part that a municipal employee shall not participate in a particular matter in which to his knowledge a member of his immediate family has a financial interest unless he first advises his appointing authority of the nature and circumstances of the particular matter and the financial interest in it and receives a written determination made by that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services the municipality may expect from the employee.

4. Mr. Hulbig violated §19 by participating in the following particular matters in which his son, Phillip E. Hulbig, as president, treasurer and principal employee of Chris Construction Company, had a financial interest:

a. On three occasions, Mr. Hulbig issued building permits upon application by Phillip E. Hulbig or Chris Construction Company. These were Westwood Building permits #5481, #5617 and #5618.

b. On seven occasions, Mr. Hulbig acted as Building Commissioner in inspecting work performed by Phillip E. Hulbig pursuant to building permits issued by Mr. Hulbig. These inspections were related to Westwood building permits #4953, #5027, #5032, #5481, #5597, #5617 and #5618.

5. The Commission has found no evidence of corrupt intent on behalf of Mr. Hulbig nor any preferential treatment of his son in the issuance of permits or the inspection of work performed.

WHEREFORE, The Commission has determined that the public interest would be served by the

[26]/Commissioner McLaughlin dissents from the Commission's conclusion of a §3(b) violation but concurs in the conclusion of a §23(e) violation with respect to the allegations involving Coolidge Bank as well as the other banks.

disposition of this matter without further enforcement proceeding on the basis of the following representations agreed to by Mr. Hulbig:

1. That, in light of the ten individual instances of conduct enumerated above, he pay the Commission the sum of $1,000 forthwith as a civil penalty for violating G.L. c. 268A, §19; 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 related administrative or judicial proceedings.

DATE: August 23, 1982

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 170

IN THE MATTER
OF
MICHAEL MARTIN

DISPOSITION AGREEMENT

This disposition agreement (agreement) is entered into between the State Ethics Commission (Commission) and Michael Martin (Mr. Martin) pursuant to Section 11 of the Commission's **Procedures Covering the Initiation and Conduct of Preliminary Inquiries and Investigations.** The parties agree that this agreement constitutes a consented to final Commission order enforceable in the Superior Court pursuant to G.L. c. 268B, §4(d).

On February 2, 1982, 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, involving Mr. Martin, formerly a selectman of the Town of Swampscott (town). The Commission has concluded that preliminary inquiry and, on September 7, 1982, found reasonable cause to believe that Mr. Martin has violated G.L. c. 268A, §17(c). The parties now agree to the following findings of fact and conclusions of law:

1. Mr. Martin served as a selectman in the town from April of 1975 to April 26, 1981. He therefore was a "municipal employee" as defined in G.L. c. 268A, §1(g).

2. At all times material hereto, Mr. Martin was also an attorney.

3. On July 25, 1980 the town obtained a final decree in a tax lien case regarding property owned by Anthony V. Grieco at 17 King Street, Swampscott (property).

4. On April 1, 1981, Mr. Grieco submitted a letter to the town Board of Selectmen (board) requesting that he be allowed to redeem his property by settling his tax debt with the town. That request was taken up by the board at its meeting on April 16, 1981.

5. In the weeks before the April 16th meeting of the board, Mr. Martin took the following actions in relation to the property:

(a) Mr. Martin met with Mr. Grieco and Deems Hatch at Grieco's house on two or three separate occasions to discuss Mr. Grieco's tax troubles and the possible purchase of the property by Mr. Hatch;

(b) in late February or early March, Mr. Martin telephoned the town tax title attorney, James Coppola, to ascertain the status of the property and to inquire about the laws relating to town tax takings and foreclosures, and during this conversation Coppola informed Martin that the town could rescind the foreclosure;

(c) on March 12, 1981, Mr. Martin, stating that he was calling on behalf of Mr. Hatch, contacted a real estate appraiser and asked him to contact Mr. Hatch to arrange for an appraisal of the property; and

(d) on or about April 16, 1981, Mr. Martin called another attorney and asked him to prepare a purchase and sale agreement.

6. At the April 16th meeting of the board, Mr. Martin, in his capacity as a member of the board, noted that Mr. Grieco had had financial difficulties not of his own making and stated that he felt it was in the town's best interest to assist the man. Mr. Martin then moved that the board allow Mr. Grieco three weeks to pay his back taxes. That motion carried. There was no evidence of any misrepresentation made by any party before this vote.

7. Subsequent to the April 16 meeting of the board:

(a) Mr. Martin instructed the attorney as to the terms of the agreement; and

(b) Mr. Martin suggested to Mr. Grieco and to Mr. Hatch the use of a mortgage instrument to protect Mr. Hatch's

interest in the over $9,000 which he would have to advance to Mr. Grieco in order for Mr. Grieco to clear the tax debt.

8. Mr. Martin was present when Mr. Hatch and Mr. Grieco signed a purchase and sale agreement at Mr. Grieco's house on April 18, 1981.

9. On April 21, 1981, Mr. Grieco delivered a check to the town in the amount of $9,379.31 to clear the tax debt on the property.

10. Sometime in June or July of 1981, Mr. Martin telephoned a title examiner and asked him to do a title examination for the property.

11. Mr. Grieco and Mr. Hatch passed papers with respect to the property on August 14, 1981. Mr. Martin was present at that closing. He inspected the checks Mr. Hatch gave to Mr. Grieco and notarized Mr. Grieco's signature on the deed.

12. On August 17, 1981, Mr. Martin recorded the deed to the property.

13. General Laws Chapter 268A, §17(c) prohibits a municipal employee, otherwise than in the proper discharge of his official duties, from acting as agent for a private party in connection with any particular matter in which his town has a direct and substantial interest. By his actions set out in paragraph 5 above, Mr. Martin violated §17(c) because:

a. the sale of the property was a "particular matter" (as that term is defined in G.L. c. 268A, §1(k)) in which the town had a direct and substantial interest by virtue of the tax debt owed;

b. he was acting on behalf of at least Mr. Hatch, if not on behalf of both Mr. Hatch and Mr. Grieco; and

c. because of this degree of participation in advising both Mr. Hatch and Mr. Grieco in this matter, Mr. Martin's conduct cannot be characterized as in the proper discharge of his official duties.

WHEREFORE, 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 representations agreed to by Mr. Martin:

1. that he pay the Commission the sum of $1,000 forthwith as a civil penalty for his violation of G.L. c. 268A, §17; and

2. that he waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this agreement or in this or any related administrative or judicial proceedings to which the Commission is a party.

DATE: September 7, 1982

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 168

IN THE MATTER
OF
DANIEL SHARRIO

DISPOSITION AGREEMENT

This disposition agreement (agreement) is entered into between the State Ethics Commission ("Commission") and Daniel Sharrio (Mr. Sharrio) pursuant to Section 11 of the Commission's **Procedures Covering the Initiation and Conduct of Preliminary Inquiries and Investigations.** The parties agree that this agreement constitutes a consented to final order of the Commission enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(d).

On March 16, 1982, 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, involving Mr. Sharrio, Deputy Director of the Worcester Housing Authority ("WHA"). The Commission has concluded that preliminary inquiry and, on June 16, 1982, found reasonable cause to believe that Mr. Sharrio has violated G.L. c. 268A, §23(d). The parties now agree to the following findings of fact and conclusions of law:

1. At all times material herein, Mr. Sharrio was Deputy Director of the WHA, and as such was a municipal employee as defined in G.L. c. 268A, §1(g).

2. General Laws Chapter 268A, §23(d) provides in pertinent part that no municipal employee shall use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.

3. Mr. Sharrio violated Section 23(d) by using his official position as Deputy Director of the WHA to secure the following unwarranted privileges:

a. On three occasions during 1980, he secured discounts in the amount of $20, $44, and $60, respectively, on personal purchases from private businesses which did business with the WHA;

b. On one occasion in 1980, by using the WHA tax exempt organization number, he failed to pay a state sales tax and a federal excise tax totalling approximately $20 on a personal purchase;

c. On one occasion in 1980, by using a WHA purchase order to make a personal

purchase from a department store, he was able to make the purchase on credit, a method of purchase not available to the general public, and, at the same time, he again avoided state sales tax, amounting to approximately $5.00; and

d. On one occasion in 1980, he withdrew items from the WHA storeroom for his personal use valued at approximately $60. One item, valued at approximately $50, was later returned, but only after the Commission notified Mr. Sharrio that it was reviewing his conduct.

WHEREFORE, 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 representations agreed to by Mr. Sharrio:

1. That in light of the five individual instances of misconduct enumerated above, but more particularly, because of the pattern of misconduct thouse instances represent, he pay the Commission the sum of $500 forthwith as a civil penalty for violating G.L. c. 268A, §23(d); 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 related administrative or judicial proceedings.

DATE: September 14, 1982

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 155

IN THE MATTER
OF
HENRY M. DOHERTY

Appearances:

David J. Burns, Esq.: Counsel for the Petitioner, State Ethics Commission
William A. McDermott, Jr., Esq.: Counsel for the Respondent, Henry M. Doherty

Commissioners:

Vorenberg, Ch., McLaughlin, Brickman, Mulligan

DECISION AND ORDER

I. Procedural History

The Petitioner filed an Order to Show Cause on May 27, 1982 alleging that the Respondent, Henry M. Doherty, had violated §7 of M.G.L. c. 268A, the conflict of interest law. The Respondent filed an Answer which denied any violation of the law and which, in addition, raised defenses based on the asserted unconstitutionality of the Commission's enforcement action and on other legal grounds.

The Petitioner filed a Motion for Summary Decision and submitted a brief in support thereof on August 25, 1982. Pursuant to notice, a hearing on the motion was conducted on August 25, 1982 before Commissioner David Brickman, a duly designated presiding officer. See, M.G.L. c. 268B, §4(c). The parties thereafter filed post-hearing briefs and presented oral argument before the full Commission on October 19, 1982. In rendering this Decision and Order, the four participating members of the Commission have considered the evidence and arguments presented by the parties.

II. Findings of Fact

1. Mr. Doherty is the Assistant Director of Recreation at the Metropolitan District Commission (MDC).

2. Mr. Doherty's working hours at the MDC are from 8:45 a.m. to 5 p.m., Monday through Friday, and he earns $21,010 per year from the MDC.

3. Mr. Doherty is also employed by the Massachusetts Bay Transportation Authority (MBTA) as a Car Cleaner. He began working for the MBTA in May, 1960.

4. Mr. Doherty's working hours at the MBTA are from 12 a.m. to 7 a.m., Sunday through Thursday, and he earns $22,308 per year from the MBTA.

III. Decision

For the reasons stated below, the Commission concludes that Mr. Doherty is in violation of M.G.L. c. 268A, *87* by having a financial interest in a contract made by a state agency.

A. The MBTA as a state agency

Section 7 prohibits a state employee from having a financial interest ". . . directly or indirectly, in a contract made by a state agency in

which the commonwealth or a state agency is an interested party, . . ." Mr. Doherty admits that he is a state employee under M.G.L. c. 268A, §1(q) by virtue of his position with the MDC but denies that the MBTA is a state agency under M.G.L. c. 268A, §1(p).

For the purposes of M.G.L. c. 268A, "state agency" is defined as

> any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department, and *any independent state authority,* district, commission, instrumentality or agency, but not an agency of a county, city or town. M.G.L. c. 268A, §1(p). (emphasis added)

The MBTA's enabling legislation, M.G.L. c. 161A, §2, defines it as a body politic and corporate and a political subdivision of the Commonwealth which has the power to hold property, to sue and be sued and to prosecute and defend actions relating to its property and affairs. The language of M.G.L. c. 161A, §2, clearly establishes the MBTA as an "independent state authority" and, as such, it is within the aforementioned definition of state agency. This conclusion is consistent with previous Commission and Attorney General Advisory Opinions. The Commission has included transit authorities comparable to the MBTA in structure as state agencies. Commission Advisory Opinions EC-COI-81-119 and 79-91 define regional transit authorities (RTA) as state agencies. The statute creating RTAs, M.G.L. c. 161B, §2, uses language identical to that found in the enabling legislation of the MBTA. Moreover, Attorney General Conflict Opinions Nos. 795 and 823 specifically conclude that the MBTA is a state agency for the purposes of M.G.L. c. 268A, §1(p).

B. Mr. Doherty's financial interest in the MBTA contract

Mr. Doherty contends that his financial interest in the MBTA contract does not violate M.G.L. C. 268A, §7, and he raises four arguments in support of his position.

1. Mr. Doherty initially maintains that M.G.L. c. 268A, §7 was not intended to cover contracts entered into prior to the enactment of M.G.L. c. 268A in 1962. However, the Commission finds no support for this contention in either the plain language of §7 or in the outside sections which accompanied the enactment of M.G.L. c. 268A. See, St. 1962 c. 779, §§1 et seq. Absent a specific grandfather or saving clause reflecting a legislative intention to exempt pre-existing contracts from the prohibitions of §7, the Commission cannot infer an intent to have §7 operate prospectively. To the contrary, §7 established a procedure for employees to divest a prohibited financial interest within thirty (30) days after they learn of the actual or prospective violation. M.G.L. c. 268A, §7(a).[1]/ Accordingly, when M.G.L. c. 268A was enacted, Mr. Doherty had the opportunity under the statute to resign from one of his state positions and divest his financial interest.

2. Mr. Doherty also argues that an employment contract is distinguishable from other contracts for "goods" or "services" which are prohibited under §7. This argument is also without merit for several reasons. First, a contract for personal services is viewed as a contract of employment within the §7 prohibitions. Buss, **The Massachusetts Conflict of Interest Statute: An Analysis,** 45 B.U.L. Rev. 299, 368, 372 (1965). Second, the Commission considered and rejected this distinction in 1980. Pursuant to this determination the Commission has consistently found that contracts for personal services fall within the purview of §7. EC-COI-80-118, 80-97 and 80-88. Third, since the policy behind §7 is to prevent state employees from using their positions to influence the awarding of state contracts in a way beneficial to themselves, Mr. Doherty's interpretation is too limited and defeats the legislative intent of this section.

3. Mr. Doherty also contends that he is not in violation of §7 since his salary under the second contract is not derived from the treasury of the Commonwealth. To support this contention Mr. Doherty cites M.G.L. c. 30, §21 which prohibits a person from receiving more than one salary from the treasury of the Commonwealth. He

[1]/This provision states that "(Section 7) shall not apply (a) to a state employee who in good faith and within thirty days after he learns of an actual or prospective violation of this section makes full disclosure of his financial interest to the contracting agency and terminates or dispotes of the interest,. . ."

maintains that because his MBTA salary does not constitute a "salary from the treasury of the Commonwealth," his compliance with M.G.L. c. 30, §21 satisfies the requirements of M.G.L. c. 268A, §7.

The Commission finds, however, that the scope of the §7 prohibition is significantly broader than the restrictions of c. 30, §21 and prohibits state employees from having a financial interest in a state contract irrespective of whether the contract funds pass through the treasury of the Commonwealth. Moreover, in a recent Advisory Opinion, the Commission concluded that a state employee's violation of §7 required his divestiture of a prohibited financial interest in a state contract notwithstanding his compliance with M.G.L. c. 30, §21. See, EC-COI-82-102.

4. Mr. Doherty further contends that the Order to Show Cause does not allege facts which form a violation of §7. Specifically, he contends that the Commission's proceeding is premised on the time which he accepted the MBTA position in 1960, prior to the enactment of M.G.L. c. 268A in 1962. However, it is clear from both the Petitioner's argument and ¶8 of the Order to Show Cause that the focus of this proceeding is on Mr. Doherty's present financial interest in the MBTA contract and not on his conduct in 1960.[2]/ The Commission finds that the Order to Show Cause sufficiently notified the parties that Mr. Doherty's present financial interest was at issue in the adjudicatory proceedings. Mr. Doherty does not contend that he lacked a reasonable opportunity to prepare and present argument on this issue, and the Commission notes that the issue was fully briefed and argued by the parties. See, M.G.L. c. 30A, §11. Compare, **Aristocratic Restaurant of Massachusetts, Inc. v. Alcoholic Beverages Control Commisison (No. 1),** 374 Mass. 547, 551 (1978); **Golden Grain Macaroni Company v. F.T.C.,** 472 F.2d 882, 886 (9th Cir., 1972).

C. Affirmative Defenses

1. Ex Post Facto

Mr. Doherty alleges that the enforcement of M.G.L. c. 268A, §7 in this instance operates as an **ex post facto** law as applied to him. To support his position, he argues that the Commission is seeking to punish him under a penal statute for past activity which was legal before the enactment of M.G.L. c. 268A. The Commission finds this argument without merit. The United States Supreme Court has held that a law is not characterized as **ex post facto** where it seeks to regulate current conduct rather than to punish an individual for past activity. **De Veau v. Braisted,** 363 U.S. 144, 160 (1960). In the instant case, the Commission is not addressing Mr. Doherty's conduct prior to 1962, but, as stated above, is addressing his ongoing activity. Furthermore, Mr. Doherty's argument characterizing M.G.L. c. 268A as a penal statute for the purposes of the Commission's proceedings has been rejected by the Supreme Judicial Court in **Opinion of the Justices,** 375 Mass. 795, 819 (1978). The Commission has also rejected the applicability of the **ex post facto** prohibition to its proceedings by noting that it is not applicable to administrative proceedings, such as the Commission's, which involve the imposition of civil sanctions. **In the Matter of George A. Michael,** Adjudicatory Docket No. 137, Decision and Order pages 27-28 (September 28, 1981).

2. Laches

Mr. Doherty also argues that the Commission is barred from pursuing this matter on the basis of laches. He maintains that he has relied to his detriment on the Commonwealth's failure to notify him that he was in violation of the law for the past nineteen (19) years.

The defense of laches is not available to defendants where the proceeding is brought by an authorized public agency to enforce the laws of the Commonwealth. **Board of Health of Holbrook v. Nelson,** 351 Mass. 17 (1966). Mr. Doherty attempts to distinguish **Holbrook** on the grounds that the Commission proceeding represents an attempt by the Commonwealth to "entrap" him. He further argues that the Commonwealth owes a higher standard of duty to its employees in this instance. However, Mr. Doherty offers no proof of his allegation of entrapment and fails to cite any authority for his position on the duty owed by the Commonwealth. Moreover, even if laches were available as a defense, it was

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[2]/The second sentence of ¶8 of the Order to Show Cause contains the Petitioner's allegation that, "[Mr. Doherty] has a financial interest [in the MBTA contract] in violation of §7 of G.L. c. 268A." The preceding sentence within ¶8 identifies the MBTA contract which Mr. Doherty accepted in 1960. The acceptance of the contract in 1960, however, is not an element of the §7 violation.

incumbent upon Mr. Doherty to prove that the Commission knew of the violation and thereafter waited several years before enforcing the law against him. Mr. Doherty failed to meet his burden of proof on this issue. Compare, **Gates v. Department of Motor Vehicles,** 94 Cal. App. 3d. 921 (1979).

3. Statute of Limitations

Finally, Mr. Doherty argues that the Commission is barred from enforcing the law by the statute of limitations. He supports his argument by maintaining that the Commission is seeking to enforce against activity dating back to 1960. As stated earlier, this enforcement proceeding is premised on ongoing activity. Therefore, the Commission finds that the statute of limitations is not a relevant factor in this proceeding.

IV. Order

On the basis of the foregoing, the Commission concludes that Henry M. Doherty is in violation of M.G.L. c. 268A, §7. Pursuant to the Commission's authority under M.G.L. c. 268B, §4(d), the Commission orders that Mr. Doherty cease and desist from such violation and pay the civil penalty as set forth below. In arriving at these sanctions for a violation of M.G.L. c. 268A, the Commission has carefully considered certain mitigating factors raised by Mr. Doherty, specifically, the fact that he entered into his employment arrangement with the MBTA prior to the enactment of M.G.L. c. 268A and the inaction of other law enforcement agencies subsequent to the law's enactment. While these factors do not excuse Mr. Doherty's violation of M.G.L. c. 268A, they do furnish a basis for the Commission's decision to impose a less-than-maximum penalty in this case.[3]/ Accordingly, the Commission orders Henry M. Doherty to:

1. Cease and desist from violating M.G.L. c. 268A, §7 by terminating one of his employment arrangements with the state.
2. Pay $100 (one hundred dollars) to the Commission as a civil penalty for having a financial interest in a contract made by the MBTA in violation of M.G.L. c. 268A, §7.

The Commission directs Mr. Doherty to comply with these orders within fourteen days of receipt of this Decision and Order.

DATE: November 18, 1982

[3]/Through this Adjudicatory Decision, the Commission intends to put state officials and employees on notice that §7, in general, prohibits employees from holding two state jobs and that violations of §7 will be prosecuted and enforced through cease and desist orders as well as civil fines. Because this is the first Commission Adjudicatory Decision involving a violation of M.G.L. c. 268A, §7, the Commission concludes that a minimum fine together with a cease and desist order is an appropriate sanction. However, subsequent cases based upon comparable violations of §7 will be subject to a more substantial civil fine.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 156

IN THE MATTER
OF
DAVID I. FLEMING, JR.

Appearances:
David J. Burns, Esq.: Counsel for the Petitioner, State Ethics Commission
Richard F. Fell, Esq.: Counsel for the Respondent, David I. Fleming, Jr.

Commissioners:
Vorenberg, Ch., Brickman, McLaughlin, Mulligan

DECISION AND ORDER

I. Procedural History

The Petitioner filed an Order to Show Cause on May 27, 1982 alleging that the Respondent, David I. Fleming, Jr., had violated §7 of M.G.L. c. 268A, the conflict of interest law. The Respondent filed an Answer which denied any violation of the law.

The Petitioner filed a Motion for Summary Decision and submitted a brief in support thereof on October 1, 1982. Pursuant to notice, a hearing on the motion was conducted on October 6, 1982 before Commissioner David Brickman, a duly

designated presiding officer. See, M.G.L. c. 268B, §4(c). The parties thereafter filed post-hearing briefs and presented oral argument before the full Commission on November 9, 1982. In rendering this Decision and Order, the four participating members of the Commission have considered the evidence and arguments presented by the parties.

II. Findings of Fact

1. Mr. Fleming is a Court Officer at the West Roxbury District Court (the Court).

2. Mr. Fleming's working hours at the Court are from 8:30 a.m. to 4 p.m., Monday through Friday, and he earns $22,728 per year from the Court.

3. Mr. Fleming is also employed by the Massachusetts Bay Transportation Authority (MBTA) as an Assistant Automotive Maintenance Foreman. He began working for the MBTA in January, 1962.

4. Mr. Fleming's working hours at the MBTA are from 12 a.m. to 7 a.m. on Saturday, and from 1 a.m. to 8 a.m. on four other days.

5. During the calendar year 1981, Mr. Fleming earned $34,109 from the MBTA.

II. Decision

For the reasons stated below, the Commission concludes that Mr. Fleming is in violation of M.G.L. c. 268A, §7 by having a financial interest in a contract made by a state agency.

A. The MBTA as a state agency

Section 7 prohibits a state employee from having a direct or indirect financial interest in a contract made by a state agency in which the Commonwealth or a state agency is an interested party. Mr. Fleming admits that he is a state employee under M.G.L. c. 268A, §1(q) by virtue of his position with the Court but denies that the MBTA is a state agency under M.G.L. c. 268A, §1(p). Mr. Fleming argues that the MBTA is an independent authority comparable in structure to the Massachusetts Turnpike Authority (MTA) and the Massachusetts Port Authority (Massport) which he contends are not state agencies under §1(p). Mr. Fleming is correct in his interpretation that the MBTA, the MTA and Massport are independent state authorities but his contention that they are not state agencies within the meaning of §1(p) is erroneous.

For the purposes of M.G.L. c. 268A, "state agency" is defined as

> any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department and *any independent state authority,* district, commission, instrumentality or agency, but not an agency of a county, city or town. M.G.L. c. 268A, §1(p). (emphasis added)

This definition includes the MBTA, the MTA and Massport. This conclusion is consistent with previous Commission and Attorney General Advisory Opinions. Attorney General Conflict Opinion Nos. 795 and 823 specifically conclude that the MBTA is a state agency for the purposes of M.G.L. c. 268A, §1(p). Furthermore, Commission Advisory Opinions EC-COI-82-84, 81-127 and Attorney General Conflict Opinion No. 556 define the MTA and Massport as state agencies within the meaning of §1(p). The identical conclusion is fully discussed in the Decision and Order of **In the Matter of Henry M. Doherty,** a companion case issued today.[1/]

B. Mr. Fleming's financial interest in the MBTA contract

Mr. Fleming contends that his financial interest in the MBTA contract does not violate M.G.L. c. 268A, §7, and he raises two arguments in support of his position.

1. Mr. Fleming initially maintains that M.G.L. c. 268A, §7 was not intended to cover employment contracts. The Commission has rejected this argument in the **Doherty** matter and does so in the instant case as well. The Commission has consistently found that contracts for personal services, such as employment contracts, are within the purview of §7. EC-COI-80-118, 80-97 and 80-88. See, Buss, **The Massachusetts Conflict of Interest Statute: An Analysis,** 45 B.U.L. Rev. 299, 368, 372 (1965). Furthermore,

[1/]Mr. Fleming also argues that because M.G.L. c. 258, §1 (the Sovereign Immunity Act) excludes the MBTA from its definition of public employer, the MBTA cannot be a state agency for the purposes of M.G.L. c. 268A. However, the exclusion of the MBTA from M.G.L. c. 268, §1 is neither inconsistent with, nor relevant to the Commission's conclusion that the MBTA is a state agency under c. 268A, §1(p).

since the policy behind §7 is to prevent state employees from using their positions to influence the awarding of state contracts in a way beneficial to themselves, Mr. Fleming's interpretation is too limited and defeats the legislative intent of this section.

2. Mr. Fleming further alleges that the applicability to the MBTA of statutes other than the conflict of interest law govern whether the Commission may apply M.G.L. c. 268A in this case. In support of this allegation, Mr. Fleming relies on M.G.L. c. 30, §21 which prohibits a person from receiving two salaries from the treasury of the Commonwealth. He maintains that since M.G.L. c. 268A, §7 and M.G.L. c. 30, §21 address the same issue, his compliance with M.G.L. c. 30, §21 satisfies the requirements of M.G.L. c. 268A, §7. The Commission also rejects this argument.

The Commission finds here, as in the **Doherty** matter, that the scope of the prohibition in M.G.L. c. 268A, §7 is broader than the restrictions of M.G.L. c. 30, §21. The former does not address the source from which the funds derive, but prohibits state employees from having a financial interest in a state contract irrespective of whether the funds pas through the treasury of the Commonwealth. Moreover, the Commission has concluded in an Advisory Opinion that a state employee violated M.G.L. c. 268A, §7 notwithstanding his compliance with M.G.L. c. 30, §21. See, EC-COI-82-102.

C. Affirmative Defenses

Mr. Fleming does not formally raise any affirmative defenses, but he makes certain legal and equitable arguments which warrant discussion.

1. Grandfather Clause

Mr. Fleming contends that the Court Reform Act, St. 1978, c. 478, §328, has a "grandfather clause" which restricts the enforcement of M.G.L. c. 268A. To support his contention, Mr. Fleming argues that enforcement of M.G.L. c. 268A would adversely affect his seniority and retirement rights in violation of St. 1978 c. 478, §328.[2]/ However, the Commission finds that the "grandfather clause" of St. 1978 c. 478, §328 does not address M.G.L. c. 268A. Further, since the Commission's actions do not affect the benefits that Mr. Fleming has previously acquired, there is no conflict between this enforcement action and St. 1978 c. 478, §328.

2. Laches

Mr. Fleming also alleges that he has relied on the inaction of law enforcement agencies to his detriment. Mr. Fleming contends that the Commonwealth had an obligation to notify him that he was in violation of the law upon the passage of St. 1978 c. 478. For the reasons stated in **Doherty,** the Commission rejects this argument. There is no evidence in the record which indicates that any law enforcement agencies of the Commonwealth knew of Mr. Fleming's dual employment arrangement prior to the initiation of this proceeding. Moreover, the defense of laches is not available to an individual against a public agency authorized to enforce the laws of the Commonwealth. **The Board of Health of Holbrook v. Nelson,** 351 Mass. 17 (1966).

IV. Order

On the basis of the foregoing, the Commission concludes that David I. Fleming, Jr. is in violation of M.G.L. c. 268A, §7. Pursuant to the Commission's authority under M.G.L. c. 268B, §4(d), the Commission orders that Mr. Fleming cease and desist from such violation and pay the civil penalty as set forth below.[3]/ Accordingly, the Commission orders David I. Fleming, Jr. to:

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[2]/The pertinent language of St. 1978 c. 478, §328 states that ". . . appointive personnel employed in the judicial system of the commonwealth shall continue to serve therein . . . without loss of seniority, vacation or retirement rights."

[3]/Consistent with the **Doherty** matter, the Commission has considered certain mitigating factors which furnish a basis for the Commission's decision to impose a less than maximum penalty. Because this and **Doherty** are the first Commission Adjudicatory Decisions involving a violation of M.G.L. c. 268A, §7, the Commission concludes that a minimum fine together with a cease and desist order is an appropriate sanction. However, subsequent cases based upon comparable violations of §7 will be subject to a more substantial civil fine.

1. Cease and desist from violating M.G.L. c. 268A, §7 by terminating one of his employment arrangements with the state.

2. Pay $100 (one hundred dollars) to the Commission as a civil penalty for having a financial interest in a contract made by the MBTA in violation of M.G.L. c. 268A, §7.

The Commission directs Mr. Fleming to comply with these orders within fourteen days of receipt of this Decision and Order.

DATE: November 18, 1982

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 187

IN THE MATTER
OF
ELLIS JOHN HATEM

DISPOSITION AGREEMENT

This disposition agreement ("agreement") is entered into between the State Ethics Commission ("Commission") and Ellis John Hatem ("Mr. Hatem") pursuant to Section 11 of the Commission's **Procedures Covering the Initiation and Conduct of Preliminary Inquiries and Investigations.** The parties agree that this agreement constitutes a consented to final order of the Commission enforceable in the Superior Court, pursuant to G.L. . 268B, §4(d).

On May 18, 1982, 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, involving Mr. Hatem, Director of Support Services at the Walter E. Fernald School ("school"), a Department of Mental Health facility. The Commission has concluded that preliminary inquiry and, on September 7, 1982, found reasonable cause to believe that Mr. Hatem has violated G.L. c. 268A, §3(b). The parties now agree to the following findings of fact and conclusions of law:

1. At all times material herein, Mr. Hatem was Director of Support Services for the school and, as such, was a state employee as defined in G.L. c. 268A, §1(q).

2. As Director of Support Services, Mr. Hatem had administrative control over nine different departments, including the laundry, housekeeping and maintenance.

3. From 1979 through 1981, Charles Young ("Mr. Young") was a representative of various chemical supply companies and sold housekeeping chemicals to the school. Mr. Young also was used by school officials to procure other items, e.g., trash cans, paper towels, as needed.

4. During that period, Mr. Hatem made purchases for or approved purchases by the departments under his supervision from Mr. Young. All such purchases were subject to further approval by the school steward's office.

5. In February of 1980, Mr. Hatem, his wife and son travelled to Lake Placid, New York to attend the Winter Olympics. The costs of their transportation and tickets to the Olympics (valued at $110 per person) were paid for by Mr. Young.

6. General Laws, Chapter 268A, §3(b) provides, in pertinent part, that a state employee, other than as provided by law for the proper discharge of official duty, shall not directly or indirectly accept, receive or agree to receive anything of substantial value for himself for or because of any official act or acts within his official responsibility performed or to be performed by him.

7. By receiving from Mr. Young items of substantial value, i.e. transportation and tickets to the Olympics for himself and family, Mr. Hatem violated §3(b). These items were given to Mr. Hatem in view of his official duties in making or approving purchases of products from Mr. Young.

As the Commission stated in **In the Matter of George A. Michael**, Commission Adjudicatory Docket No. 137, Decision and Order, pg. 31 (September 28, 1981):

> A public employee need not be impelled to wrongdoing as a result of receiving a gift or gratuity of substantial value, in order for a violation of Section 3 to occur. Rather, the gift may simple by a token of gratitude for a well-done job or an attempt to foster goodwill. All that is required to bring Section 3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited. To allow otherwise would subject public employees to a host of temptations which would undermine the impartial performance of their duties, and permit multiple renumeration for doing what employees are already obliged to do - a good job. Sound public policy necessitates a flat prohibition since the alternative would present unworkable burdens of proof. It would be nearly impossible to prove the loss of an employee's objectivity or to assign a motivation to his exercise of discretion. If public credibility in government institutions is to be fostered, constraints which are conducive to reasoned, impartial performance of public functions are necessary, and it is in this context that Section 3 operates.

WHEREFORE, 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 representations agreed to by Mr. Hatem:

1. That in light of the conduct described above, he pay the Commission the sum of one thousand dollars ($1,000.00) forthwith as a civil penalty for violating G.L. c. 268A, §3(b); and

2. That he pay the Commission three hundred and thirty dollars ($330.00) as forfeiture of the economic advantage gained by himself and his family as a result of this violation of G.L. c. 268A, §3(b); and

3. That he waive all rights to contest the findings of fact, conclusions of law and conditions contained in this agreement in this or any related administrative or judicial proceedings.

DATE: November 22, 1982

SUMMARIES OF DISPOSITION AGREEMENTS

(Where an asterisk appears, the text of the agreement has been included among the foregoing actions. Agreements concerning the late filing of Statements of Financial Interest have not been summarized.)

In the Matter of Charles Hoen
(June 1, 1979)

An employee of the Department of Revenue violates Section 4(a) and 4(c) of Chapter 268A by serving on a local Board of Assessors. Sections 4(a) and 4(c) prohibit a state employee from receiving compensation from or acting as agent or attorney for anyone other than the state in relation to matters of direct and substantial interest to the state. No sanctions or penalties were imposed in this case because the employee resigned from the Board of Assessors.

In the Matter of Myron Koffman
(October 30, 1979)

A part-time state employee violates the Standards of Conduct set out in Section 23(f) of Chapter 268A by using his state position, which required him to review and approve bid specifications for local housing authority construction projects, to obtain copies of bid specifications for his private employer (a construction company) without registering the company with the housing authority as an interested bidder or depositing the amount required for all bidders. The employee's actions in this regard were "likely to raise suspicions among the public that he was acting in violation of his public trust and to the advantage of his private employer." By terms of this Agreement, the employee agreed to pay a civil penalty of $100 for this violation.

In the Matter of Rae Ann O'Leary
(October 30, 1979)

A state employee violates Section 6 of Chapter 268A by also working for a private clinic which contracted with the employee's state agency to provide client services, where the employee's state position required her to make decisions affecting the contract and; therefore, the financial interests of her private employer. This is true even though the employee neither worked on the state contracts for the private clinic nor derived funds from those contracts. No sanctions or penalties were imposed in this case.

In the Matter of Edward Pignone
(November 16, 1979)

A state employee violates the Standards of Conduct set out in Section 23(e) of Chapter 268A by using his official position to assist a private individual in an attempt to secure an unwarranted return of affidavits filed in a case pending before the Massachusetts Commission Against Discrimination. No sanctions or penalties were imposed in this case.

In the Matter of Stephen Clifford
(December 12, 1979)

A state employee violates Section 7 of the Financial Disclosure law, Chapter 268B, by intentionally failing to disclose on his 1978 Statement of Financial Interests a transfer of real property in which he had a financial interest, and which occurred during the reporting year.

In the Matter of Joseph Counter
(February 12, 1980)

A former Department of Education employee violates Section 5(a) of Chapter 268A both by receiving compensation from a grant which he approved while a state employee, and by receiving compensation from a municipal agency for evaluating a state funded project which he had approved while a state employee. By terms of the Agreement, the employee agreed to pay $4,000 to the Commonwealth as reimbursement for compensation he received in violation of Chapter 268A and to pay a civil penalty of $100.

In the Matter of Anthony C. Moshella
(February 13, 1980)

A treasurer of a regional school committee (a municipal agency under Chapter 268A) violates Section 19 of Chapter 268A by depositing school committee funds in a bank which employs him, since he had not advised the school committee that he was an employee of the bank, and had not requested or received a written determination that his employment by the bank would not substantially affect the integrity of his services to the committee. By terms of the Agreement, the employee agreed to pay a civil penalty of $250.

***In the Matter of Frederick Hanna**
(February 13, 1980)

A state seafood inspector violates Section 6 of Chapter 268A by personally conducting or supervising inspections of seafood wholesalers and retailers which stock seafood products purchased from a company owned by the inspector in his private capacity. This same inspector also violates Section 6 by inspecting food retailers which employed him as an independent snow removal contractor. He violates the Standards of Conduct set out in Section 23(e) and (f), by producing and marketing products which he is responsible for inspecting, and by selling those products, and providing services, to businesses which he is responsible for inspecting and regulating. By terms of the Agreement, the employee voluntarily terminated his state employment and paid a civil penalty of $6,500.

In the Matter of Thomas Cummings
(April 23, 1980)

A full-time municipal employee who privately owns and operates a construction business violates Section 20(a) of Chapter 268A by contracting on fourteen separate occasions to provide services to the town which employs him. No penalties or sanctions were imposed in this case.

In the Matter of John Chmura
(April 30, 1980)

The chairman of a local sewer commission violates Section 19 of Chapter 268A by participating in commission discussions and actions concerning a proposed housing development which was to be built on land owned by a corporation in which he was a director and an investor. No sanctions or penalties were imposed in this case.

In the Matter of Kenneth Masse
(September 17, 1980)

A state nursing home inspector violates Section 23(a), (e) and (f) of Chapter 268A by accepting part-time employment in nursing homes which he is responsible for inspecting. He also violates Section 6 of Chapter 268A when he inspects the nursing homes which employ him in his private capacity. Such inspections violate Section 6 even though there is no evidence that the inspection reports were influenced by his employment by the homes, or that the part-time employment was offered or solicited with the intent to influence official actions within the inspector's responsibility. If such additional factors had been present, more serious violations of Chapter 268A would have been found.

The employee agreed to pay a civil fine of $500 and to avoid employment with nursing homes or other facilities which are within the inspection jurisdiction of the state unit which employs him.

***In the Matter of Bernard J. Smith**
(September 23, 1980)

A consultant, hired by the Department of Public Health (DPH) to work on a full-time basis as a personnel recruiter for a state hospital, violates Section 4(a) of Chapter 268A by receiving compensation from a private firm in relation to recruiting events which he attended on behalf of the hospital, and for which he was paid by the Commonwealth. He violates Section 6 of Chapter 268A by contracting, on behalf of the hospital and with the private firm that employs him, to rent exhibitor's booth space at recruiting affairs. He also violates Section 23(d) of Chapter 268A by receiving $5,000 in reimbursements from the Commonwealth for expenses owed to private businesses and failing to turn over to these businesses the funds received for a period of six months, thereby securing the unwarranted personal use of the Commonwealth's funds for that period.

The employee agreed to pay a civil penalty of $1,500 - $500 for each of the three violations - and to return to the Commonwealth $2,679.04 he received in state salary for work for which he was also compensated by a private firm.

***In the Matter of Richard B. Simches**
(October 7, 1980)

A member of the Governing Board of Automobile Reinsurance Facility is a "state employee" (albeit a "special state employee" because Board members are uncompensated), and, therefore, subject to the provisions of the Conflict of Interest law. A Board member, therefore, violates Section 4(c) of Chapter 268A by appearing before the Board as the corporate agent of one of his companies which was seeking favorable Board action on a matter. By terms of the Agreement, the employee agreed to pay a civil penalty of $500 for this violation.

***In the Matter of Badi G. Foster**
(October 7, 1980)

A former state employee violates Section 5(a) of Chapter 268A by contracting with a private party to evaluate a program which he had reviewed and recommended for funding while a grant reader for the state Department of Education. Section 5(a) prohibits a former state employee from receiving compensation in relation to a matter of "direct and substantial interest" to the state in which he participated while a state employee. By terms of the Agreement, the former employee agreed to pay a civil penalty of $250 and an additional $1,800 as recoupment of the economic benefit received under the contract.

In the Matter of Vincent Caroleo
(January 5, 1981)

An employee of the Department of Commerce and Development violated Chapter 268A by having financial interests in state contracts prohibited for state employees under Section 7. The employee had such an interest - through a corporation of which he was president, a member of the Board of Directors, and 50% stockholder - in state contracts on 39 occasions. The employee agreed to pay a civil fine of $1,000 for this violation.

In the Matter of John Esdale
(January 6, 1981)

A former inspector of the Department of Public Health's Division of Food and Drug violated Section 3 of Chapter 268A by requesting and accepting special charge privileges and discounts from a business he was responsible for inspecting. Such privileges and discounts were not available to the general public and were extended to him because of his official acts and responsibilities. He also violated Section 23(d) because he used his official position to "obtain unwarranted privileges" for himself and others. By taking favors from a business he inspected, he also violated Section 23(e) because his conduct gave a reasonable basis for the impression that he could be influenced by that business in the performance of his official duties.

The employee agreed to pay a civil penalty of $1,000 for these violations, and to stop receiving anything of substantial value from businesses or individuals he is responsible for inspecting or regulating, or with which he had official dealings.

In the Matter of Andrew Bayko
(February 9, 1981)

A former municipal wiring inspector violated Section 19 of Chapter 268A by allowing his own private electrical work to go uninspected. He also violated the Standards of Conduct in Sections 23(d) and (e) of Chapter 268A which prohibit municipal employees from engaging in conduct which creates the impression that they can be unduly affected in the performance of their official duties, and from securing unwarranted privileges or exemptions for themselves or others.

The wiring inspector agreed to pay a civil penalty of $250 and to stop participating in his official capacity in matters in which he has a financial interest.

***In the Matter of the Collector-Treasurer's Office of the City of Boston, et al**
(February 27, 1981)

Municipal employees violate Chapter 268A by charging private fees to expedite the preparation and issuance of municipal lien certificates. For many years, employees had collected an extra private fee to perform this service within the time limit set by statute. By so doing, they violated Sections 3 and 17 of the conflict law which prohibits public employees from receiving extra compensation for performing official acts required by their jobs. Municipal officials who authorize this improper practice violated the Standards of Conduct in Section 23 of Chapter 268A because their authorization created the impression that official acts could be influenced by those willing to pay private fees for those acts, and that employees were acting in violation of their public trust.

Municipal officials put a stop to the practice of accepting private expediting fees after being advised by the State Ethics Commission that the practice raised substantial questions under Chapter 268A.

By the terms of the Disposition Agreement, this practice will not be resumed and steps will be taken to alert employees to prohibitions against the receipt of such private fees.

***In the Matter of David L. Dray**
(August 19, 1981)

A municipal employee violated Section 20 of Chapter 268A by continuing to act and receive fees under a contract as legal counsel to a municipal agency at the same time he is that agency's Acting Executive Director. Section 20 prohibits a municipal employee from having a financial interest in a contract with the same municipality which employs him.

By the terms of the Disposition Agreement, the employee agreed to pay the State Ethics Commission $3,915 as recoupment of the salary he received as legal counsel while simultaneously serving as Acting Executive Director, and $1,000 as civil penalty for violating Section 20 of Chapter 268A. The Commission has returned the $3,915 recoupment to the municipality.

***In the Matter of Herbert Risser**
(August 27, 1981)

A state employee violates Section 3 of the conflict law by receiving private fees for processing backlogged requests for copies of birth, marriage and death records. State employees are prohibited by Section 3 from receiving private fees to expedite official acts which they are required to perform as part of their state jobs.

By terms of the Disposition Agreement, the employee agreed to pay a civil penalty of $250 and $670 as recoupment of monies received in violation of the conflict law.

***In the Matter of Edward Brooks**
(November 13, 1981)

A former municipal employee violated Section 18 of Chapter 268A by accepting private compensation in relation to a matter which (a) was of direct interest to the municipality where he had worked and (b) in which he had personally participated while working for that municipality. Specifically, after leaving his municipal employment, the employee received a private fee for helping a business settle a past due account which he had been assigned to collect as a municipal employee.

By terms of the Disposition Agreement, the employee agreed to pay a civil penalty of $500 for this violation.

In the Matter of Victor Peters
(December 10, 1981)

A state employee violated Section 3 and the Standards of Conduct in Section 23(e) by requesting and accepting charge privileges and discounts extended to him and his family by a store which he inspected for the state. Section 3 prohibits public employees from seeking or receiving anything of "substantial value" (including gifts) over and above their regular government pay for doing their jobs. Section 23(e) prohibits them from giving by their conduct a reasonable basis for the impression that they can be improperly influenced in the performance of their official duties.

By the terms of the Disposition Agreement, the employee agreed to pay a civil penalty of $1,000 for these violations.

In the Matter of Robert Morency
(February 17, 1982)

A "special" municipal employee violated Section 17(a) by receiving private compensation in relation to matters in which the municipal agency for which he worked had a direct and substantial interest. Specifically, the employee was paid to provide services and materials to a contractor working on the same municipal construction project which the employee was supervising.

By the terms of the Disposition Agreement, the employee agreed to pay $400 to the municipal agency as recoupment of the economic advantage he received in violation of the conflict law.

In the Matter of George J. O'Brien
(March 5, 1982)

A municipal employee violated Section 19 by participating in his agency's decisions to deposit funds in a credit union of which he was a director. Under Section 19, a municipal employee may not participate in any matter involving the financial interests of a business organization in which he is serving as director.

By the terms of the Disposition Agreement, the employee agreed to pay a civil penalty of $1,000 for this violation.

***In the Matter of Henry A. Brawley**
(March 16, 1982)

A municipal employee violated Sections 23(a) and 19 by, in his private capacity, performing surveying work for a firm under contract with his own municipal agency and by participating in the agency's decisions (e.g., change orders), regarding that same firm. According to the Standards of Conduct in Section 23(a), a public employee is prohibited from "accepting other employment which will impair his independence of judgment in the exercise of his official duties." Section 19 prohibits a municipal employee from participating in official decisions affecting the financial interests of a firm which employs him.

By the terms of the Disposition Agreement, the employee agreed to pay a civil penalty of $1,000 for these violations.

***In the Matter of George Cunningham**
(May 6, 1982)

A municipal employee violated Section 19 by participating in discussions and decisions relative to the award of a municipal contract to his wife's company and violated Section 20 by subcontracting through his own company to do work for the town. Section 19 prohibits a municipal employee from participating in matters in which a member of his immediate family had a financial interest. Under Section 20 a municipal employee may not have a financial interest in a second contract with the town which employs him.

By the terms of the Disposition Agreement, the employee agreed to pay a civil penalty of $2,000 for these violations.

***In the Matter of John A. Pellicelli**
(June 25, 1982)

A member of a municipal housing authority violated Section 19 by participating in a decision to reclassify his brother's employment, thus granting him a pay increase.

By the terms of the Disposition Agreement, the employee agreed to pay a civil penalty of $250 for this violation.

***In the Matter of William J. Hulbig**
(August 23, 1982)

A municipal building commissioner violated Section 19 by issuing three permits for, and carrying out seven inspections of, construction projects performed by his son. In light of the ten individual instances of improper conduct, the employee agreed to pay a civil penalty of $1,000.

***In the Matter of Michael Martin**
(September 7, 1982)

A selectman violated Section 17(c) of Chapter 268A by acting as the agent for a private party in connection with the sale of property which was the subject of foreclosure proceedings by his town. Section 17(c) prohibits a municipal employee from acting as agent for any private party in connection with any particular matter in which his town has a direct and substantial interest.

By the terms of the Disposition Agreement, the employee agreed to pay a civil penalty of $1,000 for this violation.

***In the Matter of Daniel Sharrio**
(September 14, 1982)

The deputy director of a municipal housing authority violated the Standards of Conduct in Section 23(d) of Chapter 268A by using his official position to secure discounts, tax exemptions, credit purchases and goods for his personal use. Section 23(d) provides that no municipal employee "shall use . . . his official position to secure unwarranted privileges or exemptions for himself or others."

By terms of the Disposition Agreement, the employee agreed to pay a civil penalty of $500 for his violations.

In the Matter of B. Joseph Tully
(September 15, 1982)

A city manager violated the Standards of Conduct in Section 23(e) of Chapter 268A because he (1) asked an individual whose hotel project was under consideration by the city to make arrangements for his Florida vacation, and (2) accepted "VIP" treatment and direct billing privileges arranged by that individual. Section 23(e) prohibits a public employee from "giv[ing] a reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties. . . ."

By terms of the Disposition Agreement, the employee agreed to pay a civil penalty of $250 for this violation.

In the Matter of Robert L. Camandona
(October 25, 1982)

A police patrolman violated Section 20 of the conflict of interest law by contracting with his community's School Committee to provide school bus transportation. Section 20 prohibits a municipal employee from having a financial interest in a contract made by a municipal agency of the same city or town.

By the terms of the Disposition Agreement, the employee agreed to pay a $1,000 civil penalty for this violation.

***In the Matter of Ellis John Hatem**
(November 22, 1982)

The Director of Support Services at a state school violated Section 3 of the conflict of interest law by accepting a trip to the Winter Olympics for himself and his family from an individual whose products he purchased for the school. Section 3(b) prohibits a state employee from receiving anything of substantial value for or because of his official acts.

By the terms of the Disposition Agreement, the employee agreed to pay a $1,000 civil penalty and to return to the state the $330 economic advantage he and his family had gained.