STATE ETHICS COMMISSION
ENFORCEMENT ACTIONS
ADVISORY OPINIONS
1983

Massachusetts State Ethics Commission

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PUBLISHED BY
THE MASSACHUSETTS STATE ETHICS COMMISSION
James Vorenberg (Chairman)
David Brickman
Frances M. Burns
Rev. Bernard P. McLaughlin
Joseph I. Mulligan, Jr.
Robert V. Greco, Executive Director

Included are:

1. All Commission Decisions and Orders issued in 1983.

2. Selected Disposition Agreements and Compliance Letters issued in 1983.

3. Summaries of all Disposition Agreements issued in 1983.

Cite enforcement actions by name of case, year and page, as follows:
In the Matter of John Doe, 19___ Ethics Commission (page)

TABLE OF CASES*

(By subject or respondent)

*Cases are numbered consecutively from 1979. Cases from 1979 - 1982 appear in a prior volume.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 188

IN THE MATTER
OF
DAVID I. WALSH

DISPOSITION AGREEMENT

This disposition agreement ("agreement") is entered into between the State Ethics Commission ("Commission") and David I. Walsh ("Mr. Walsh") 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 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. Walsh, a water commissioner employed by the town of Pepperell. The Commission has concluded that preliminary inquiry and, on November 9, 1982 found reasonable cause to believe that Mr. Walsh has violated G.L. c. 268A, §§19, 20 and 23(d). The parties now agree to the following findings of fact and conclusions of law:

A. **Section 23[d]**

1. Mr. Walsh is an elected member of the Pepperell Water Commission. He therefore is a "municipal employee" as defined in G.L. c. 268A, §1(q).

2. On July 23, 1981, and July 24, 1981, Mr. Walsh purchased tires for his personal use for $312.14 and $1,087.72 respectively, and had both of these purchases billed to the Pepperell Water Department.

3. Although Mr. Walsh eventually was made to pay for these tires, he, by charging these purchases to the water department, avoided substantial finance charges, state sales tax and federal excise tax.

4. Section 23(d) of G.L. c. 268A prohibits a public employee from using or attempting to use his position to secure on unwarranted privilege for himself.

5. As a public employee, Mr. Walsh violated G.L. c. 268A, §23(d) by attempting to use his official position to secure an unwarranted privilege (the tires) for himself.

6. As a public employee, Mr. Walsh violated G.L. c. 268A, §23(d) by using his official position to secure an unwarranted privilege (by not paying for the finance charges, sales tax and excise tax) for himself.

B. **Sections 19 and 20**

1. On January 4, 1980, the Pepperell selectmen authorized Mr. Walsh in his private capacity to construct a sewer line at a cost of $855.00.

2. On January 10, 1980, Mr. Walsh submitted a bill to the town for $957.50 which was approved for payment.

3. On January 14, 1980, the town of Pepperell issued its check payable to Mr. Walsh for $957.50.

4. On February 1, 1982, the Pepperell Trucking Company submitted a bill to thePepperell Water Department for $1,514.00 including an amount of $480.00, identified as "12 hours backhoe at $40 per hour." Mr. Walsh performed this backhoe work for Pepperell Trucking.

5. On February 8, 1982, the town of Pepperell issued its check for $1,514.00 payable to Pepperell Trucking.

6. This check was supported by a voucher approved by Kenneth L. Davis and Mr. Walsh, in their capacity as members of the Pepperell Water Commission.

7. On February 13, 1982, Pepperell Trucking issued a check in the amount of $480 to Mr. Walsh for the backhoe work.

8. On February 10, 1982, Pepperell Trucking submitted a bill in the amount o $1,144.00 to the Pepperell Water Department. The bill represents a charge of $160.00, identified as "4 hours backhoe at $40.00 per hour;" $858.00 "repair loader labor;" $221.00 "steel;" and $5.00 "paint."

9. On February 16, 1982, the town of Pepperell issued its check for $1,144.00 payable to Pepperell Trucking.

10. This check was supported by a voucher approved by Raul Pena and Mr. Walsh, in their capacity as members of the Pepperell Water Commission.

11. On February 23, 1982, Pepperell Trucking issued a check to Mr. Walsh in the amount of $900.00 for the work he did on this job.

12. Section 19 of G.L. c. 268A prohibits a municipal employee from participating in matters in which he or a business organization by which he is employed has a financial interest.

13. When he approved the two vouchers, Mr. Walsh violated G.L. c. 268A, §19 by participating in matter in which he or a business organization by which he was employed (Pepperell Trucking) had a financial interest.

14. Section 20 of G.L. c. 268A prohibits a municipal employee from having a financial interest in a contract made by a municipal agency of the same city or town.

15. As a Pepperell municipal employee, Mr. Walsh violated G.L. c. 268A, §20 by having a financial interest in the above-described three contracts with the town of Pepperell.

In view of the foregoing violations of G.L. c. 268A, §§19, 20 and 23, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceeding on the basis of the following terms and conditions agreed to by Mr. Walsh:

1. that he pay to the Commission the sum of $750 as a civil penalty for violating G.L. c. 268A, §23(d);

2. that he pay to the Commission the sum of $750 as a civil penalty for violating G.L. c. 268A, §19;

3. that he pay to the Commission the sum of $500 as a civil penalty for violating, G.L. c. 268A, §20;

4. that he refrain from using his position as commissioner of the Pepperell Water Department to secure unwarranted privileges for himself, prohibited by G.L. c. 268A, §23(d);

5. that he refrain from participating in matters in which he or any business organizations by which he is employed have a financial interest, prohibited by G.L. c. 268A, §19;

6. that he refrain from having a financial interest in any contract made by a municipal agency of the town of Pepperell, prohibited by G.L. c. 268A, §20; and

7. that he waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this agreement or any related administrative or judicial proceeding to which the Commission is a party.

DATE: January 11, 1983

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory
Docket No. 173

IN THE MATTER
OF
DAVID H. KOPELMAN

Appearances:
Dennis G. Marquise, Esq.: Counsel for Petitioner State Ethics Commission
David H. Kopelman, Esq.: pro se

Commissioners:
Vorenberg, Ch.,; Brickman, McLaughlin, Mulligan.

DECISION

I. Procedural History

The Petitioner, State Ethics Commission (the Commission), filed an Order to Show Cause on October 1, 1982, alleging that Respondent David H. Kopelman (the Respondent) had violated Section 5 of M.G.L. c. 268B, the financial disclosure law by failing to file a Statement of Financial Interests (SFI) within ten days of his receipt of a Formal Notice of Delinquency. The Respondent filed an Answer which admitted that he had not filed a timely SFI, but cited extenuating circumstances which prevented him from filing on time.

Pursuant to notice, an evidentiary hearing was conducted on November 10, 1982, 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 waived oral argument and briefs. In rendering this Decision, each of the four participating members of the Commission has considered the evidence presented by the parties.

II. Findings of Fact[1]/

1. David H. Kopelman, the Respondent, is a justice of the Trial Court of the Commonwealth and as such was required by G.L. c. 268B, §5 to file an SFI for calendar year 1981, on or before May 1, 1982.

2. The Respondent did not receive an SFI form before May 1, 1982.

3. The Respondent's SFI was not filed on or before May 1, 1982.

4. On May 8, 1982, a Saturday, the Respondent received a written Formal Notice of Delinquency sent by the Commission, and an SFI form to be completed and filed within ten days.

5. The Respondent presided over a trial in Dedham from Monday, May 10 through Friday, May 14, 1982, during normal business hours.

6. On Monday, May 17, 1982, the Respondent visited his bank vault at a bank in Boston in order to inspect stock certificates and obtain information from them to be listed on his SFI. The vault was only accessible during normal business hours.

7. The Respondent had his SFI prepared on May 19, 1982, at which time he called the Commission's executive accountant and offered to hand-deliver his SFI to the Commission's office; he was told that hand delivery would not matter since the form was already overdue.

8. The Respondent sent his SFI to the Commission by certified mail on May 21, 1982, where it was received on May 25, 1982.

9. The Respondent did not file his SFI within ten days of receiving a Formal Notice of Delinquency.

III. Decision

1. Jurisdiction

The Respondent stipulated that the Commission is authorized by G.L. c. 268B to enforce the provisions of G.L. c. 268B, the Financial Disclosure Law, and in that regard to initiate and conduct adjudicatory proceedings. He also stipulated that, under G.L. c. 268B, §5, he was required to file an SFI for calendar year 1981.

2. Chapter 268B, §5 Allegation

The Petitioner alleges that the Respondent violated the financial disclosure requirements of M.G.L. c. 268B, §5, which states, in relevant part:

> (c) 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. . .
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> . . .
>
> Failure of a reporting person to file a statement of financial interests within ten days after receiving notice as provided in clause (f) of section 3 of this chapter,[2]/ 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.

The elements necessary to establish a G.L. c. 268B, §5 violation are that: (1) the subject was a public employee (as defined by the statute) during the year in question; (2) the subject was notified in writing of his delinquency and the possible penalties for failure to file a statement; and (3) the subject did not file an SFI within ten days of receiving notice.

Inasmuch as the Respondent stipulated, at the adjudicatory hearing, all the elements of a G.L. c. 268B, §5 violation, the Commission concludes that he violated G.L. c. 268B, §5 by failing to file his 1981 SFI within ten days of receiving a delinquency notice from the Commission.

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[1]/Findings 1, 3, 4, 8 and 9 are based upon Stipulations of Fact agreed to by the Parties and admitted as Exhibit 1 at the evidentiary hearing. Other findings are based upon the Respondent's testimony.

[2]/"[The Commission shall] inspect all statements of financial interests filed with the commission in order to ascertain whether any reporting person has failed to file such a statement or has filed a deficient statement. If, upon inspection, it is ascertained that a reporting person has failed to file a statement of financial interest, or if it is ascertained that any such statement filed with the commission fails to conform with the requirements of section five of this chapter, then the commission shall, in writing, notify the delinquent; such notice shall state in detail the deficiency and the penalties for failure to file a statement of financial interests."

IV. Sanction

> G.L. c. 268B, §4(d) authorizes the Commission, upon a finding . . . that there has been a violation of chapter 268A or this chapter, [to] issue an order requiring the violator to:
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> (1) cease and desist such violation [of c. 268B];
>
> (2) file any report, statement or other information as required by . . . this chapter, or
>
> (3) pay a civil penalty of not more than $1,000 for each violation of this chapter. . .[3]/

Pursuant to this section, the Commission has adopted a policy of levying civil fines on those who do not file timely SFIs as required by G.L. c. 268B.[4]/ This policy, which has been followed in numerous Disposition Agreements filed with the Commission, and in a Decision and Order issued in another case on this date,[5]/ establishes the fine according to the stage of legal proceedings reached by the time the SFI is filed. Commission practice under this policy has been to levy a fine of $100 when an SFI is filed after the expiration of the ten-day notice period, but before the initiation of a preliminary inquiry.

As stated in the **Chilik** decision issued today, the Commission retains the discretion to adjust the civil penalty in recognition of mitigating or aggravating circumstances in individual cases. One of the mitigating circumstances outlined in that decision is where,

> given the total circumstances, the Respondent made a serious, good faith, effort to comply as expeditiously and fully as possible after being put on notice of the filing requirement.[6]/

The case at hand presents just such circumstances, outlined below.

The Respondent here did not receive the SFI form that was sent him originally, but first received a blank form with the Notice of Delinquency on May 8, 1982, a Saturday. The form required a listing of securities held by the Respondent and members of his family, and this information was contained in stock certificates which were kept in the Respondent's bank vault in Boston. Respondent testified that this vault was only accessible on weekdays from 10 a.m. to 4 p.m. During the entire week following his receipt of the Notice and SFI form, the Respondent was sitting as judge in a case at the Dedham Probate Court and was unable to visit his vault without neglecting his judicial duties. On Monday, May 17, his first opportunity, he visited the vault and obtained the necessary information; he prepared his SFI form the following day and had it typed on Wednesday, May 19, 1982. Thereafter, he called the Commission and offered to hand-deliver the SFI, but he was told that it was unnecessary to do so, since the SFI was already overdue. He sent the form by certified mail on May 21, and it was received by the Commission on May 23, five days after it was due.

None of these factors excuse or nullify the failure to comply with G.L. c. 268B, §5, but insofar as they evidence a good faith effort on Respondent's part to file his SFI in a timely, accurate manner, the Commission considers them sufficient grounds to forego the assessment of a fine. Although it would be preferable for a person who knows he is unable to file a timely SFI to contact the Commission of that fact *before* the expiration of the ten-day filing period, because this is the first time the Commission has adjudicated G.L. c. 268B, §5 violations based on late filing and issued decisions on them, the Commission will here give the Respondent the benefit of the doubt. However, in the future the Commission will consider a failure to contact the Commission when possible during that period as an aggravating factor in a G.L. c. 268B, §5 violation. As stated in the **Chilik** decision, the Commission generally regards violations of G.L. c. 268B, §5 to be serious infractions which merit penalty, and the Commission's forebearance of a fine in this case should in no way be read as inconsistent with that view.

DATE: January 12, 1983

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[3]/St. 1982, c. 612, §16 raises the maximum fine to $2,000 per violation, effective 3/29/83.

[4]/See, Minutes of Commission Meeting, April 7, 1980.

[5]/**In the Matter of Thomas A. Chilik**, Commission Adjudicatory Docket No. 182.

[6]/Id. at p. 5.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 174

IN THE MATTER
OF
PATRICK RYAN

Appearances:
Stephen P. Fauteux, Esq.: Counsel for Petitioner State Ethics Commission
Patrick Ryan, Esq.: pro se

Commissioners:
Vorenberg, Ch.; Brickman, McLaughlin, Mulligan.

DECISION AND ORDER

I. Procedural History

The Petitioner filed an Order to Show Cause on September 30, 1982 alleging that the Respondent, Patrick Ryan, had violated M.G.L. c. 268B, §5[1]/ by failing to file his Statement of Financial Interests for 1981 (Statement) within ten days of receiving from the Commission a Formal Notice of Delinquency.

Pursuant to notice, an adjudicatory hearing was conducted on November 23, 1982 before Commissioner David Brickman, a duly designated presiding officer. See, M.G.L. c. 268B, §4(c). The parties waived the filing of post-hearing briefs and oral argument before the full Commission. In rendering this Decision and Order, each participating member of the Commission has considered the evidence and arguments presented by the parties.

II. Findings of Fact

1. The Respondent, Patrick Ryan, served as the executive assistant to the Suffolk County Sheriff until August, 1981.

2. In December, 1981 the Respondent was designated by the Suffolk County Sheriff as a person in a "major policy-making position" for the year 1981 and was required to file a Statement for 1981 on or before May 1, 1982.

3. The Respondent failed to file his 1981 Statement by May 1, 1982.

4. On or about May 25, 1982, the Respondent received from the Commission a Formal Notice of Delinquency (Notice) requiring him to file his Statement within ten days of receipt of the Notice.

5. The Respondent failed to file his 1981 Statement within ten days of receipt of the Notice.

6. The Commission initiated a preliminary inquiry on June 16, 1982 and thereafter authorized the initiation of adjudicatory proceedings.

7. The Respondent filed his 1981 Statement on August 3, 1982, approximately seven weeks after the expiration of the ten-day period contained in the Notice.

8. The Respondent explained to the Commission that his failure to file a timely Statement was due to negligence and inattentiveness and his preoccupation in setting up a law practice.

III. Decision

The failure of a reporting person to file a Statement within ten days after receiving a notice of delinquency constitutes a violation of M.G.L. c. 268B, §5. The elements necessary to establish a G.L. c. 268B, §5 violation are that: (1) the subject was a public employee (as defined by the statute) during the year in question; (2) the subject was notified in writing of his delinquency and the possible penalties for failure to file a statement; (3) the subject did not file a statement within ten days of receiving notice. Inasmuch as the Respondent conceded at the adjudicatory hearing that he had violated M.G.L. c. 268B, the Commission concludes that the Respondent violated M.G.L. c. 268B, §5 by failing to file his 1981 Statement within ten days of receiving a Notice from the Commission.

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[1]/G.L. c. 268B, §5 states in relevant part:

(c) 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 . . .

. . .

Failure of a reporting person to file a statement of financial interests within ten days after receiving notice as provided in clause (f) of section 3 of this chapter, or of 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.

IV. Sanction

Under G.L. c. 268B, §4(d), the Commission may order an individual who violates G.L. c. 268B to pay a civil penalty of not more than $1,000 for each violation.[2]/ The Commission has customarily assessed a civil fine of $250 in cases where an individual files a Statement following the initiation of a preliminary inquiry but prior to the conclusion of the inquiry.[3]/ While the Commission does retain the discretion to adjust a civil penalty in recognition of mitigating circumstances, none of the factors warranting mitigation are present in this case. In particular, the Respondent did not demonstrate a serious, good faith effort to comply as expeditiously and fully as possible after being put on notice of the filing requirement. Compare, **In the Matter of David Kopelman,** Commission Adjudicatory Docket No. 173 Decision and Order (January 12, 1983).

V. Order

On the basis of the foregoing, the Commission concludes that Patrick Ryan violated M.G.L. c. 268B, §5. Pursuant to the authority granted it by M.G.L. c. 268B, §4(d), the Commission hereby orders Mr. Rayn to pay a civil penalty of $250.

DATE: January 12, 1983

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 176

IN THE MATTER
OF
DELABARRE F. SULLIVAN

Appearances:

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

Thomas J. Hannon, Esq.: Counsel for Respondent Delabarre F. Sullivan

Commissioners:

Vorenberg, Ch.; Brickman, McLaughlin, Mulligan.

[2]/The maximum civil penalty has recently been increased to $2,000. See, St. 1982, c. 612, §16, effective March 29, 1983.

[3]/See, Minutes of Commission Meeting, April 7, 1980.

DECISION

I. Procedural History

The Petitioner, State Ethics Commission (the Commission), filed an Order to Show Cause on October 1, 1982, alleging that Respondent Delabarre F. Sullivan (Respondent) had violated Section 5 of M.G.L. c. 268B, the financial disclosure law, by failing to file a Statement of Financial Interests (Statement) within ten days of his receipt of a Formal Notice of Delinquency. The Respondent filed an Answer which admitted the facts alleged, but asserted that there was no violation because, during the relevant period, the Respondent's mental condition was such that he did not comprehend the necessity for complying with G.L. c. 268B, §5.

Pursuant to notice, an evidentiary hearing was conducted on November 23, 1982, 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 waived briefs and oral argument. In rendering this decision and Order, each of the four participating members of the Commission has considered the evidence presented by the parties.

II. Findings of Fact[1]/

1. The Respondent, Delabarre F. Sullivan, the federal funds coordinator for Middlesex County, was required by G.L. c. 268B, §5 to file a Statement for calendar year 1981, on or before May 1, 1982.

2. The Respondent failed to file his Statement on or before May 1, 1982.

3. Pursuant to G.L. c. 268B, §3(f), the Respondent received a written Formal Notice of Delinquency ("Notice") from the Commission on May 19, 1982, requiring him to file a Statement within ten days of receiving the Notice.

4. The Respondent failed to file his Statement within ten days of his receipt of the Notice.

5. The Respondent's Statement was filed with the Commission on June 15, 1982.

6. The Commission initiated a preliminary inquiry on June 16, 1982, as authorized by G.L. c. 268B, §4(a).

[1]/These findings were all either admitted by the Respondent in his Answer by way of Demurrer, or were corroborated by exhibits introduced into evidence, or both.

7. The Respondent suffered a concussion on July 23, 1981, which left him partially disabled by brain damage. Since that time, he underwent psychotherapy and medication; the treatment continued through May and June of 1982.

8. The Respondent has received Workmen's Compensation payments from Middlesex County from July 23, 1981 through the present.

9. The Respondent did not file a federal or state income tax return for the year 1981.

III. Decision

1. Jurisdiction

The parties agreed that the Respondent was, at all times relevant, subject to the provisions of G.L. c. 268B, §5 and that the Commission was authorized to initiate and conduct adjudicatory proceedings pursuant to that statute.

2. Chapter 268B Allegation

G.L. c. 268B, §5 states, in relevant part:

> (c) 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. . .
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> . . .
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> Failure of a reporting person to file a statement of financial interests within ten days after receiving notice as provided in clause (f) of section 3 of this chapter,[2]/ 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.

The elements necessary to establish a G.L. c. 268B, §5 violation are that: (1) the subject was a public employee (as defined by the statute) during the year in question; (2) the subject was notified in writing of his delinquency and the possible penalties for failure to file a Statement; (3) the subject did not file a Statement within ten days of receiving notice.

Inasmuch as the Respondent admitted, by way of demurrer, all the elements of a G.L. c. 268B, §5 violation, the Commission concludes that he violated G.L. c. 268B, §5 by failing to file his 1981 Statement within ten days of receiving a delinquency notice from the Commission. With the violation established, the only issue left for the Commission to address is the sanction to be imposed.

IV. Sanction

In general, the Commission considers G.L. c. 268B, §5 violations, whether technical or flagrant, to be serious infractions which merit a penalty. Under G.L. c. 268B, §4(d),

> upon a finding . . . that there has been a violation of Chapter 268A or this chapter, [the Commission may] issue an order requiring the violator to:
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> (1) cease and desist such violation [of c. 268B];
>
> (2) file any report, statement of other information as required by . . . this chapter; or
>
> (3) pay a civil penalty of not more than $1,000 for each violation of this chapter. . .[3]/

Pursuant to this section, the Commission has adopted a policy of levying civil fines on those who do not file timely statements as required by G.L. c. 268B.[4]/ This policy, which has been followed in numerous Disposition Agreements filed with the Commission, and in a Decision and Order issued in another case on this date,[5]/ establishes the fine according to the stage of legal proceedings reached by the time the Statement is filed. Commission practice under this policy has

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[2]/"[The commission shall] inspect all statements of financial interests filed with the commission in order to ascertain whether any reporting person has failed to file such a statement or has filed a deficient statement. If, upon inspection, it is ascertained that a reporting person has failed to file a statement of financial interests, or if it is ascertained that any such statement filed with the commission fails to conform with the requirements of section five of this chapter, then the commission shall, in writing, notify the delinquent; such notice shall state in detail the deficiency and the penalties for failure to file a statement of financial interests."

[3]/St. 1982, c. 612, §16 raises the maximum fine to $2,000 per violation, effective 3/29/83.

[4]/See, Minutes of Commission Meeting, April 7, 1980.

[5]/In the Matter of Thomas A. Chilik, Commission Adjudicatory Docket No. 182.

been to levy a fine of $100 when a Statement is filed after the expiration of the ten-day period following a delinquency notice, but before a preliminary inquiry has been initiated.

As stated in the **Chilik** decision issued today, the Commission retains the discretion to adjust the civil penalty in recognition of mitigating or aggravating circumstances in individual cases. One of the mitigating circumstances is where

> the Respondent was unable to comply due to a documentable physical or mental condition, either temporary or permanent.[6]/

The case at hand presents just such circumstances, as outlined below.

The Respondent suffered a concussion at work on July 23, 1981. Substantial documentation of his resultant condition was introduced into evidence, including documents detailing his brain damage, headaches, forgetfulness and depression. He was under psychiatric therapy from at least March through July, 1982, the time period covered by the Order to Show Cause, and also received workmen's compensation payments during that period. These facts, combined with his failure to file a 1981 income tax return (thereby subjecting him to possible criminal liability), persuaded the Commission that the Respondent's failure to comply with G.L. c. 268B, §5 was not intentional but caused by his continuing medical problems, physical and mental. Although these facts do not nullify the G.L. c. 268B, §5 violation, the Commission considers them sufficient grounds to forego the assessment of a fine against the Respondent. The Commission's forebearance of a fine here should in no way be read as diminishing the seriousness of a G.L. c. 268B, §5 violation, but rather as attributable to the substantive medical evidence on record in this case.

DATE: January 12, 1983

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[6]/Id. at 5.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory
Docket No. 182

IN THE MATTER
OF
THOMAS A. CHILIK

Appearances:
David J. Burns, Esq.: Counsel for Petitioner
State Ethics Commission
Thomas A. Chilik: **pro se**

Commissioners:
Vorenberg, Ch.,; Brickman, McLaughlin, Mulligan.

DECISION AND ORDER

I. Procedural History

The Petitioner, State Ethics Commission (the Commission), filed an Order to Show Cause on October 22, 1982, alleging that Respondent Thomas A. Chilik (Respondent) had violated Section 5 of M.G.L. c. 268B, the financial disclosure law, by failing to file a Statement of Financial Interests (Statement) within ten days of his receipt of a Formal Notice of Delinquency. The Respondent filed an Answer which admitted the allegations, but questioned the necessity of a fine.

Pursuant to notice, an evidentiary hearing was conducted on November 23, 1982, before David Brickman, a member of the Commission duly designated as presiding officer. See. M.G.L. c. 268B, §4(c). The parties waived briefs, and oral argument was heard by the full Commission on December 20, 1982. In rendering this Decision and Order, each of the four participating members of the Commission has considered the evidence presented by the parties.

II. Findings of Fact[1]/

1. The Respondent, Thomas A. Chilik, general manager of the Greenfield Montague Transportation Area, was required by G.L. c. 268B, §5 to file a Statement for calendar year 1981, on or before May 1, 1982.

2. The Respondent failed to file his Statement on or before May 1, 1982.

3. Pursuant to G.L. c. 268B, §3(f), the Respondent received a written Formal Notice of Delinquency ("Notice") from the Commission on May 13, 1982, requiring him to file a Statement within ten days of receiving the Notice.

4. The Respondent failed to file his Statement within ten days of his receipt of the Notice.

5. The Commission initiated a preliminary inquiry on June 16, 1982, as authorized by G.L. c. 268B, §4(a).

6. The Respondent's Statement was sent on July 23, 1982 and received by the Commission on July 27, 1982.

III. Decision

1. Jurisdiction

The parties agreed that the Respondent was, at all times relevant, subject to the provisions of G.L. c. 268B, §5 and that the Commission was authorized to initiate and conduct adjudicatory proceedings pursuant to that statute.

2. Chapter 268B Allegation

G.L. c. 268B, §5 states, in relevant part:

> (c) Every public employee shall file a statement of financial interest 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. . .
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> . . .
>
> Failure of a reporting person to file a statement of financial interests within ten days after receiving notice as provided in clause (f) of section 3 of this chapter,[2]/ 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.

The elements necessary to establish a G.L. c. 268B, §5 violation are that: (1) the subject was a public employee (as defined by the statute) during the year in question; (2) the subject was notified in writing of his delinquency and the possible penalties for failure to file a Statement; (3) the subject did not file a Statement within ten days of receiving notice.

Inasmuch as the Respondent admitted all the facts which constitute a G.L. C. 268B, §5 violation, the Commission concludes that he violated G.L. c. 268B, §5 by failing to file his 1981 SFI within ten days of receiving a delinquency notice from the Commission. With the violation established, the only issue left for the Commission to address is the sanction to be imposed.

IV. Sanction

In general, the Commission considers G.L. c. 268B, §5 violations, whether technical or flagrant, to be serious infractions which merit a penalty. Under G.L. c. 268B, §4(d),

> upon a finding . . . that there has been a violation of chapter 268A or this chapter, [the Commission may] issue an order requiring the violator to:
>
> (1) cease and desist such violation [of c. 268B];
>
> (2) file any report, statement of other information as required by . . . this chapter; or
>
> (3) pay a civil penalty of not more than $1,000 for each violation of this chapter. . .[3]/

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[1]/These findings were all admitted by the Respondent in his Answer, and were also corroborated by exhibits introduced into evidence at the hearing.

[2]/"[The commission shall] inspect all statements of financial interests filed with the commission in order to ascertain whether any reporting person has failed to file such a statement or has filed a deficient statement. If, upon inspection, it is ascertained that a reporting person has failed to file a statement of financial interests, or if it is ascertained that any such statement filed with the commission fails to conform with the requirements of section five of this chapter, then the commission shall, in writing, notify the delinquent; such notice shall state in detail the deficiency and the penalties for failure to file a statment of financial interests."

[3]/St. 1982, c. 612, §16 raises the maximum fine to $2,000 per violation, effective 3/29/83.

Pursuant to this section, the Commission has adopted a policy of levying civil fines on those who do not file timely statements as required by G.L. c. 268B.[4]/ This policy, which has been followed in numerous Disposition Agreements filed with the Commission, establishes the fine according to the stage of legal proceedings reached by the time the Statement is filed. Commission practice under this policy has been to levy a fine of $250 when a Statement is filed after a preliminary inquiry has been initiated, but before the conclusion of the inquiry.

Of course, the Commission retains the discretion to adjust the civil penalty in recognition of mitigating or aggravating circumstances in individual cases. The Commission suggests that the following factors, if clearly established, might serve as adequate grounds in mitigation of a civil fine:

(1) The Respondent was unable to comply due to a documentable physical or mental condition, either temporary or permanent;

(2) Given the total circumstances, the Respondent made a serious, good faith effort to comply as expeditiously and fully as possible after being put on notice of the filing requirement.

These criteria are not necessarily exclusive, but are intended to give reporting persons notice as to the limited nature of mitigating factors which the Commission will recognize.

Applying the above criteria to the Respondent, no mitigating factors exist in this case sufficient to warrant diminution of the customary fine. To the contrary, the Respondent here ignored several written notices, and waited approximately five weeks after the initiation of the Preliminary Inquiry before filing his Statement. During that time, he made no effort to contact the Commission for clarification of the filing requirement.[5]/

In view of the record, the Commission finds it appropriate to fine the Respondent as requested by the Petitioner in the Order to Show Cause.

V. Order

On the basis of the foregoing, the Commission concludes that Thomas A. Chilik violated M.G.L. c. 268B, §5. Pursuant to the authority granted it by M.G.L. c. 268B, §4(d), the Commission hereby orders Mr. Chilik to pay a civil penalty of $250 for such violation.[6]/

DATE: January 12, 1983

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 190

IN THE MATTER
OF
PATRICK F. JORDAN

DISPOSITION AGREEMENT

This disposition agreement ("agreement") is entered into between the State Ethics Commission ("Commission") and Patrick F. Jordan ("Mr. Jordan") pursuant to Section 11 of the Commission's Enforcement Procedures. 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 April 12, 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. Jordan, a member of the Stoneham Board of Selectmen. The Commission has concluded that preliminary inquiry and, on December 20, 1982, found reasonable cause to believe that Mr. Jordan has violated G.L. c. 268A, §3. The parties now agree to the following findings of fact and conclusions of law:

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[4]/See, Minutes of Commission Meeting, April 7, 1980.

[5]/It should be noted that the Respondent made no contact despite the fact that the notice included a name and telephone number to call if the recipient had any questions.

[6]/In deference to the Respondent's arguments about his inability to pay a fine without suffering financial hardship, the Commission will allow the Respondent the option of satisfying the fine in ten monthly installments at the statutory rate of interest (12%). Under this option the Respondent must make ten payments of $26.40 each, to commence on or before February 1, 1983, with payments due on the first of each month thereafter until the obligation is paid in full.

1. Since May 1977, Mr. Jordan has been a member of the Board of Selectmen for the Town of Stoneham (the "Board") and, as such, at all times material to this agreement was a municipal employee as defined in G.L. c. 268A, §1(g).

2. As a selectman, Mr. Jordan considered and voted upon applications for approval of site plans filed by owners and developers of property located in Stoneham.

3. In January 1980, Mr. Jordan asked Simon Zaltman ("Mr. Zaltman"), a real estate developer in Stoneham, if Mr. Zaltman knew where Mr. Jordan might borrow $5,000. Mr. Zaltman arranged for Mr. Jordan to borrow $5,000 on January 29, 1980 from Nicholas Gouliamas ("Mr. Gouliamas"). This loan was payable on demand and at an interest rate of 13% it was personally guaranteed by Mr. Zaltman.

4. Mr. Jordan made the interest payments due Mr. Couliamas under the loan for the first 2½ months. Thereafter, from approximately April 1980 until June 1982, Mr. Zaltman made the remaining interest payments owed by Mr. Jordan. On or about June 6, 1982, Mr. Zaltman paid Mr. Gouliamas $5,000 to discharge Mr. Jordan's debt and received thereafter from Mr. and Mrs. Jordan a note evidencing their promise to repay the $5,000 plus interest at the rate of 13% from April 29, 1980. No payments of either interest or principal have been made on this note to date.

5. On December 13, 1980, Mr. Zaltman made an unsecured loan of $2,000 to Mr. Jordan, payable on demand and interest-free. To date, Mr. Jordan has made no payments of either principal or interest on this loan.

6. On October 15, 1981, Mr. Zaltman lent Mr. Jordan an additional $2,000 payable on demand and interest-free. This loan was later discharged when Mr. Zaltman withheld $2,000 in commissions owed Mr. Jordan's wife for her work for Mr. Zaltman selling townhouses in the Stoneham condominium development known as Moseley Park.

7. During the period when Mr. Zaltman was making interest payments to Mr. Gouliamas for Mr. Jordan, discharging Mr. Jordan's $5,000 debt to Mr. Gouliamas, and making loans, interest-free, to Mr. Jordan, Mr. Jordan was a selectman and had official dealings with matters in which Mr. Zaltman had a substantial interest.

a. In August 1980, Mr. Zaltman agreed to sell Moseley Park to another developer for $400,000, conditioned on Mr. Zaltman's ability to secure site plan approval and other permits and authorizations needed from the town. Under this agreement, Mr. Zaltman retained exclusive rights to sell units at the development for a commission of approximately $4,000 per townhouse.

b. On October 6, 1980, Mr. Jordan voted to approve Mr. Zaltman's site plan for the Moseley Park development which provided for forty-seven townhouses.

c. On October 21, 1980, Mr. Zaltman sold Moseley Park under the August 1980 agreement and took back a $251,000 second mortgage from the purchaser

d. On April 21, 1981, Mr. Jordan voted to approve Mr. Zaltman's amended site plan for Moseley Park which increased the number of townhouses to be built to fifty. As a result of the approval of the amended site plan, Mr. Zaltman's potential commissions on the project were increased by approximately $12,000.

8. Section 3(b), G.L. c. 268A, provides in pertinent part that a municipal employee, other than as provided by law for the proper discharge of his 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.

9. By receiving from Mr. Zaltman items of substantial value -- i.e., the guarantee and interest and principal payments on the first loan and the interest-free second and third loans -- Mr. Jordan violated section 3(b) because these items were given to Mr. Jordan in view of his official duties as a member of the Stoneham Board of Selectmen and his responsibilities for approving site plans. As the Commission stated in **In the Matter of George A. Michael**, Commission Adjudicatory Docket No. 137, Decision and Order, p. 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 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 obligated 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 instructions 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 to which Mr. Jordan has agreed:

1. That he pay the Commission the sum of one thousand dollars ($1,000) forthwith as a civil penalty for violating G.L. c. 268A, §3(b), because he received interest and principal payments and interest-free loans for or because of his acts and responsibilities as a member of the Stoneham Board of Selectmen;

2. That he pay the Commission the sum of nine hundred dollars ($900) as a forfeiture of the economic advantage he gained -- that is, the interest foregone by Mr. Zaltman -- as a result of this violation of G.L. c. 268A, §3(b);

3. That he refrain from participation in any matters in which Mr. Zaltman has a financial interest coming before the Stoneham Board of Selectmen while Mr. Jordan is a member until the outstanding debt to Mr. Zaltman is repaid; and

4. 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: February 4, 1983

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory
Docket No. 191

IN THE MATTER
OF
DONALD S. POTTLE

DISPOSITION AGREEMENT

This disposition agreement ("agreement") is entered into between the State Ethics Commission ("Commission") and Donald S. Pottle ("Mr. Pottle") pursuant to section 11 of the Commissions's **Enforcement Procedures.** This agreement constitutes a consented to final Commission order enforceable in the Superior Court pursuant to G.L. c. 268B, §4(d).

On April 15, 1982, the Commission initiated a preliminary inquiry into whether Donald Pottle, director of the state's Waste Water Treatment Plant Operators Training Program ("OTP"), violated G.L. c. 268A with respect to his association, financial interests, and activities on behalf of Environmental Engineering Services, Inc. ("EES"), a private firm which conducted programs similar to OTP. The Commission concluded that preliminary inquiry and on January 11, 1983, found reasonable cause to believe that Mr. Pottle violated G.L. c. 268A, §§4(a), 4(c), 23(a), 23(d), and 23(e). The parties now agree to the following findings of fact and conclusions of law.

1. Mr. Pottle was the state's OTP director from 1972 to March 1982. The OTP's purpose is to provide training to individuals responsible for the operation of waste water treatment plants ("WWTP's"). In addition, the OTP provides review and upgrading sessions to enable individuals to pass the state's certification examinations required for persons in charge of public or private WWTP's.

2. As OTP director, Mr. Pottle was responsible for scheduling courses, scheduling applicants, developing course curriculum and related materials. In addition, Mr. Pottle acted as the primary instructor for the OTP basic advanced courses. The OTP basic and advanced courses

were generally given by Mr. Pottle twice per year and were open to anyone, subject to classroom and laboratory space restrictions. No tuition was charged for those courses.

3. During the period October 1979, through March 1982, Mr. Pottle was associated with EES, as an incorporator, member of its board of directors, vice president and stockholder. One of EES' primary activities during that period was to provide private WWTP operator training, for profit.

4. During the period October 1979, through August 1981, Mr. Pottle received compensation from EES and another firm in relation to the following private WWTP operator training courses:

a. In November 1979, a 28-week course given to employees of Digital Equipment Corporation's, Hudson WWTP. Digital paid EES $12,000 for the course. Mr. Pottle, as an employee of EES taught portions of that course and received compensation from EES for 81½ hours, totalling approximately $4,075.00.

b. In July 1980, Mr. Pottle gave five afternoon lectures to Westford Anodizing Corporation employees. Westford paid Pottle $875 for his services, travel and related administrative expenses.

c. In December 1980, EES gave a course to employees of three Worcester area companies. The course consisted of 12 evening sessions. EES was paid $4,800 for that course. Mr. Pottle taught six of those sessions and received compensation from EES for 33 hours, totalling approximately $1,650.00.

d. In May 1981, EES contracted with the city of Lowell CETA administration to provide a 15-week, full-time course to CETA participants. EES received $29,040 for that course. Mr. Pottle, as an employee of EES taught portions of that course and received compensation from EES for 120 hours, totalling approximately $6,000.00.

5. Section 4(a) of G.L. c. 268A prohibits a state employee from receiving compensation from anyone other than the commonwealth in relation to any particular matter in which the commonwealth has a direct and substantial interest. The training courses offered by the OTP and EES were nearly identical in course content, format and materials utilized. In addition, the private training courses provided by EES and Mr. Pottle were offered to the same pool of clients/applicants which the OTP was designed to service. By receiving compensation as an employee of EES or directly from the private firms involved, Mr. Pottle violated G.L. c. 268A, §4(a).[1]/

6. During the period December 1981, to March 1982, Mr. Pottle acted as the agent of EES in connection with the following private WWTP operator training courses:

a. In February 1982, Mr. Pottle, as OTP director, was contacted by Digital Equipment Corporation and asked about training courses for its Stow WWTP employees. Mr. Pottle advised them that EES could provide a training program during March and April of 1982 for a fee. Mr. Pottle subsequently submitted a written proposal to Digital on behalf of EES offering to provide training to Digital employees for a fee of $12,000. The proposed course syllabus was nearly identical to the state OTP's and indicated that Mr. Pottle would teach some of the session.

b. In February of 1982, Wayland officials contacted Mr. Pottle inquiring about state OTP courses for their employees. Mr. Pottle advised that no further OTP courses were scheduled before the next state certification examination to be given in August of 1982. Mr. Pottle advised further, however, that EES had previously scheduled a private training program for Digital's employees and indicated that municipal employees could take that course for an additional fee. Mr. Pottle subsequently submitted a written proposal on behalf of EES offering to train up to four

[1]/Even if Mr. Pottle was a state employee whose official duties were unrelated to the OTP, the §4 prohibitions would apply. The determinative factor is whether the activity for which Mr. Pottle was privately paid, the private training, is a matter in which the state has a direct and substantial interest. Nevertheless, the direct overlap between Mr. Pottle's official duties as director of the state's OTP and his activities in connection with private training, was a factor considered by the Commission in determining the appropriate sanction for Mr. Pottle's §4 violations.

municipal employees at a cost of $4,500.

c. In March of 1982, Mr. Pottle was contacted by representatives of the Massachusetts Air National Guard at Otis Airforce Base concerning state OTP training courses. Mr. Pottle advised that the state OTP course could not be offered at Otis Airforce Base, but that EES could offer such a service for a fee. EES subsequently submitted a written proposal to the Air National Guard offering to train up to 15 people for a fee of $14,620. The proposed training course syllabus was nearly identical to that of the state OTP.

7. Section 4(c) of G.L. c. 268A prohibits a state employee from acting as agent for anyone other than the commonwealth in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest. By submitting private WWTP operator training proposals on behalf of EES, Mr. Pottle acted as EES' agent in connection with a particular matter in which the commonwealth had a direct and substantial interest, WWTPO training. Mr. Pottle, therefore, violated G.L. c. 268A, §4(c).

8. In addition to his activities on behalf of EES and compensation received from that firm, as outlined above, Mr. Pottle received compensation from the commonwealth for approximately 70 hours of service which overlapped with hours when Mr. Pottle was performing services for and receiving compensation from EES in connection with private OTP training courses.

9. Section 23(d) of G.L. c. 268A prohibits a state employee from using his position to secure unwarranted privileges for himself or others.

10. By submitting time sheets and accepting his state salary during periods in which he was privately paid by EES for his private activities, Mr. Pottle violated G.L. c. 268A, §23(d).

11. By assisting EES in developing and presenting a private training course nearly identical to the state OTP course and advising interested persons who had contacted him about OTP that he and/or EES could provide private training for a fee, Mr. Pottle also violated G.L. c. 268A, §23(d).

12. Section 23(a) of G.L. c. 268A prohibits a state employee from accepting other employment which will impair his independence of judgment in the exercise of his official duties. By accepting employment with EES, Mr. Pottle's decisions as OTP director were impaired because his official decisions to schedule applicants or to schedule state OTP training courses could affect the number and availability of clients desiring similar training from EES for a fee. Mr. Pottle, therefore, violated G.L. c. 268A, §23(a).

13. Section 23(e) of G.L. c. 268A prohibits a state employee from giving reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties. By engaging in activities on behalf of EES in which he directed interested persons and firms who had contacted him about the state OTP to EES' private training courses, Mr. Pottle violated G.L. c. 268A, §23(e).

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 and terms agreed to Mr. Pottle:

1. that he pay to the Commission the sum of $2,500:

a. $1,000 for violating G.L. c. 268A, §4(a), by receiving compensation from EES in connection with particular matters in which the state had a direct and substantial interest

b. $1,000 for violating G.L. c. 268A, §4(c), by acting as agent for EES in connection with particular matters in which the state had a direct and substantial interest

c. $500 for violating G.L. c. 268A, §23(d).[2]/

2. that he pay to the Commission the sum of $1,000 as reimbursement to the commonwealth

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[2]/by using his state position to secure an unwarranted privilege for himself, i.e. being paid privately for the same hours he was being paid by the state. Because Mr. Pottle's violations of G.L. c. 268A, §§23(a), 23(d) and 23(e) described in paragraphs 11, 12 adn 13 above, are cumulative of his violations of G.L. c. 268A, §§4(a) and 4(c), no additional civil penalty is imposed.

for his state salary received while he was also receiving private compensation in connection with his private training activities; and

3. that he pay the Commission the sum of $3,000 as recoupment of his economic advantage gained in connection with his private training activities violating G.L. c. 268A, §§4 and 23; and

4. 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 proceeding to which the Commission is a party.

DATE: February 4, 1983

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 153

IN THE MATTER
OF
MICHAEL W. C. EMERSON

Appearances:

Stephen P. Fauteux, Esq.: Counsel for Petitioner State Ethics Commission

Paul G. Holian, Esq.: Counsel for Respondent Michael W. C. Emerson

Commissioners:

Vorenberg, Ch.; Brickman, Mulligan

DECISION AND ORDER

I. Procedural History

The Petitioner initiated these adjudicatory proceedings on April 27, 1982 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, Michael W. C. Emerson, while employed as a consultant by the City of Leominster (city) in connection with a wastewater treatment plant construction project (Project), had violated M.G.L. c. 268A, §19, by participating as a municipal employee in particular matters in which his business partner, Thomas Crabtree, a sole officer, director and stockholder of UTS of Massachusetts, Inc. (UTS of Mass.), had a financial interest.

Specifically, Mr. Emerson was alleged to have participated in 1) the hiring of UTS of Mass. as a contractor to do testing on the Project; 2) the review and/or approval of reports submitted to the City by UTS of Mass.; and 3) the review and/or approval of invoices for payment submitted by UTS of Mass. to the City. The Petitioner also alleged that Mr. Emerson used his official position to secure an unwarranted privilege for UTS of Mass. and Mr. Crabtree by recommending that the City contract with UTS of Mass., and that the Respondent pursued a course of conduct giving reasonable basis for the impression that Mr. Crabtree, his business partner and associate in other firms, could improperly influence or unduly enjoy his favor in the performance of his official duties in violation of M.G.L. c. 268A, §§23(d) and (e) respectively.

The Respondent's Answer denied these allegations and asserted three affirmative defenses. Only one of these, that the Respondent was not a municipal employee within the meaning of the definition of that term in M.G.L. c. 268A, §1(g), was subsequently pursued by the Respondent.

Following approximately two months of discovery, the adjudicatory hearing commenced on August 5, 1982 before Commissioner Joseph I. Mulligan, Jr., the Presiding Officer designated pursuant to M.G.L. c. 268B, §4(c), and was completed on September 3, 1982 after six days of testimony. The parties thereafter filed briefs with the Commission and presented oral arguments before the three Commissioners participating in the case on December 20, 1982.[1]/ In Rendering this Decision and Order, each of the participating Commissioners has read and/or heard the evidence and arguments presented by the parties.

II. Findings of Fact

1. The Respondent is a consulting engineer with a doctorate in civil engineering and is currently in his third year of law school.

[1]/Commissioner Bernard P. McLaughlin abstained from all matters in connection with this case ab initio. Commissioner Marver Bernstein's term expired on or about October 20, 1982. His successor, Francis M. Burns, was sworn into office on January 10, 1983 and has not participated in this Decision and Order.

The Partnership

2. On August 13, 1974, the Respondent, Mr. Crabtree and Donald Jones formed a partnership named Richardson Properties (Partnership) for the purpose of buying and managing property. The Partnership Agreement (Agreement) provided that any partner could withdraw six months after notifying the other parties of his intent to do so. The Agreement did not provide that the Partnership was established for a specific period of time or to accomplish a particular objective.

3. The Partnership purchased two buildings; one located at One Richardson Lane in Stoneham, Massachusetts, and the other at 20 Lomasney Way in Boston. Both properties, at least in part, were leased as office space by various tenants, including UTS of Mass., during the time the Partnership was in existence.

4. By letter of January 16, 1980, Mr. Jones offered to sell his interest in the Partnership to Mr. Crabtree and the Respondent. This offer was rejected.

5. On February 1, 1980, Mr. Jones gave notice that he was withdrawing from the Partnership six months from that date, in accordance with the terms of the Agreement.

6. On August 1, 1980, Mr. Jones's withdrawal from the Partnership became effective. Mr. Crabtree and the Respondent continued to let and manage the properties owned by the Partnership until their disposition in early 1982. During 1981, the Partnership grossed $23,399.00 in rental income from the two properties.

7. In addition to the Partnership, Respondent and Mr. Crabtree were associated with two other business entities, Yale Survey, Inc. and Universal Testing Services, Inc., the latter being the corporate predecessor of UTS of Mass. Respondent owned stock in each of these corporations and also served as a director. These firms conducted no significant business activity after 1979.

The Project

8. During all times relevant, the City was proceeding with the design and/or construction of the Project, Wastewater Treatment Plant Project No. C250336-03. Actual construction began in the fall of 1980. The City was to be reimbursed with federal and state funds for up to 90 percent of the costs associated with the Project, provided that construction was conducted in compliance with certain regulations and guidelines. The Environmental Protection Agency (EPA) and the Division of Water Pollution Control (DWPC) were the federal and state agencies, respectively, overseeing the Project.

9. During all times relevant, Metcalf & Eddy (M & E) was the firm acting as Resident Engineer on the Project, assigned to oversee all phases of the construction.

10. Raymond D. Harper was elected Mayor of the City in 1979 and commenced a two-year term in January of 1980. As the City's chief executive officer, Mayor Harper was responsible for the Project, and his approval was required before any invoices were paid by the City.

11. During all relevant times, Mr. Crabtree was the sole officer, director and stockholder of UTS of Mass. and that firm leased office space from the Partnership.

12. On November 4, 1980, Mr. Crabtree met with Mayor Harper at the Leominster City Hall to discuss the hiring of UTS of Mass. to perform testing and inspection work on the Project. After this meeting, Mr. Crabtree believed that UTS of Mass. would be hired by the City.[2]/

13. Within weeks of the commencement of construction of the Project, invoices submitted by contractors were not being processed and approved by Mayor Harper in accordance with EPA procedures because of Mayor Harper's distrust of M & E and his lack of technical knowledge upon which to base his approvals of these invoices. The City's Director of Public Works had refused to aid Mayor Harper in connection with the Project, claiming that his other duties precluded such assistance.

14. On December 31, 1980, Mayor Harper and the Respondent executed an "Engineering Agreement" stating, in material part, that the "City . . . retains the services of Dr. Michael W. C. Emerson P.E. as agent and liaison engineer to coordinate efforts, make recommendations, approve or disapprove work, oversee and advise on all work in connection with the [Project], sewer improvements, solid waste disposal program

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[2]/Although Mayor Harper testified that he did not recall this meeting, the Commission credits the testimony of Mr. Crabtree, as corroborated by Mr. John Gorham, in regard to the occurrence and substance of this meeting.

and any other administrative engineering services required. . ." The Engineering Agreement further provided that the Respondent was to be paid $30.00 per hour plus expenses.

15. Mayor Harper did not have City funds in his budget to pay the Respondent, nor had he complied with EPA regulations requiring prior approval before hiring an administrator/engineer who would be compensated from Project funds.

16. The Respondent began performing services for the City on January 2, 1981 and last performed work pursuant to the Engineering Agreement on March 26, 1981. The Respondent submitted for payment detailed descriptions of his services rendered to the City. On February 2, 1981, the Respondent billed the City for $3,240.00 for services rendered during January, 1981 and received that compensation. On April 9, 1981, Respondent submitted a bill for $4,365.00 for the months of February and March. The latter bill has never been paid and is the subject of litigation between the Respondent and the City.

17. On January 6, 1981, the Respondent established a procedure for reviewing and approving pay estimates submitted to the City by M & E. These pay estimates related to work performed by M & E and the general contractor on the Project. The five steps in this procedure were: 1) Monthly pay estimates prepared by M & E; 2) Pay estimate checked and approved or disapproved by the Respondent; 3) City Department of Public Works approval based on Respondent's approval; 4) Approval of Mayor's Office; and 5) Payment by City accounting office.

18. On January 8, 1981, Mayor Harper, the Respondent, James F. Connors, who was the City Solicitor, and others met regarding the Project. Among the topics discussed was the hiring of testing firms. The Respondent stated at this meeting that the firms being discussed, including UTS of Mass., were technically qualified to perform the work for which they applied. The Respondent used as a point of reference the fact that he and Mr. Crabtree had been associated in the past with two corporations and certain real estate dealings. The Respondent did not disclose any ongoing business relationship in existence between himself and Mr. Crabtree.

19. On January 14, 1981, Mr. Crabtree was interviewed at City Hall in connection with the UTS of Mass. proposal to perform testing services on the Project. Mayor Harper and the Respondent were present at this interview.

20. On or about January 27, 1981, UTS of Mass. was hired by Mayor Harper and began to perform testing services on the Project. UTS of Mass. invoices for payment were submitted directly to the Mayor's office. During the three months that the Respondent performed services for the City, Mayor Harper approved UTS of Mass. invoices upon the advice and recommendation of the Respondent following Respondent's review and approval.[3]/

21. On February 17, 1981, the Respondent drafted a letter to the EPA, signed by Mayor Harper, detailing the scope of the Respondent's responsibilities as a consultant to the City. Among these responsibilities was included the management of the City's cash flow to meet all pay requirements connected with the Project.

22. On March 1, 1981, UTS of Mass. submitted an invoice for $1,297.00 for services rendered from January 30, 1981 to February 29, 1981. Mayor Harper approved that invoice authorizing payment by the City on March 6, 1981.

23. In late March or early April of 1981, following the Respondent's resignation from his position with the City, a meeting was held by the Leominster City Council in connection with the payment of invoices submitted by contractors working on the Project. Mr. Crabtree, other contractors on the Project and representatives of M & E were among those present. At this meeting, it was agreed that from then on Mr. Crabtree would send UTS of Mass. invoices to M & E, which would approve and submit them to the City's Director of Public Works, rather than continuing to send UTS of Mass. invoices directly to the City.

24. From January, 1981 through March, 1981, UTS of Mass. had a contract for services with the Chelsea Jewish Nursing Home. The Respondent was employed by UTS of Mass. as a consultant in connection with this contract and received at least $2,759.30 as payment for his services.

III. Decision

The Respondent has been charged with violations of M.G.L. c. 268A, §§19, 23(d) and 23(e).

[3]/The Commission makes this finding contrary to the contentions of the Respondent for reasons set out in the Decision. See p. [143], infra.

Before considering these substantive allegations, the Commission will address a procedural matter raised by the Respondent.

A. Alleged Failure of Petitioner to Comply With Discovery Requests

The Respondent alleges that the Petitioner has failed to produce discoverable documents and, as a result, that Respondent has been denied a full and fair hearing in this case. For the reasons set out below, the Commission concludes otherwise.

On July 16, 1982, Respondent served upon the Petitioner an Amended Request for Production and Inspection of Documents. Among the list of documents specifically requested were:

> "Copies of all sworn and unsworn statements made by potential Hearing witnesses taken as a result of the Commission's investigation of the Respondent."

Following conclusion of the hearing in the case, Respondent, on October 26, 1982, made a motion to compel production of documents pursuant to the above-quoted request, citing certain hearing testimony as indicating that such a statement by Mayor Harper was in the possession of the Petitioner and had not been produced. Petitioner responded that the statement referred to by Mayor Harper in his testimony was a compilation of notes taken by an investigator which Mayor Harper had subsequently refused to sign and adopt as his statement. Petitioner urged that the Commission utilize the definition of "statements" found in Rule 26 of the Massachusetts Rules of Civil Procedure:

> (A) [A] written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

The Presiding Officer on November 1, 1982 allowed the motion to compel production to the extent that Petitioner possessed "statements" as defined in MRCP Rule 26.[4]/ Petitioner responded that no such "statements" were in his possession, all having been provided to the Respondent on or before August 16, 1982.

On November 24, 1982, Respondent moved for an independent examination of Petitioner's documents by the legal advisor to the Presiding Officer, in order to ascertain whether Petitioner had complied with the orders of the Presiding Officer. That motion was denied on that date. In a supplementary document filed on December 31, 1982, Respondent requested that the Commission set forth its reasons for denying this independent investigation.

The Commission denial of the motion for such an independent examination is based on two factors: 1) the Commission does not believe that Petitioner has in his possession any "statement" as contemplated by MRCP Rule 26; and 2) Respondent was not prejudiced by this denial.

The definition of "statement" in Rule 26 (see p. 10) narrowly limits the scope of that term for discovery purposes. That definition was explicitly adopted by the Presiding Officer in this case.

Respondent at no time alleges that the document sought is one signed or otherwise adopted by the Mayor. Mayor Harper specifically states that he did not comply with the Commission's request that he sign and adopt it as his statement, bringing the evidentiary value of the document into question regardless of its origin. Further, Mayor Harper's characterization of the document in his testimony as a "recorded statement" not only was in response to Respondent counsel's suggestion that it was a "recorded statement," but, also, does not require the conclusion that the interview was mechanically or electronically recorded. Absent additional evidence that Petitioner possessed a "statement" as defined in MRCP Rule 26, the Commission accepts Petitioner's declarations that the interview transcript described by Mayor Harper was a compilation of notes of an investigator and not a transcription of a stenographic, mechanical, electrical or other recording. Such a compilation does not satisfy the definition in MRCP Rule 26. 7 Mass. Practice 211 (Smith and Zobel 1975). The fact that the Petitioner sought Mayor Harper's verification of the contents of the document supports this conclusion.

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[4]/As a result of a typographical error, the Ruling on Pending Motions on November 1, 1982 referred to MRCP Rule 26(b)(2). Examination of that Rule discloses its application to discovery of insurance agreements rather than statements. Rule 26(b)(3) addresses discovery of statements. Neither party raised this discrepancy nor alleged any prejudice resulting from it.

Moreover, Respondent was not prejudiced by his inability to obtain a copy of this document. Respondent was made aware of its existence during the hearing on August 6, 1982 while cross-examining Mayor Harper. On the next hearing day, Respondent attempted to impeach Mayor Harper's direct testimony with the contents of the document which the Mayor had refused to sign. At this time, Respondent's counsel refused the Presiding Officer's offer to have the document marked for identification. Respondent, therefore, was aware of the existence of the document, its source and, at least in part, its contents, yet made no demand for its production at that time, nor during the three days of hearing which followed.

The only testimony of Mayor Harper which is part of the evidence in this case is that elicited under oath at the hearing. The proper way for Respondent to attempt to impeach that testimony is on cross-examination or through rebuttal testimony during the hearing. The record reflects no effort by Respondent to obtain this document at a time when it could have been used for these purposes. Respondent was not prejudiced by being unable to obtain, after the closing of the hearing, an unsworn document which is not a part of the record in the case. Therefore, the refusal to grant Respondent's request for an independent examination of Petitioner's documents did not deny Respondent a full and fair hearing. See **NLRB v. Interboro Contractors, Inc.,** 432 F.2d 854, 860 (2nd Cir. 1970), cert. denied 402 U.S. 915 (1971); also **Vermont Board of Health v. Town of Waterbury,** 129 Vt. 168, 274 A.2d 495, 499 (1970); also 4 Mezines, Stein, Gruff, **Administrative Law,** §23.01[1] (1982).

B. M.G.L. c. 268A Allegations

1. Section 19

The Commission concludes that the Respondent participated as a municipal employee of the City of Leominster in a particular matter in which his business partner, Mr. Crabtree, had a financial interest, in violation of M.G.L. c. 268A, §19. Specifically, the Commission finds by a perponderance of the evidence in the record that Mr. Emerson, in his role as administrator/engineer for the City, made or recommended approval of payment of an invoice for $1,297.00 submitted to the City by UTS of Mass. and that Mr. Crabtree, Respondent's partner in the Partnership, had a financial interest in those approvals as sole officer, director and stockholder of UTS of Mass.

Section 19 states, in relevant part, that

> a municipal employee who participates as such an employee in a particular matter in which to his knowledge . . . [his] partner . . . has a financial interest [violates this section] . . .
>
> It shall not be a violation of this section (1) if the municipal employee first advises the official responsible for appointment to his position of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives a written determination made by that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee. . .

a. Municipal Employee

The Commission finds that the Respondent was a municipal employee for the purposes of §19 during the time that he was providing services to the City from January to March of 1981.

"Municipal employee" is defined, in relevant part, as a person performing services for a municipal agency,[5]/ 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. M.G.L. c. 268A, §1(g). Because the term is specifically defined in the conflict of interest law, that definition supersedes any other definition which might be used for other purposes. Compare M.G.L. c. 32, §1 (definition of "employee" for state retirement law); also M.G.L. c. 150E, §1 (definition of "employee" for state labor relations law).

Respondent does not deny performing services for the Mayor and the City. The definition

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[5]/Municipal agency is defined 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." M.G.L. c. 268A, §1(f).

above does not require a contract, does not require payment for services and imposes no requirement that a municipal employee's hiring be in accord with federal EPA procedures, municipal budget requirements or municipal law, as asserted by Respondent in his affirmative defense. The performance of services for a municipal agency makes one a municipal employee and, as a result, subject to M.G.L. c. 268A, §19. Admittedly broad in scope, this definition assures protection of citizens from malfeasance by persons performing services in municipal government who might cloud their employment relationship in order to escape liability for unlawful acts.

b. Participate as such an Employee in a Particular Matter

Participation for purposes of M.G.L. c. 268A, §19 is defined as participation 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. M.G.L. c. 268A, §1(j) emphasis added). A particular matter is any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court. M.G.L. c. 268A, §1(k).

The Commission finds that the approval for payment of a UTS of Mass. invoice constitutes a decision and, therefore, a particular matter. The Commission also finds that the Respondent participated in this particular matter personally and substantially by recommending or advising that Mayor Harper give his required approval.

The Respondent contends that he had no power to approve payment of invoices for the Project and, as a result, did not participate as contemplated in §19. That Respondent did not "approve" the invoices may, in one sense, be technically true, since the legally significant approval on each invoice was that of Mayor Harper. The evidence, however, supports the finding that any approval made by Mayor Harper during the tenure of Respondent's City employment was predicated on the assurance by the Respondent that such approval was proper.

Mayor Harper and Mr. Connors, the City Solicitor, agree in their testimony that pay vouchers related to the Project were accumulating prior to Respondent's hiring because Mayor Harper did not feel qualified to assess their validity. The Mayor testified that resolving this back-up problem was the first task for the Respondent to undertake, and Mr. Emerson testified that this was, in fact, his first project. Prior to the hiring of UTS of Mass., the Respondent set up the procedure for reviewing and approving M & E pay estimates which clearly establishes his role in reviewing and approving or disapproving those submissions. The letter of February 17, 1982, describing Respondent's responsibilities in connection with the Project, includes the management of the City's cash flow to meet all pay requirements connected with the Project. And, while the Respondent was performing services for the City, UTS of Mass. invoices were sent directly to the Mayor's office for approval. One such invoice, submitted by UTS of Mass. on March 1, 1981, was approved by Mayor Harper on March 6, 1981. These facts combine to create the inference that, pursuant to his duty to approve invoices submitted to the City by contractors on the Project, Mr. Emerson acted on the UTS of Mass. invoice submitted March 1, 1981. The evidence also supports a finding that the Mayor's approval of this invoice was based on the recommendation and advice of the Respondent that such approval should be made.[6]/

Petitioner alleged additional violations of M.G.L. c. 268A, §19, based on Respondent's participation in 1) the hiring of UTS of Mass. by the City, and 2) the review and approval of testing reports made by UTS of Mass. The Commission finds that there is insufficient evidence to support these allegations.

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[6]/Respondent submits that his role in connection with invoices submitted to the City was solely organizational: i.e. he set up a filing system and organized the approval process. The weight of the evidence does not support this claim. Respondent was hired specifically for the expertise he could impart on a phase of the Project in which the Mayor felt most inadequate: approval of invoices related to highly technical services rendered in connection with the Project. These invoices remained unpaid and were accumulating before Respondent's hiring. In a matter of a few days, Respondent had made progress in relieving this backlog. If the solution to this problem was the establishment of a bookkeeping system, as Respondent alleges, such services could most likely have been obtained in a way other than by hiring a professional engineer at $50.00 per hour.

c. In Which to His Knowledge His Partner has a Financial Interest

The Commission finds that Mr. Emerson knew that Mr. Crabtree was his partner and that, as sole officer, director and stockholder of UTS of Mass. Mr. Crabtree had a financial interest in the approval of the invoices submitted to the City.

The Respondent has maintained throughout these proceedings that upon Mr. Jones's withdrawal in August, 1980 the Partnership was dissolved. Therefore, he asserts, he and Mr. Crabtree were no longer partners after that time, even though the Partnership business continued for over a year.

In Massachusetts, partnerships are governed by M.G.L. c. 108A. Partnerships not created for a definite term or for a particular undertaking are partnerships at will and may be dissolved simply by the withdrawal of any one of the partners. M.G.L. c. 108A, §31(1)(b). Dissolution of a partnership is the change in the relation of the partners caused by a partner's withdrawal. M.G.L. c. 108A, §29. Dissolution is followed by winding-up of partnership affairs in which the business or property interests of the partnership are transferred or otherwise disposed of. However, the partnership does not terminate its existence during the winding-up period. The partnership itself continues to exist until its affairs are completely wound-up -- then it is terminated. M.G.L. c. 108A, §30.

The Partnership created by the Respondent, Mr. Crabtree and Mr. Jones was dissolved in accordance with M.G.L. c. 108A, §29 on August 1, 1980, the effective date of the withdrawal of Mr. Jones. The Partnership did not terminate at that time. The Respondent and Mr. Crabtree remained partners throughout the period that the Partnership's business continued, including the period in which the Respondent was employed by the City.

The evidence amply supports a finding that the Respondent knew he was a partner in the Partnership with Mr. Crabtree during the relevant period. The Partnership business was continuing, even renting office space to UTS of Mass. in its Stoneham property. The Partnership grossed over $23,000.00 in income during 1981. The Respondent admits receipt of a Federal income tax statement reflecting his share of the Partnership's income earned in 1981. Each of these unambiguous facts indicates that, after the withdrawal of Mr. Jones, the Partnership continued. It is unreasonable to believe that Respondent ignored all these factors and relied on an incorrect reading of a single section of state law to conclude that the Partnership no longer existed.[7]/

Mr. Crabtree's financial interest in the approval of UTS of Mass. is not contested. As sole officer, director and stockholder of UTS of Mass., he had a financial interest in invoices submitted for payment by the firm.

d. Disclosure and Exemption

The Commission finds that Respondent's reference to past business associations with Mr. Crabtree at the January 8, 1981 meeting with Mayor Harper and Mr. Connors was not a "full disclosure" as called for by the second paragraph of M.G.L. c. 268A, §19.

Mr. Connors's testimony under oath established that the Respondent did not disclose any ongoing business relationships with Mr. Crabtree.[8]/ Not only was the existence of the Partnership not disclosed, but, neither was the Respondent's consulting arrangement with UTS of Mass. or that firm's tenancy in the Partnership's Stoneham property. Absent full disclosure of relationships, like the Partnership, which implicate the provisions of M.G.L. c. 268A, §19, no valid exemption can be granted by an appointing official. Assuming **arguendo** that the Respondent related his past relationships with Mr. Crabtree in order to ascertain whether a conflict of interest existed and Mayor Harper, on the advice of Mr. Connors, determined that a conflict was not present, any exemption granted would be invalid because of the incomplete disclosure. Moreover, Respondent at no time claims that he received the written determination called for in §19.

The provisions of §19 are logical and clear. A public employee should not take official action in matters wherein those associated with him in the ways listed in §19 have a financial interest.

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[7]/The Commission is not persuaded by Respondent's testimony on the last day of the hearing that his wife, an attorney, had given an opinion to the effect that the Partnership no longer existed.

[8]/Respondent's testimony that he fully disclosed all his relationships with Mr. Crabtree, including the "winding-down" of a real estate partnership, is not supported by the evidence.

See **In the Matter of James J. Craven, Jr.,** Commission Adjudicatory Docket No. 110, Decision and Order, pp. 13-14, (June 18, 1980), aff'd. sub nom. **Craven v. Vorenberg et al,** Suffolk Superior Civil Action No. 43269 (1981), appeal pending (re: M.G.L. c. 268A, §6). The objective is plain: Decisions and actions of a public employee should be made exclusive of the private financial interests of those to whom he is related by blood or in business. Exemption is available, but should be judiciously granted, and only in strict compliance with the procedure described, in order to protect the public interest. See, **In the Matter of William G. McLean,** Commission Adjudicatory Docket No. 143, Decision and Order, p. 11, (January 8, 1982). No such exemption was granted in this case.

2. **Section 23**

In the Order to Show Cause initiating these proceedings, Petitioner alleged that the Respondent violated §§23(d) and 23(e) of M.G.L. c. 268A in addition to §19. Following the close of the adjudicatory hearing, Petitioner chose not to pursue the alleged violation of §23(d).

Subsection 23(e) provides that no officer or employee of a municipal agency shall:

> 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.

The Commission concludes that the facts on which a finding of a violation of 23(e) would be based primarily are those which comprise the §19 violation. Those additional facts which Petitioner would contend justify a separate violation of §23(e), i.e. Respondent's failure to disclose his consulting arrangement with UTS of Mass. and that firm's rental of Partnership office space, are neither distinct enough nor sufficient in and of themselves to support a separate and non-cumulative violation of §23(e).

IV. Order

On the basis of the foregoing, the Commission concludes that Mr. Michael W. C. Emerson violated M.G.L. c. 268A, §19. Pursuant to its authority under M.G.L. c. 268B, §4(d), the Commission hereby orders Mr. Emerson to:

> Pay $500 (five hundred dollars) to the Commission as a civil penalty for participating as a municipal employee of the City of Leominster in a particular matter in which to his knowledge his partner, Mr. Thomas Crabtree, had a financial interest.

The Commission orders Mr. Emerson to pay this penalty of $500 (five hundred dollars) to the Commission within thirty days of the receipt of this Decision and Order.

DATE: February 14, 1983

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 175

IN THE MATTER
OF
ANN R. CARROLL

Appearances:
Marilyn L. O'Connell, Esq.: Counsel for the State Ethics Commission
William J. Carroll, Esq.: Counsel for the Respondent Ann R. Carroll

Commissioners:
Vorenberg, Ch.; Brickman, Burns, McLaughlin, Mulligan

DECISION AND ORDER

I. Procedural Background

The Petitioner initiated these adjudicatory proceedings by filing an Order to Show Cause on October 1, 1982 pursuant to the Commission's Rules of Practice and Procedure, 930 CMR 1.01 (5)(a). The Order alleged that the Respondent Ann R. Carroll, Director of Student Services at

Quinsigamond Community College (QCC) had violated G.L. c. 268B, §5[1]/ by failing to file her Statement of Financial Interests (SFI) for calendar year 1981 within ten days of her May 10, 1982 receipt of a Formal Notice of Delinquency (Notice) from the State Ethics Commission (Commission). In her Answer, the Respondent contended that she did not receive the Notice until her return from an out-of-state conference on May 17, 1982 and that the Commission received her SFI within the permissible ten-day period following her receipt of the Notice.

An adjudicatory hearing was conducted in this matter on November 16, 1982 before Commissioner Bernard McLaughlin, who was designated as the Presiding Officer under G.L. c. 268B, §4(c). The parties thereafter filed post-hearing briefs and waived oral argument before the full Commission. In rendering this Decision and Order each member of the Commission has considered the testimony, evidence and arguments presented by the parties.

II. Findings of the Facts[2]/

1. The Respondent is the Director of Student Services at QCC and was designated as a reporting person under G.L. c. 268B, §1(r) and was required to file her 1981 SFI by May 1, 1982.

2. The Respondent did not file her 1981 SFI by May 1, 1982.

3. On Friday, May 7, 1982, the Commission sent a Notice by certified mail to the Respondent at her QCC mailing address. The Notice stated that the Commission would commence enforcement proceedings if she failed to file her SFI within ten days after receiving the Notice.

4. On Monday, May 10, 1982, Leo DiPilato, a QCC mailroom employee, signed the signature card for the Notice and sorted the Notice together with regular QCC mail for delivery on that day.

5. The Respondent was at work at QCC on Monday, May 10, 1982 and was preparing for an out-of-state conference which began on the following day and which lasted until the end of that week.

6. The Respondent received the Notice on May 10, 1982 prior to her leaving for the conference.

7. The Respondent returned to QCC on Monday, May 17, 1982. She mailed her 1981 SFI on May 24, 1982, and the Commission received it on May 27, 1982.

III. Decision

The Commission concludes that the Respondent violated G.L. c. 268B, §5 by failing to file her 1981 SFI within ten days after receipt of the Commission's Notice. In so ruling, the Commission finds that the Petitioner has satisfied its burden of proving by a preponderance of the evidence, that the Respondent received the Commission's Notice on May 10, 1982. See, Commission Rules of Practice and Procedure, 930 CMR 1.01(9)(m)(2). The inferences supporting this finding outweigh the Respondent's assertion that she did not receive Notice until after her return from the out-of-state conference. See, **1001 Plays, Inc. v. Mayor of Boston,** 387 Mass. 879, 887 (1983); **Arthurs v. Board of Registration in Medicine,** 1981 Mass. Adv. Sh. 849, 860-861. In particular, the Commission finds persuasive the testimony of Martin Howard, the Commission Executive Accountant, who spoke with the Respondent by telephone on May 25, 1982 at which time she told Mr. Howard that she had put the SFI form aside and had failed to mail it in; and the Respondent's June 16, 1982 letter to Mr. Howard in which she stated "[a]t the time I received the notice, I was preparing for an important seminar out-of-state."

The Commission has carefully considered the evidence inroduced from which a contrary inference may be drawn, but finds the evidence, taken as a whole, unpersuasive. While affidavits in evidence suggest a possibility that a piece of certified mail received by QCC mail room personnel might not be delivered to the addressee on that same day, no QCC mailroom employees could recall handling the particular Notice to the Respondent following DiPilato's signature. Moreover, other evidence suggests that the day of receipt of a certified letter might depend on the time of day that the letter was received in the mailroom and that the Notice could very well

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

Failure of reporting person to file a statement of financial interests within ten days after receiving notice 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.

[2]/Findings 1, 2, 3, 4, 5 and 7, which are undisputed, are based on the Respondent's Answer, exhibits received into evidence during the adjudicatory hearings, and the testimony of witnesses at the hearing. The reasons for Finding 6 are explained in the Decision, infra.

have been received by the Respondent on the same day. Absent first-hand testimony from QCC mailroom employees regarding the actual delivery of the Notice to the Respondent, the Commission finds the inference suggested by the Respondent to be inconclusive. To the extent that the Respondent's hearing testimony regarding the date of receipt of Notice conflicts with her written and oral statements to Mr. Howard, the Commission credits the position of the Petitioner. This finding is supported by the observations of the Presiding Officer who viewed the testimony and deameanor of the witnesses during the hearing and whose observations regarding the conflicting testimony, as found here, are entitled to deference. See, **Duato v. Commissioner of Public Welfare,** 359 Mass. 635, 641 (1971).

IV. Order

On the basis of the foregoing, the Commission concludes that the Respondent Ann R. Carroll violated G.L. c. 268B, §5 by failing to file her 1981 SFI within ten days of her receipt of a Formal Notice of Delinquency from the Commission. Pursuant to its authority under G.L. c. 268B, §4(d),[3]/ the Commission hereby orders the Respondent to pay a civil penalty of $100 (one hundred dollars) to the Commisison within thirty days of receipt of this Decision and Order.

DATE: February 15, 1983

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 193

IN THE MATTER
OF
EUGENE J. MAHONEY

DISPOSITION AGREEMENT

This disposition agreement ("agreement") is entered into between the State Ethics Commission ("Commission") and Eugene J. Mahoney ("Mr. Mahoney") pursuant to Section 11 of the Commissions's **Enforcement Procedures.** This agreement constitutes a consented to final Commission order enforceable in the Superior Court pursuant to G.L. c. 268B, §4(d).

On September 9, 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. Mahoney, a former member of the Braintree Board of Assessors. The Commission has concluded that preliminary inquiry and, on February 4, 1983, found reasonable cause to believe that Mr. Mahoney has violated G.L. c. 268A, §§19 and 3(b). The parties now agree to the following findings of fact and conclusions of law:

1. Mr. Mahoney was a member of the Braintree Board of Assessors ("Board") from April 5, 1976 to March 1, 1982; he was chairman of the Board from 1978 to 1981. He therefore was a "municipal employee" as defined in G.L. c. 268A, §1(g).

2. The Braintree Board is comprised of three elected members. Mr. Mahoney was not only chairman of the Board for three years of his tenure; but he was also the Board's acknowledged expert on the assessments on Braintree's approximately 1,100 commercial parcels, and it was to his judgment that the other members deferred on these matters. In Fiscal 1980 (July 1, 1979 to June 30, 1980), the Town of Braintree had a tax base of approximately $550,000,000.

Jubilation Realty Trust

3. On January 6, 1979, the Citgo station located at 1599 Washington Street in Braintree and owned by Cities Service Company (the "Citgo parcel") burned, substantially damaging the building.

4. In February 1979, Mr. Mahoney began negotiations in his private capacity on behalf of himself and a friend and business associate to purchase the Citgo parcel from Cities Service.

5. On March 13, 1979, Mr. Mahoney paid the deposit of $7,000 to secure the $70,000 purchase price for the Citgo parcel to which the parties had agreed. The purchase and sale agreement executed that same day was signed on behalf of the purchaser by the friend and business associate of Mr. Mahoney.

6. In May 1979, the friend and business associate having withdrawn from the deal, Mr. Mahoney and his attorneys determined that title to the Citgo parcel should be taken in the name of a realty trust with secret beneficiaries. Jubilation Realty Trust ("JRT"), of which Mr. Mahoney and his family were

[3]/The $100 penalty imposed in this case is consistent with the Civil Penalty guidelines adopted by the Commission on April 7, 1980 for cases where SFIs have been filed after the ten-day notice of delinquency period has expired but prior to the initiation of a preliminary inquiry.

the beneficiaries, was formed for this purpose.

7. On June 20, 1979, the closing on the sale of the Citgo parcel occurred. Mr. Dignan, as trustee, represented JRT at the closing and took title for it. The balance due on the purchase price, approximately $63,000, was paid by Mr. Mahoney.

8. In August 1979, the Braintree Assessors' Office began its process of compiling and preparing the property tax bills for Fiscal 1980. By statute, G.L. c. 59, §11, those tax bills were based on the assessed value of property as of January 1, 1979.

9. As of January 1, 1979, the assessed value on the Citgo parcel totalled $121,800 ($47,100 in the land and $74,700 in the building).

10. In September or October 1979, Mr. Mahoney directed Mary Norton, the administrative secretary of the Assessors' Office who was in charge of the billing process for Fiscal 1980, to reduce the assessment of the building on the Citgo parcel from $74,700. to $2,500. No legitimate reason (e.g., abatement application, demolition permit or Appellate Tax Board decision on the parcel) existed for the reduction. Because this change came from only a single assessor rather than from the whole Board, Mrs. Norton noted that the reduction was "per Mr. Mahoney" on the record card for the parcel maintained by the Assessors' Office.

11. This reduction in value resulted in a tax savings on the parcel for Fiscal 1980 totalling $3,158.75.

12. On December 5, 1979, Mr. Dignan, as trustee for JRT, paid the property tax bill on the Citgo parcel for the first half of Fiscal 1980. The funds for this tax payment came from Mr. Mahoney.

13. In or about June 1980, Mr. Mahoney became aware of the "per Mr. Mahoney" notation on the record card for the Citgo parcel and directed Mrs. Norton to remove it. Under protest, she erased the notation.

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

15. As a municipal employee, Mr. Mahoney violated G.L. c. 268A, §19, by lowering the assessment on the Citgo parcel which he knew he and members of his immediate family owned through a trust.

16. In imposing a penalty for this violation of Section 19, the Commission has taken into consideration a number of exacerbating factors: (1) Mr. Mahoney's attempts to keep his interest in the Citgo parcel concealed by utilizing JRT with its secret list of beneficiaries as record-owner, denying any interest in or knowledge of JRT to governmental agencies investigating the matter, and directing Mrs. Norton (who has since died) to erase the notation attributing the decrease to Mr. Mahoney; and (2) the fact that the reduction in value was made by Mr. Mahoney acting on his own. Because of these factors, the Commission deems this an appropriate case to impose the maximum fine and to seek both recovery of the benefit accuring to Mr. Mahoney as a result of his action in this matter -- i.e., the tax savings for Fiscal 1980 -- and some of the costs incurred by the Commission in investigating the matter.

Walworth

17. In early December 1979, Mr. Dignan, acting on behalf of JRT, offered a real estate broker, Donald Tofias, acting as agent for the Walworth Company ("Walworth"), $1,000 for the approximately 25,700 square-foot parcel ("Parcel A") owned by Walworth that fronted on Washington Street next to the Citgo parcel. Mr. Tofias, on Walworth's behalf, rejected JRT's $1,000 offer and informed Mr. Dignan that Walworth's asking price for Parcel A was $25,000.

18. On December 14, 1979, Walworth filed abatement applications for two other real estate parcels ("Parcel B" and "Parcel C") it owned in Braintree, larger than Parcel A and also adjacent to the Citgo parcel. Walworth sought to reduce the total assessments on these two parcels by $2,421,333 (from $4,932,100 to $2,470,767). This would have resulted in a tax savings for the first year of the abatement of approximately $110,000.

19. On December 26, 1979, Mr. Tofias called the Assessors' Office to schedule a meeting to discuss Walworth's abatement applications, in which Mr. Tofias was also acting as Walworth's agent. He was referred to Mr. Mahoney.

20. The same day, Mr. Tofias spoke with Mr. Mahoney to arrange a meeting to discuss the applications. During this conversation, Mr. Mahoney asked about the status of JRT's offer for Parcel A and disclosed that he had an interest in JRT. Mr. Tofias told Mr. Mahoney that Walworth had rejected JRT's offer and explained that Walworth viewed the sale of Parcel A to JRT and the abatement applications for Parcels B and C as separate issues that should not be discussed in the same conversation.

21. At the meeting to discuss Walworth's abatement applications that followed in late December 1979 or ealry January 1980, Mr. Mahoney again raised JRT's offer of $1,000 to purchase Parcel A. Mr. Tofias reiterated that Walworth regarded the issues as separate. Mr. Tofias was concerned lest the success of the abatement applications be linked to the sale of Parcel A to JRT.

22. In a telephone conservation in January 1980 to follow up this discussion of the abatement applications, Mr. Mahoney increased JRT's offer for Parcel A to $3,000. Mr. Tofias again emphasized Walworth's position that the issues were separate and distinct.

23. Walworth's abatement applications were not granted by the Board and were therefore deemed denied. ATB appeals covering these and later Walworth abatement applications were settled in 1982.

24. In December 1981, Walworth sold Parcels A, B and C. to the Flatley Company.

25. Section 3(b) of G.L. c. 268A prohibits a municipal employee from soliciting an item of substantial value for himself for or because of his official duties or official acts performed or to be performed.

26. The Commission has construed section 3(b) to mean that if there is an official regulatory relationship between the donor and the donee and each is aware of the relationship, the solicitation or receipt of anything of substantial value by the public official is prohibited barring some legitimate justification. See **In the Matter of Saccone and DelPrete**, Commission Adjudicatory Docket No. 132, Decision and Order, pp. 10-11 (June 1, 1982); **In the Matter of George A. Michael**, Commission Adjudicatory Docket No. 137, Decision and Order, p. 31 (September 28, 1981). The Commission recognizes that in certain circumstances -- such as where the item of substantial value involves a personal service contract or other sales agreement for fair value rather than a gift or other gratuity -- further inquiry may be necessary to determine whether section 3 has been violated. Factors to be considered in making the determination in these circumstances include: (1) whether the official has particular power or leverage within his agency; (2) whether the private party is someone with substantial interests that have or may be expected to come before the official's agency for action; and (3) whether the official has a prior relationship with the person he regulates.

27. As a municipal employee, Mr. Mahoney violated G.L. c. 268A, §3(b), by trying to arrange JRT's purchase of Parcel A from Walworth, the owner of a substantial amount of commercial property in Braintree with pending abatement applications. Not only was Mr. Mahoney chairman of the Board at the time and the acknowledged commercial expert on the Board to whom the other two members deferred (factor 1 above), but Walworth had abatement applications, involving a large amount of money, pending at the time Mr. Mahoney discussed JRT's offer to purchase Parcel A with Mr. Tofias (factor 2). In addition, Mr. Mahoney, Mr. Tofias and Walworth had had no dealings with each other before Mr. Mahoney's election to the Board (factor 3).

28. In deciding to impose the maximum penalty for this violation and to seek recovery of some of its investigative costs, the Commission has taken into consideration that Mr. Mahoney tried to negotiate the purchase of Parcel A in three separate conversations and sought a purchase price substantially below the asking price at least twice following Mr. Tofias informing him that Walworth had rejected JRT's $1,000 offer.

In view of the foregoing violations of G.L. c. 268A, §§19 and 3(b), and the statutory rights of the Town of Braintree pursuant to G.L. c. 268A, §21, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings on the basis of the following terms and conditions agreed to by Mr. Mahoney:

1. that he pay to the Commission the sum of $1,000 as a civil penalty for violating G.L. c. 268A, §19, by reducing the assessed value on a parcel in which he knew he had a financial interest;

2. that he pay to the Town of Braintree the sum of $3,150 as reimbursement for the economic advantage he obtained as a result of the reduced assessment;

3. that he pay to the Commission the sum of $1,000 as a civil penalty for violating G.L. c. 268A, §3(b), by soliciting the purchase of a parcel of land from a company with abatement applications pending before the Board; and

4. that he pay to the Commission the sum of $4,850 as costs incurred in investigating these violations.

DATE: March 14, 1983

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 198

IN THE MATTER
OF
ROBERT J. O'BRIEN

DISPOSITION AGREEMENT

This disposition agreement ("agreement") is entered into between the State Ethics Commission ("Commission") and Dr. Robert J. O'Brien ("Dr. O'Brien") pursuant to Section 11 of the **Commission's Enforcement Procedures.** This agreement constitutes a consented to final Commission order enforceable in the Superior Court pursuant to G.L. c. 268B, §4(d).

On October 19, 1982, the Commission initiated a preliminary inquiry into whether Dr. O'Brien, chairman of the Holyoke Water Commission, violated G.L. c. 268A by using employees of the Holyoke Water Departemnt ("department") to perform repair work on his home during department working hours. The Commission concluded that preliminary inquiry and, on January 11, 1983, found reasonable cause to believe that Dr. O'Brien violated G.L. c. 268A, §23(d). The parties now agree to the following findings of fact and conclusions of law.

1. Dr. O'Brien was a member of the Holyoke Water Commission from 1973 to August, 1982, serving as its chairman during 1982. The Water Commission is comprised of 3 part-time members who oversee the department's activities.

2. During the week of June 21, 1982, Dr. O'Brien contacted John Kennedy, department assistant manager, and asked him to send department employees to Dr. O'Brien's home to inspect a wooden deck in order to advise Dr. O'Brien to its needed repair.

3. On June 28, 1982, in response to Dr. O'Brien's request, two department employees met Dr. O'Brien at his home, inspected the deck and prepared a list of materials necessary to make the repairs.

4. Following that inspection, two department employees picked up the necessary materials in a city owned vehicle at a local lumberyard, delivered those materials to Dr. O'Brien's home, and made the necessary repairs during June 29, 30 and part of July 1, 1982. All of those services were performed during normal department working hours for which those department employees received wages from the city of Holyoke. During the course of certain of those repairs, Dr. O'Brien observed the employees making those repairs and allowed them to continue. At no time did Dr. O'Brien request that those repairs be performed during working hours.

5. Lumber and materials used in those repairs were paid for by Dr. O'Brien to the lumberyard in the amount of $214.08.

6. Following discovery of the foregoing activities by another member of the Water Commission, Dr. O'Brien resigned from the Commission and promptly reimbursed the city $465.72 for the wages paid those department employees while they were working at his home.

7. Section 23(d) of G.L. c. 268A prohibits a municipal employee form using his position to secure an unwarranted privilege for himself or others.

8. By using his position as Water Commission chairman to request that department employees inspect his property and make necessary repairs, and by allowing those department employees to make those repairs during normal working hours, their labor paid by the city, Dr. O'Brien used his position to secure an unwarranted privilege; therefore, he violated G.L. c. 268A, §23(d).

Based on the foregoing facts, 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 and terms agreed to by Dr. O'Brien:

1. that he pay to the Commission the sum of $2,000 forthwith as a civil penalty for the following violations of G.L. c. 268A;

   a. $1,000 for his conduct in requesting department employees to inspect his property and make the necessary repairs to it and;

   b. $1,000 for his conduct in allowing department employees to perform the necessary repairs during normal working hours on June 29, 30 and July 1, 1982; 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 proceeding to which the Commission is a party.

DATE: March 24, 1983

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory
Docket No. 205

IN THE MATTER
OF
CHRISTINE SHANE

DISPOSITION AGREEMENT

This disposition agreement ("agreement") is entered into between the State Ethics Commission ("Commission") and Christine Shane ("Ms. Shane") pursuant to Section 11 of the Commission's **Enforcement Procedures**. The parties agree that this agreement constitutes a consented to final Commission order enforceable in the Superior Court pursuant to G.L. c. 268A, §4(d).

On March 22, 1983, 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 Ms. Shane, director of the Office of Staff Training Manpower Planning and Development. The Commission has concluded that preliminary inquiry and, on March 22, 1983, found reasonable cause to believe that Ms. Shane violated §23(d).

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

1. Ms. Shane is, and has been since June, 1982, director of the Office of Training Manpower Planning and Development for the Department of Mental Health (DMH). As director, she is a state employee as defined in §1(q) of G.L. c. 268A.

2. In October, 1982, Ms. Shane was asked by a representative from Georgia's Department of Mental Health (GDMH) to participate in a week-long workshop in Atlanta. She filled out a travel approval sheet which was required to be completed because she was going to attend on state time and submitted it to her supervisor, William Jones ("Mr. Jones"). On this form Ms. Shane stated that the purpose of the trip was "to participate in a workshop on program evaluation and staff training for human service workers." She also wrote that "expertise will be gained, in staff training, especially, workshop format, design, implementation in quantitative analysis." Mr. Jones approved this request.

3. Ms. Shane went to Georgia and participated in the workshop on state time. She was invited to participate not because of her state position but because of other skills she possessed.

4. Three months after the workshop, Shane received a $1,500 honorarium for her involvement in it.

5. Section 23(d) of G.L. c. 268A prohibits a state employee from using her official position to secure unwarranted privileges for herself.

6. By accepting the honorarium for participating in this workshop on state time, Ms. Shane violated G.L. c. 268A, §23(d).

In view of the foregoing violation of G.L. c. 268A, §23(d), the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings on the basis of the following terms and conditions agreed to by Ms. Shane:

1. That she pay to the Commission the sum of $500.00 as a civil penalty for violating G.L. c. 268A, §23(d);

2. that she pay to the Commission the sum of $1,000.00 as restitution for the money she received for participating in the Georgia workshop;*

3. that she in the future refrain from engaging in private employment on state time.

4. that she waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this agreement or any related administrative or judicial proceeding to which the Commission is a party.

DATE: May 5, 1983

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory
Docket No. 183

IN THE MATTER
OF
OWEN McNAMARA

Appearances:
Sally C. Reid, Esq.: Counsel for Petitioner
State Ethics Commission
Owen McNamara: pro se

Commissioners:
Brickman, Burns, McLaughlin, Mulligan

*The reason that only $1,000 of the $1,500 honorarium is being paid as restitution is because the Commission determined that one-third of her activities for GDMH were performed on her private time.

DECISION AND ORDER

I. Procedural History

The Petitioner, State Ethics Commission (the Commission), filed an Order to Show Cause on November 2, 1982, alleging that Respondent Owen McNamara (Respondent) had violated Section 5 of M.G.L. c. 268B, the financial disclosure law, by failing to file a Statement of Financial Interests (Statement) within ten days of his receipt of a Formal Notice of Delinquency. The Respondent filed no Answer, and did not appear at an evidentiary hearing held on January 24, 1983, before Joseph Mulligan, a member of the Commission duly designated as presiding officer. See M.G.L. c. 268B, §4(c). At that hearing, the Petitioner presented evidence on the alleged violation and moved that a summary decision be granted in favor of the Petitioner. That motion was referred to the full Commission which heard Petitioner's argument in support of the motion and allowed the motion on February 4, 1983; Respondent did not appear at that proceeding. In its written notice to the Respondent of the decision in favor of the Petitioner, the Commission stated its willingness to reconsider that decision, if the Respondent came forth with additional evidence.

The Respondent, on March 9, 1983, wrote the Commission a letter stating reasons why he felt he should not be found in violation of the law. Because the letter was unsworn, the Presiding Commissioner treated it as a request to reopen the hearing in this matter, and ordered a hearing held on May 5, 1983, for the Respondent to present his evidence. See 930 CMR 1.01 (9)(n). The Respondent appeared on that date and made a sworn statement for the record; he also acknowledged that he had received notice of the prior proceedings at which he had failed to appear. The parties waived briefs and oral argument before the full Commission.

In rendering this decision and order, each of the four participating members of the Commission has considered the evidence presented by the parties.

II. Findings of Fact[1]/

1. The Respondent, Owen McNamara, former acting superintendent of North Central Correctional Center, a state facility, was required by G.L. c. 268B, §5 to file a Statement for calendar year 1981, on or before May 1, 1982.

2. The Respondent failed to file his Statement on or before May 1, 1982.

3. Pursuant to G.L. c. 268B, §3(f), the Respondent received a written Formal Notice of Delinquency ("Notice") from the Commission on May 13, 1982, requiring him to file a Statement within ten days of receiving the Notice.

4. The Respondent failed to file his Statement within ten days of his receipt of the Notice.

5. The Respondent received notice on June 21, 1982, that the Commission has initiated a preliminary inquiry with respect to him, as authorized by G.L. c. 268B, §4(a).

6. The Respondent's Statement was received by the Commission on July 12, 1982.

7. As of the date of the hearing, the Respondent had not been employed for the previous five months.

III. Decision

1. Jurisdiction

The parties agreed that the Respondent was, at all times relevant, subject to the provisions of G.L. c. 268B, §5 and that the Commission was authorized to initiate and conduct adjudicatory proceedings pursuant to that statute.

2. Chapter 268B Allegation

G.L. c. 268B, §5 states, in relevant part:

> (c) 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. . .
>
> . . .
>
> Failure of a reporting person to file a statement of financial interests

[1]/These findings were all either admitted by the Respondent in his sworn statement, or contained in exhibits which were introduced into evidence at the hearing.

> within ten days after receiving notice as provided in clause (f) of section 3 of this chapter,[2]/ 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.

The elements necessary to establish a G.L. c. 268B, §5 violation are that: (1) the subject was a public employee (as defined by the statute) during the year in question; (2) the subject was notified in writing of his delinquency and the possible penalties for failure to file a Statement; (3) the subject did not file a Statement within ten days of receiving notice.

Inasmuch as the Respondent admitted all the facts which constitute a G.L. c. 268B, §5 violation, the Commission concludes that he violated G.L. c. 268B, §5 by failing to file his 1981 SFI within ten days of receiving a delinquency notice from the Commission. With the violation established, the only issue left for the Commission to address is the sanction to be imposed.

IV. Sanction

Under G.L. c. 268B, §4(d), as amended by St. 1982, c. 612,

> upon a finding . . . that there has been a violation of chapter 268A or this chapter, [the Commission may] issue an order requiring the violator to:
>
> (1) cease and desist such violation [of c. 268B];
>
> (2) file any report, statement or other information as required by . . . this chapter; or
>
> (3) pay a civil penalty of not more than two thousand dollars for each violation of this chapter . . .

Pursuant to this section, the Commission in 1980 adopted a policy of levying civil fines on those who do not file timely statements as required by G.L. c. 268B, calculated according to the stage of legal proceedings reached by the time the statement is filed.[3]/ Commission practice under that policy has been to levy a fine of $250 when a statement is filed after a preliminary inquiry has been initiated, but before the conclusion of the inquiry.

Of course, the Commission retains the discretion to adjust the civil penalty in recognition of mitigating or aggravating circumstances in individual cases. In previous G.L. c. 268B decisions,[4]/ the Commission has enunciated certain mitigating factors which would cause it to forego altogether the assessment of a fine. Other Commission decisions have set forth reasons for assessing a penalty lower than the statutory maximum.[5]/ In the case at hand, the Commission does not find sufficient evidence in the record to justify waiving a fine based on Respondent's mental condition in May, 1982;[6]/ nevertheless, the Commission recognizes that the Respondent has been unemployed for approximately five months and his ability to pay a fine is thereby limited. For these reasons, the Commission considers it appropriate to assess an amount lower than the usual fine, and will exercise its discretion to assess the Respondent a $100 civil penalty in this matter.

IV. Order

On the basis of the foregoing, the Commission concludes that Owen McNamara violated G.L. c. 268B, §5. Pursuant to the authority granted it by G.L. c. 268B, §4(d), the Commission hereby orders Mr. McNamara to pay a civil penalty of $100 for such violation, within thirty days of the issuance of this Decision and Order.

DATE: June 1, 1983

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[2]/"[The commission shall] inspect all statements of financial interests filed with the commission in order to ascertain whether any reporting person has failed to file such a statement or has filed a deficient statement. If, upon inspection it is ascertained that a reporting person has failed to file a statement of financial interests, or if it is ascertained that any such statement filed with the commission fails to conform with the requirements of section five of this chapter, then the commission shall, in writing, notify the delinquent; such notice shall state in detail the deficiency and the penalties for failure to file a statement of financial interests."

[3]/Recently, the Commission amended that policy to calculate a fine based on the number of days a statement is late. See, Minutes of Commission Meeting, April 12, 1983. In the case at hand, however, the Commission will adhere to the former policy, which was in effect when the Order to Show Cause was filed.

[4]/See, e.g., Decision and Order, **In the Matter of Thomas A. Chilik**, Commission Adjudicatory Docket No. 182 (January 12, 1983); Decision, **In the Matter of Delabarre F. Sullivan**, Commission Adjudicatory Docket No. 176 (same date).

[5]/See, e.g., Decision and Order, **In the Matter of C. Joseph Doyle**, Commission Adjudicatory Docket No. 109 (June 18, 1980), p. 10; Decision and Order, **In the Matter of Henry M. Doherty**, Commission Adjudicatory Docket No. 155 (November 18, 1982), pp. 9-10.

[6]/Compare, Decision, **In the Matter of Delabarre F. Sullivan**, supra.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss Commission Adjudicatory Docket No. 196

IN THE MATTER
OF
DANA G. CHASE

Appearances:
David J. Burns, Esq.: Council for Petitioner, State Ethics Commission

Dennis G. Regan, Esq.: Counsel for Respondent, Dana G. Chase

Commissioners:
Brickman, Burns, McLaughlin, Mulligan

DECISION AND ORDER

I. Procedural History

The Petitioner initiated these adjudicatory proceedings on March 23, 1983 by filing an Order to Show Cause pursuant to the Commission's Rules of Practice and Procedure, 930 CMR 1.01(5) (a). That Order alleged that the Respondent, Dana G. Chase, while a member of the Board of Selectmen of the Town of East Bridgewater (Town), had violated M.G.L. c. 268A, §19 by participating as a municipal employee in certain particular matters in which he and the real estate firm he owned and operated in his private capacity had a financial interest.

Specifically, Mr. Chase was alleged to have participated in a vote to approve the hiring of a contractor by the Town to clear and bury trees and debris on a parcel of land, known as the Polo Field, at a time when representatives of his realty firm, Dana Chase Real Estate (Chase Real Estate) were negotiating the sale of that land. Those negotiations culminated in the sale of the Polo Field shortly after the clearing took place. He was also alleged to have signed the contract between the Town and the contractor for the performance of that work. The Order alleged that by these actions, Mr. Chase used his official position as Selectman to secure unwarranted privileges for himself, his realty firm and the parties to the land transaction, in violation of M.G.L. c. 268A, §23(d).[1/]

At oral argument after the close of the hearing, and in his brief, Petitioner also alleged violations by the Respondent of M.G.L. c. 268A, §§19 and 23(d) by signing as Selectmen an agreement excusing the sellers of the Polo Field from any liability i connection with that clearing.

The Respondent's Answer admitted the fact alleged in the Order to Show Cause, but denied tha he or Chase Real Estate had a financial interest i the vote to hire the contractor or the signing of th contract for that purpose, and that his action constituted use of his official position to secure a unwarranted privilege for himself, his firm or th parties to the land sale.

An adjudicatory hearing was held on June 1 1983 before Commissioner David Brickman, th Presiding Officer designated pursuant to M.G.L. c 268B, §4(c), at which four witnesses gave testimon and forty-four (44) documents were entered int evidence. The parties thereafter filed briefs with th Commission and presented oral arguments befor the full Commission on June 23, 1983. In rendering this Decision and Order, each participating Commissioner has read and/or heard the evidence and arguments presented by the parties.

II. Findings of Fact

1. The Respondent is and has been a member of the Board of Selectmen in the Town since 1972. He is also owner and principal officer of Chase Real Estate, a business engaged in the representation of buyers and sellers of real property as a real estate broker.

The Starling Problem

2. The Polo Field is a 21-acre parcel of land located in the Town. This land was vacant and a portion of it contained trees and shrubs.

3. During 1982 and until March 1983, the Polo Field was owned by the East Bridgewater Land Trust (Trust). The beneficiaries of the Trust were represented by three trustees (Trustees): Frank Solari (Mr. Solari), Roland Veilleux (Mr. Veilleux) and John C. Wheatley, Esq. (Mr. Wheatley).

4. In 1979, the Town experienced a problem with large numbers of starlings. The birds were roosting in the trees and shrubs which covered approximately three acres of the Polo Field and abutting property owned by a Mr. Skinner. In such large numbers the starlings present a health hazard because their feces produce a fungus which, upon becoming airborne, can lead to histoplasmosis, a respiratory ailment. This problem was of particular concern because of the Polo Field's proximity to the Town's public schools.

[1/] As of March 29, 1983, M.G.L. c. 268A, §23(d) was renumbered M.G.L. c. 268A, §23 (para. 2) (2). See St. 1982, c. 612.

5. At that time, the owners of the Polo Field were contacted by the Town in regard to remedying the starling problem. Mr. Veilleux, representing the owners, appeared before the Town Board of Selectmen and stated that it was unlikely that the owners of the Polo Field would be willing to spend any money to alleviate the problem. Mr. Veilleux said he would attempt to locate someone who would be willing to remove the trees from the land in return for being allowed to sell the resulting wood. Mr. Veilleux did so and all the large trees on the Polo Field were cut down.

6. By the summer of 1982, trees and other growth had again appeared on the Polo Field. The starlings returned, as well.

7. In August of 1982, complaints from citizens of the Town about the starlings came to the attention of the Board of Selectmen.

8. In September of 1982, the Board of Selectmen directed the Town Police Department to attempt to drive away the starlings by shooting blank shot in the area and by broadcasting amplified tape recordings of starling distress calls.

9. The Chief of Police reported to the Board of Selectmen on September 16, 1982, that the measures prescribed were costly and non-permanent remedies. He called a meeting of Town officials and suggested three alternative solutions: 1) require the owners to clear the land; 2) to have the Town clear the property, bury the debris and lien the property for the costs incurred; 3) hire an outside contractor to perform the clearing and lien the property for costs.

10. On September 20, 1982, at a meeting of the Town Board of Selectmen, Town officials discussed the starling problem and concluded that the best solution would be to dig up and bury all the trees and shrubs, and then plant grass seed to prevent regrowth.

11. Robert H. Jones (Mr. Jones), a member of the Town Board of Health, stated that the owners would be contacted for permission for the Town to enter onto the Polo Field for the clearing operation.

12. On September 21, 1982, Mr. Jones contacted Mr. Wheatley and informed him of the Town's concern with the starling problem. Mr. Jones asked whether the Trust would have any objection to the Town taking action to clear the trees and accumulating debris on the Polo Field. Mr. Wheatley responded that the Trust would have no objection, provided it incurred no cost or other liability.

13. Between September 21 and 27, 1982, Mr. Wheatley drafted an agreement (Agreement), subject to the approval of the other Trustees, granting the Town permission to enter onto the Polo Field to cut and remove or bury whatever vegetation it deemed necessary. The Agreement also excused the Trust from any liability, financial or otherwise, arising from this operation.

14. On September 23, 1982, the Town Board of Health declared the Polo Field and the abutting land of Mr. Skinner "a serious health hazard and nuisance."

15. On September 27, 1982, Mr. Wheatley appeared at a meeting of the Board of Selectmen and presented them with the Agreement proposed by the Trustees. The Selectmen read the Agreement and gave it to Kenneth E. MacMullen, Esq. (Mr. MacMullen), Town Counsel to read over. Mr. Skinner submitted a document with substantially the same terms as the Agreement.

16. The Selectmen, including Mr. Chase, voted at the September 27, 1982 meeting to have a contractor clear, level and seed the Polo Field as soon as possible and signed the documents offered by the Trustees and Mr. Skinner on behalf of the Town.

17. On October 4, 1982, the Town Selectmen, including Mr. Chase, signed a contract with Bertarelli Brothers, Inc., a Brockton contracting firm, for the work to be performed on the Polo Field at a cost of $5,000. That work was to be completed within 10 days.

18. On November 1, 1982, Mr. MacMullen, in response to a request by the Board of Selectmen, ruled that because the starlings were wild animals roosting on the land as a result of natural, rather than manmade, causes, the cost of clearing the land was not recoverable by the Town from the owners.

The Sale of the Polo Field

19. In February of 1980, the Town had taken tax title to the Polo Field, pursuant to M.G.L. c. 60, §53, for non-payment of taxes. The Trust, as owner of the property, had the ability to redeem that title by paying off the overdue taxes plus interest prior to the foreclosure of that right of redemption. See M.G.L. c. 60, §§62 and 65. The Town filed a petition for such a foreclosure on September 8, 1981.

20. In the spring of 1982, the Trustees decided to attempt to sell the Polo Field. They agreed that Mr. Veilleux would list the property at an asking price of $120,000 with three real estate brokers in the Town as an "open listing," meaning that whichever of the three agents produced an acceptable buyer would be paid a commission by the Trust.

21. Mr. Veilleux listed the Polo Field with three real estate brokers in the Town, including Chase Real Estate. No written contract was entered into and no rate for the commission was set at that time.

but the usual commission on vacant land sold at the asking price was ten percent (10%).

22. In June of 1982, Elsa Trombly (Ms. Trombly), an employee of Chase Real Estate, began dealings with John Peck (Mr. Peck), Director of Operations of Cumberland Farms. That company purchases large tracts of land not immediately eligible for profitable development, like the Polo Field, to be used as farm land.

23. On or about August 30, 1982, Mr. Peck offered the Trust $50,000 for the Polo Field. The Trustees rejected that offer.

24. In September or early October of 1982, Mr. Peck offered $60,000 for the land. The Trustees rejected that offer, and shortly thereafter made a counter-offer of $75,000 to Mr. Peck.

25. During the first week of October, 1982, Mr. Peck was driving by the Polo Field and saw that the clearing of the land had begun. Presuming that the land had been purchased, he later contacted Ms. Trombly and inquired who the buyer had been. Ms. Trombly told him that the land had not been sold and explained about the starling problem and that the Town was providing for the clearing.

26. On October 9, 1982, Mr. Peck made an offer of $67,500 which was accepted by the Trustees within the following week.

27. The clearing of the Polo Field by the Town did not, in Mr. Peck's opinion, increase the value of the land.

28. At about this time, the Trustees contacted Mr. Chase concerning the commission to be paid to Chase Real Estate. The Trustees did not intend to pay 10% on the proposed selling price of $67,000. After some negotiations, the Trustees and Mr. Chase agreed to a $4,000 commission.

29. On October 16, 1982, Mr. Peck signed a Purchase and Sale Agreement declaring $67,500 as the sale price for the Polo Field and setting a commisison of $4,000 for Chase Real Estate. The Trustees signed this Agreement on October 21, 1982, subject to a provision regarding acknowledgement by the buyer that he was aware that trees and other debris had been buried on the land by the Town.

30. In March of 1983, the sale of the Polo Field by the Trust to Cumberland Farms was finalized. Proceeds of that sale were used by the Trust to redeem tax title from the Town. On March 30, 1983, the Town withdrew its petition to foreclose the right of redemption and Chase Real Estate was paid a commission of $4,000.

III. Decision

The Respondent has been charged with violations of M.G.L. c. 268A, §§19 and 23(d).

A. Section 19[2]/

The Commission concludes that the Respondent did not violate M.G.L. c. 268A, §19. Specifically, the Commission holds that a preponderance of the evidence does not support a finding that Mr. Chase had a financial interest in the particular matter in which, by his own admission, he participated.

1. Municipal Employee

The Respondent admits that, as an elected member of the Town Board of Selectmen, he was a "municipal employee" as defined in M.G.L. c. 268A, §1(g).

2. Participate as such an employee in a Particular Matter

Participation for purposes of M.G.L. c. 268A, §19 is defined as participation 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. M.G.L. c. 268A, §1(j). A particular matter is any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court.[3]/. M.G.L. c. 268A, §1(k).

The Commission finds that the vote by the Board of Selectmen to hire a contractor to clear the Polo Field and the signing of a contract for that purpose are particular matters. By his own admissions, the Respondent participated as a municipal employee in those particular matters. Assuming **arguendo** that the Petitioner properly raised the Respondent's signing of the Agreement as an alleged violation of M.G.L. c. 268A, §19, the signing of that Agreement would also be a particular matter in which the Respondent participated.

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[2]/Section 19 states, in relevant part, that "a municipal employee who participates as such an employee in a particular matter in which to his knowledge he . . . or . . . a business organization in which he is serving as officer, director . . . or employee . . . has a financial interest violates this section.

[3]/As of March 29, 1983, petitions of cities, towns, counties and districts for special laws related to their governmental/organizational powers, duties, finances and property have also been excluded from this definition. See St. 1982, c. 612, §1.

3. In Which He or a Business Organization in which He is an Officer, Director or Employee has a Financial Interest

The Commission concludes that the evidence in the record does not support the finding that the Respondent or his realty firm had a financial interest in the particular matters in which he participated. Both the Respondent and Chase Real Estate clearly had a financial interest in the sale of the Polo Field and in the negotiations between Mr. Peck and the Trustees. Messrs. Wheatley and Veilleux testified that they expected to pay a commission to the selling broker, even though the rate of that commission had not been explicitly agreed upon. The fact that a buyer produced by Chase Real Estate was in the process of negotiation with the Trustees at the time the alleged violations of §19 occurred lends additional support to this finding. That the Town held tax title to the Polo Field has no bearing on the conclusion. Until foreclosure of the statutory right of redemption, the Trust had the ability to redeem that title at will by paying the delinquent taxes. The Trustees could freely negotiate and consummate a sale of the property and in this case that sale resulted in a commission for Chase Real Estate.

However, it does not necessarily follow that the Respondent or Chase Real Estate had a financial interest in the particular matters in which Mr. Chase participated, and it is that financial interest which is necessary for a violation of §19. Petitioner presented no direct evidence that the clearing affected the value of the land or that the parties to the sale considered such an effect in their negotiations. The chronology of those negotiations, the clearing of the Polo Field by the Town and the subsequent agreement on a sale price is presented to support the inference that the clearing of the land precipitated that agreement. However, Mr. Peck testified that the clearing of the land was not the reason why he increased his offer from $60,000 to $67,000, and that the clearing had not increased the value of the Polo Field to him. No attempt was made to impeach or otherwise rebut this testimony. No evidence in the record indicates that the Trustees considered the clearing of the land or waiver of liability by the Town in their decision to accept Mr. Peck's offer. Moreover, the course of the negotiations between the parties followed the normal pattern between buyer and seller, in which offers and counteroffers are made until an acceptable compromise is agreed upon, and fails to suggest that the negotiations were affected by the clearing of the land. The lack of a nexus between the sale of the Polo Field, in which Mr. Chase and Chase Real Estate had a financial interest, and the actions taken by the Town Board of Selectmen to clear the land, the particular matters in which the Respondent participated, precludes a finding by the Commission of a violation of §19 in this case.

Petitioner correctly argues that the financial interest in the sale gave the Respondent an "identifiable financial interest in . . . any physical alterations or excavation of the property which might affect the sale, purchase price or future use of that property."[4]/ But, Petitioner's assertion that the clearing of the Polo Field by the Town affected those factors is not supported by the evidence in the record.

B. Section 23[5]/

The Commission also concludes that the Respondent did not violate M.G.L. c. 268A, §23(d). Specifically, the Commission holds that a preponderance of the evidence does not support a finding that the Respondent's actions as a Selectmen in connection with the clearing of the Polo Field by the Town constituted the use of his official position to secure an unwarranted privilege or exemption for himself, his business or the parties to the land transaction.

The Respondent's sole connection with the Polo Field is related to the sale of the land. As stated above, the Commission finds that the clearing had no effect on the negotiations between the Trust and Mr. Peck which led to that sale. Therefore, the Respondent's actions as Selectmen in connection with the decision by the Town to clear the land, having no bearing on the sale of the Polo Field, did not result in any privilege or exemption for him.

In holding that the evidence does not sustain a violation of §19, the Commission concludes that neither party to the land sale viewed the clearing of the Polo Field as contributing any value to it; nor did either party benefit in any way by that clearing. Therefore, the clearing was not a privilege or exemption for the Trust or Mr. Peck.

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[4]/The effect on "future use" in this case is significant only as it relates to an effect on the sale of the Polo Field because the financial interest of Mr. Chase and Chase Real Estate is solely in connection with that sale. Any effect on future use of the land not relative to the sale between these parties is irrelevant to the §19 allegations.

[5]/Section 23(d) states that "no municipal employee shall . . . use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others."

In regard to the waiver of liability agreed to by the Selectmen, the Commission finds the evidence insufficient to support a violation of §23(d). In particular, the Commission holds that a preponderance of the evidence does not support a finding that the privilege or exemption granted to the owners of the Polo Field was unwarranted.

The Trust was granted an exemption from liability for the costs of the clearing by the Selectmen. Petitioner argues that M.G.L. c. 111, §§122-125, empowering local boards of health to remove any "nuisance, source of filth or cause of sickness" on land at the expense of the owner, entitled the Town to recover the cost of clearing the Polo Field from the Trust, and supports the conclusion that this exemption is unwarranted.

On the other hand, when the starling problem had occurred several years earlier, Mr. Veilleux expressed the reluctance of the owners of the Polo Field to make any expenditure to remedy the situation. At that time, the Town made no effort to force the owners to take action and took no action of its own. When the problem recurred, the Town, through Mr. Jones of the Board of Health, approached the Trust seeking **permission** to go onto the land to remedy the situation. The Trustees were not ordered to solve the problem themselves, nor were they being informed of the Town's intent to enter the land under some statutory authority to do so. Mr. Wheatley's response was reasonable given his role as both a Trustee and a beneficiary of the Trust -- permission would be granted as long as no liability would be incurred by the Trust.

Therefore, the position of the Trust in regard to the clearing of the land, as expressed by Mr. Wheatley to Mr. Jones, was clear; the Trust expected to be absolved of any liability. This position was made clear in the Agreement presented to the Selectmen at their meeting of September 27, 1982. Mr. MacMullen, the town counsel, was present at that meeting and was given the Agreement to "read over" prior to the Selectmen's signing on behalf of the Town. The record contains no evidence that Mr. MacMullen, whom the Board of Selectmen is expected to consult on such matters, had any objection to the terms of the Agreement or a substantially similar document offered by Mr. Skinner. In fact, when later asked to rule on the ability of the Town to recover from the owners of the Polo Field the $5,000 spent on the clearing, Mr. MacMullen ruled that it was not a recoverable expense, being the result of natural causes.

The Town was faced with what it considered an emergency situation requiring immediate attention. The steps taken by all Town officials toward remedying the problem are consistent with reasonable efforts to provide a rapid solution. Even if the town had the statutory authority to force the owners to pay for the clearing, the approval of the waiver by the Selectmen, whether resulting from bad advice, wasteful haste, or a legitimate desire to quickly remedy a bothersome and unhealthy situation, was not unwarranted in light of all the facts surrounding that decision. As a result, Respondent did not violate §23(d).

ORDER

On the basis of the foregoing the Commission concludes that the Respondent did not violate G.L. c. 268A, §§19 and 23(d), and orders that the Show Cause Order of March 23, 1983 be dismissed.

DATE: July 28, 1983.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory
Docket No. 220

IN THE MATTER
OF
ELIZABETH BUCKLEY

DISPOSITION AGREEMENT

This Agreement is entered into between the State Ethics Commission ("Commission") and Elizabeth Buckley ("Ms. Buckley") pursuant to Section 11 of the Commission's **Enforcement Procedures.** This Agreement constitutes a consented to final Commission order enforceable in the Superior Court pursuant to G.L. c. 268B, §4(d).

On May 5, 1983, 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 Ms. Buckley, former vacancy coordinator for the City of Boston's ("City") Neighborhood Business Program. The Commission has concluded that Preliminary Inquiry and, on July 19, 1983, found reasonable cause to believe that Ms. Buckley violated §23 (para. 2) (2).

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

1. Ms. Buckley was the vacancy coordinator for the City's Neighborhood Business Program from July 5, 1978 to December 30, 1981.

2. In April and May of 1980, Ms. Buckley wrote a series of letters on city stationery to an elderly tenant who rented an apartment from Ms. Buckley. In the first letter, dated April 14, 1980 and written on City Neighborhood Business Program stationery, Ms. Buckley advised the tenant that her apartment had been decontrolled and her rent raised. The second letter, dated May 1, 1980, advised the tenant that her rent check had been rejected because the amount of the check did not cover the recent rent increase. This letter was written on Mayor's Office of Housing stationery which she obtained from the office of her son, who was head of the Office of Housing at the time. The third letter, dated May 13, 1980, was an itemized bill for the rent allegedly past due; and was also written on City stationery.

3. On November 10, 1982, in an eviction proceeding between Ms. Buckley and the tenant, the City Rent Control Administration found that Ms. Buckley's use of City stationery was an attempt to intimidate the tenant.

4. Section 23 (para. 2) (2) of G.L. c. 268A prohibits a public employee from using her official position to secure unwarranted privileges for herself.

5. By using City stationery to further her own private interests, Ms. Buckley violated G.L. c. 268A, §23 (para. 2) (2).

In view of the foregoing violation of G.L. c. 268A, §23 (para. 2) (2), the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings on the basis of the following terms and conditions agreed to by Ms. Buckley:

1. that she pay to the Commission the sum of $500.00 as a civil penalty for violating G.L. c. 268A, §23 (para. 2) (2);

2. that she in the future refrain from using any public position to further her private interests; and

3. that she waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in the agreement or any related administrative or judicial proceeding to which the Commission is a party.

DATE: September 12, 1983.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss — Commission Adjudicatory Docket No. 200

IN THE MATTER
OF
JOHN R. HICKEY

Appearances:

Sally C. Reid, Esq.: Counsel for Petitioner, State Ethics Commission

Michael G. Sites, Esq.: Counsel for The Respondent, John R. Hickey

Commissioners:

McLaughlin, Brickman, Burns, Mulligan

DECISION AND ORDER

I. Procedural History

The Petitioner filed an Order to Show Cause on April 12, 1983 alleging that the Respondent, John R. Hickey, had violated §19 of M.G.L. c. 268A, the conflict of interest law. The Respondent filed an Answer denying the allegation and, in lieu of an adjudicatory hearing, the parties stipulated to the relevant facts. Following the submission of briefs, the parties presented oral arguments to the full Commission on July 19, 1983. 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]/

1. Mr. Hickey was a member of the Bridgewater Board of Selectmen ("Board") for six years, until April 23, 1983.

2. At all times relevant to this proceeding, Mr. Hickey was also chairman of the Board.

3. As a member of the Board, Mr. Hickey was a municipal employee as that term is defined in §1(g) of M.G.L. c. 268A.

4. At all times relevant to this proceeding, Mr. Hickey was employed as an estimator-salesman for Tilcon Massachusetts, Inc. ("Tilcon"). Tilcon is a manufacturer and supplier of asphalt paving materials.

[1]/These findings are based on relevant stipulated facts agreed to by the parties.

5. On June 7, 1982, Tilcon submitted a sealed bid to the Board to supply bituminous concrete to the town of Bridgewater pursuant to an advertisement for bids.

6. The Board transmitted Tilcon's bid to the town's Highway Superintendent for his review and recommendation.

7. At the June 14, 1982 meeting of the Board, with Mr. Hickey presiding as chairman, the Selectmen reviewed a letter from the Highway Superintendent in which he recommended that the bituminous concrete supply contract be awarded to the lowest bidder, Tilcon. The recommendation included awards to five other low bidders on various other supply contracts.

8. At the same meeting, the Board voted to adopt the Highway Superintendent's recommendations on the supply contracts, including the Tilcon contract.

9. Selectman Robert F. Wallace moved to award the supply contracts to the low bidder, and Selectman David A. Canepa seconded the motion, whereupon Mr. Hickey stated "so voted."

III. Decision

For the reasons stated below, the Commission concludes that Mr. Hickey did not participate as a municipal employee in a particular matter in which a business organization which employed him had a financial interest in violation of M.G.L. c. 268A, §19.[2]/

The Petitioner contends that Mr. Hickey violated M.G.L. c. 268A, §19 by presiding over the vote to award the Tilcon contract at the Board's June 14, 1982 meeting. The prohibited activity imputed to Mr. Hickey involved his stating "so voted" after a motion to award the supply contracts to the low bidders had been made and seconded by the other Selectmen. On the basis of the evidence presented by the parties, the Commission concludes that Mr. Hickey's actions at the Baord meeting on June 14, 1982 did not rise to the level of participation contemplated by M.G.L. c. 268A, §1(j).

Under M.G.L. c. 268A, §1(j), "participate" means to "participate in an 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." (emphasis added) Mr. Hickey's announcement of the result of the vote was ministerial and after the fact. In EC-COI-82-70, 82-46 and 80-47, the Commission recognized that not every action by a public official will satisfy the substantiality requirement. In those instances where a government employee is involved in ministerial activity not directly affecting a particular matter, the conduct may not constitute substantial participation as defined in the statute.

The Petitioner cites the statement in **Graham v. McGrail**, 370 Mass. 133, 138 (1976) that "[t]o preside over a vote is to participate in it." However, the Court's statement in that case must be read in conjunction with the statutory requirement that participation be substantial. M.G.L. c. 268A, §1(j). Mr. Hickey's limited involvement in the approval of the Tilcon contract represented a **pro forma** presiding. This is not to say that presiding must be on a level comparable to the **Graham** facts to constitute participation under §1(j).[3]/ For example, if the presiding officer were to make any procedural ruling, recognize people to speak on the matter in question, determine the order of speakers, cut off debate or the remarks of any individual speaker, or refuse to recognize someone, he would be deemed to have participated for purposes of §19. There was no evidence of such conduct here.

IV. CONCLUSION

On the basis of the foregoing, the Commission concludes that Mr. Hickey did not violate M.G.L. c. 268A, §19, and orders that the Show Cause Order of April 12, 1983 be dismissed.

DATE: September 26, 1983

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[2]/The only element of §19 at issue is this proceeding is the extent of Mr. Hickey's participation. The contract award to Tilcon represented a "particular matter" as defined by M.G.L. c. 268A, §1(k) in which Tilcon had a financial interest; and Tilcon is a "business organization" for the purposes of M.G.L. c. 268A, §19.

[3]/In **Graham**, members of the school committee participated in formulating and adopting a school budget in which members of their immediate families had a financial interest. Prior to the actual vote on the school budget, the school committee members participated in "work sessions" designed to finalize the budget process. When the vote to adopt the budget took place, the members were deadlocked at 2-2. One member (and the chairman) voted for a version of the budget which increased the salary of her family member, two other members voted against that version and one member abstained on both votes. At a subsequent meeting where the opponents to the budget were absent, the abstaining member and the other member alternated disqualifying themselves from the actual vote but presiding over the process until a budget reflecting salary increases to their family members was passed. Presiding over the vote was the mechanism used to ensure completion of the budget process at a time when those who contested the budget were absent.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 194

IN THE MATTER
OF
MICHAEL W. C. EMERSON
AND
JOHN E. GREELEY

THE COMMISSION'S RULING ON THE RESPONDENTS' MOTION FOR SUMMARY DECISION

The Respondents' Motion for Summary Decision is granted because the statute of limitations bars the Petitioner from bringing this action.

Pursuant to the precedent established in the Decision and Order of **In the Matter of John P. Saccone and Edmund W. DelPrete** [1982 Ethics Commission 87], the Commission finds that the Petitioner is bound to a three year statute of limitations with respect to this enforcement proceeding, and that the statute of limitations begins to run at the time of the receipt of the gratuity,[1]/ unless there is evidence that the violation was "fraudulently concealed" or "inherently unknowable." **In the Matter of Saccone and Delprete, supra,** [94]. In the **Saccone and Delprete** matter, the Commission found that in causes of action based on an inherently unknowable wrong, the limitations period starts to run when the Petitioner reasonably should have learned that he was harmed by the Respondent's conduct. **Id.**

The alleged violations in this case took place in November, 1976, and July, 1977. The Petitioner presented evidence that it first became aware of the alleged violations in March, 1981 through a newspaper article, approximately four to five years after the alleged violations occurred. The Petitioner maintains that the statute of limitations did not begin to run until the Petitioner became aware of the violations because the violations were inherently unknowable. The Commission disagrees. This case is factually indistinguishable from the **Saccone and DelPrete** matter.[2]/ In the instant case, there were other "disinterested persons," the attorney general and the appropriate district attorneys, capable of enforcing §3 and the "petitioner did not show that [it] [was] unable, despite due diligence, to discover the violation[s] earlier. . ." **Id.**, at [98]. In invoking the statute of limitations, the Commission notes that, unlike the substantive sections of G.L. c. 268A, §23 is also enforceable by an agency head, who may take administrative action against an employee for violations of the section. Thus, in 1976 and 1977, Respondent Greeley's appointing official was capable of bringing an action against him for the conduct alleged and failed to act within the required time. **Id.**, at [99].

In the alternative, the Petitioner argues that the Respondents fraudulently concealed the violations thereby tolling the statute of limitations until the Petitioner discovered the alleged wrongdoing. The Petitioner argues that the act of concealment involved Respondent Greeley signing Respondent Emerson's name to the credit card receipts after he used the latter's credit card. The Commission rejects this position. The act of fraudulent concealment must be accompanied by positive steps done with the intention to deceive. **Id.** at [94]. The Commission is unpersuaded that Respondent Greeley signed the credit card receipts with the intent of hiding any wrongdoing. The overwhelming inference in that he signed the receipts in order to utilize the credit card.

Based on the facts presented before the Commisison, the statute of limitations began to run at the time the violations occurred. Therefore, the Commission follows the holding of the **Saccone and Delprete** matter.

DATE: October 18, 1983

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[1]/In its Order to Show Cause, dated March 16, 1983, the Petitioner alleged that Respondent Emerson violated G.L. c. 268A, §3(a) by giving Respondent Greeley something of substantial value for or because of official acts performed or to be performed by Greeley, a municipal employee, Greeley, in turn, was charged with violating §3(b) for accepting something of substantial value from Emerson based on the performance of official acts on his (Greeley's) part and with violating §23(e), by giving the impression that Emerson could unduly enjoy his (Greeley's) favor in the performance of his official duties.

[2]/In **Saccone and Delprete** the Commission found that the Petitioner's failure to discover the alleged violations did not toll the statute of limitaitons unless the violations (which involved the same sections of G.L. c. 268A at issue here) were inherently unknowable. **Id.**, at [98].

COMMONWEALTH OF MASSACHSUETTS
STATE ETHICS COMMISSION

SUFFOLK,ss. Commission Adjudicatory Docket No. 213

IN THE MATTER
OF
DAVID E. MAY

DISPOSITION AGREEMENT

This Agreement is entered into between the State Ethics Commission ("Commission") and David E. May ("Mr. May") pursuant to Section 11 of the Commission's **Enforcement Procedures.** This agreement constitutes an assented to final Commission order enforceable in Superior Court pursuant to General Laws Chapter 268B, section 4(d).

On February 4, 1983, 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. May, former Mansfield selectman. The Commission concluded that preliminary inquiry and, on May 24, 1983, found reasonable cause to believe that Mr. May had violated chapter 268A. Adjudicatory proceedings were initiated with the issuance of an Order to Show Cause on June 28, 1983.

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

1. Mr. May was a member of the Mansfield Board of Selectmen from February, 1980 through December, 1982; he was chairman from March, 1981 through February, 1982. As such, he was a "municipal employee" as defined in G.L. c. 268A, §1(g).

2. The Mansfield selectmen serve as commissioners of the town's electric department and appoint Mansfield's town manager, the full-time administrator responsible for the operations of all town departments.

3. Mr. May's wife has been employed by the town since 1977 and, during this time, was a member of the Mansfield Clerks' Association, a collective bargaining unit representing office and clerical employees of various town departments.

4. On June 10, 1981, a contract between the town and the Mansfield Clerks' Association -- relating to, among other things, hours of employment, salary and other employee benefits -- came before the selectmen for their approval. Mr. May seconded the motion to approve and then voted to approve this contract. It was approved by the selectmen and, the next day, executed by the town manager and members of the Clerks' Association, including Mr. May's wife.

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

6. By seconding the motion and voting to approve a contract between the town and the Clerks' Association of which his wife was a member, Mr. May violated §19.

7. Durig the spring of 1982, the Mansfield Board of Selectmen conducted a search for a new town counsel. Resumes were received by the end of March, 1982, and the selectmen interviewed the various candidates in early May. One of the applicants for the position was John Dwyer, an attorney representing Mr. May's son, a minor, in criminal proceedings. (The proceedings were concluded on April 21, 1982, with a not guilty finding.)

8. On May 12, 1982, the selectmen voted, 3 to 2, to appoint Attorney Dwyer as town counsel. Mr. May participated in the interviewing process and voted to appoint Attorney Dwyer.

9. At the time the selectmen were engaged in this process of finding and appointing a new town counsel, Attorney Dwyer was representing Mr. May's son and was owed approximately $625 for his services. While Mr. May disclosed that Attorney Dwyer had represented his son, Mr. May did not disclose that his son still owed Attorney Dwyer money.

10. Sometime after his son was arrested, during the first half of 1982, Mr. May asked the director of Mansfield's electric light department whether Paradise Cleaners, his son's former employer and the complainant in the criminal matter, owed anything on its electric bills. When told that Paradise Cleaner's payments were a little in arrears, Mr. May asked the director if there was anything he could do about that arrearage.

11. In March, 1982, Mr. May's son received a speeding ticket issued by the Mansfield police. The ticket indicated that the posted speed for Franklin Street, where the violation occurred, was 40 miles per hour.

12. Mr. May contacted the town manager and told him that a constituent had received a speeding citation from the Mansfield police on Franklin Street and that the ticket was invalid because, in fact, the speed limit sign where the citation had been issued was missing. Mr. May asked the town manager for a letter verifying that fact to be used in the constituent's defense. Mr. May made this request twice and was twice refused.

13. At the April 7, 1983 meeting of the board of selectmen, Mr. May told the selectmen that a Franklin Street resident had requested a listing of speed limit signs on the street because of a citation received on the part of Franklin Street where there was no speed limit sign. Mr. May moved to have the town manager prepare a letter stating where the speed limit signs were placed on Franklin Street and voted in support of that motion. The motion passed.

14. The town manager wrote a memorandum on the location of speed limit signs on Franklin Street, as the selectmen had directed, and Mr. May gave his son a copy of the memorandum to be used in his defense. The memorandum was in fact not used.

15. Section 23 (para. 2) (3) of G.L. c. 268A forbids a public official from giving 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.

16. By this course of conduct – (a) as a selectmen, voting to appoint an attorney as town counsel without disclosing that the attorney was still owed money by his son; (b) as a light department commissioner, suggesting that the electric light department director do something about arrearages of a business which had brought a criminal complaint against Mr. May's son; and (c) as a selectmen, twice requesting that the town manager create a memorandum to be used in Mr. May's son's defense of a speeding charge – Mr. May gave reasonable basis for the impression that he, in the performance of these official duties as selectman and electric light department commissioner, was unduly affected by his son's interests, thereby violating §23 (para. 2) (3) of Chapter 268A.

17. Pursuant to petitioner's motion to amend, the Commission had dismissed paragraphs 9-12 of the Order to Show Cause relating to the request made by Mr. May of the Mansfield town manager in connection with the police's handling of the prosecution of his son's case.

Based on the foregoing facts, 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 and terms agreed to by Mr. May:

1. That he pay to the Commission the sum of $250.00 as a civil penalty for violating G.L. c. 268A, §19;

2. That he pay to the Commission the sum of $250.00 as a civil penalty for violating G.L. c. 268A, §23 (para. 2) (2); and

3. That he waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this agreement or any related administrative or judicial proceeding to which the Commission is a party.

DATE: October 21, 1983

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 214

IN THE MATTER
OF
CHARLES YOUNG

DISPOSITION AGREEMENT

This Agreement is entered into between the State Ethics Commission ("Commission") and Charles B. Young ("Mr. Young") pursuant to Section 11 of the Commission's **Enforcement Procedures.** This Agreement constitutes a consented to final Commission order enforceable in the Superior Court pursuant to G.L. c. 268B, §4(d).

On July 19, 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. Young, a representative of Minutemen and Women Contract Cleaners, Inc. of Winchester, MA ("Minutemen"), and Olympic Executive Sales of Bedford, New Hampshire ("Olympic"). The Commission has concluded that Preliminary Inquiry and, on October 19, 1982, found reasonable cause to believe that Mr. Young violated G.L. c. 268A. Adjudicatory proceedings were initiated with the issuance of an Order to Show Cause on August 8, 1983.

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

1. During the period July 1, 1978 through June 30, 1981, Minutemen and Olympic provided goods and services to the Commonwealth of Massachusetts, Department of Mental Health, Walter E. Fernald School ("Fernald School"), and received periodic payments from the Commonwealth. The goods and services provided by Minutemen and Olympic included housekeeping supplies and equipment, cleaning materials and related services.

2. In connection with the foregoing supplies and services, Mr. Young acted as the representative of Minutemen and Olympic and had business dealings, on a regular basis, with a number of employees of the Fernald School responsible for purchasing and contracting for those supplies and services.

3. During the late summer of 1980, a business organization, which Mr. Young represented, sponsored a boat cruise of Boston Harbor and paid for tickets, entertainment, food and beverage for approximately 120 guests. Three employees of Fernald School, who had official responsibility for purchasing and contracts involving Minutemen and Olympic, attended that affair, together with their guests, at Mr. Young's invitation. Their tickets, entertainment, food and beverages were paid for, along with the other guests, by the business organization which Mr. Young represented.

4. During the fall of 1980, Mr. Young invited six employees of Fernald School, who had official responsibility for purchasing and contracts involving Minutemen and Olympic, together with their guests, to attend a theatre performance in Boston and a party held at Mr. Young's home, following the performance. Mr. Young paid for all of the tickets to that performance, together with the food and beverage at the party.

5. General Laws c. 268A, §3(a) prohibits anyone, otherwise than as provided by law for the proper discharge of official duty, from directly or indirectly giving, offering or promising anything of substantial value to any state employee for or because of any official act or acts within his official responsibility performed or to be performed by that employee.

6. By providing tickets and other gratuities to employees of the Fernald School with whom Mr. Young had frequent business dealings with respect to purchases and contracts between Minutemen, Olympic and Fernald School, Mr. Young violated §3(a). Notwithstanding any well intentioned motivations of friendship, G.L. c. 268A, §3(a) clearly prohibits the giving of any gift or gratuity of substantial value when a nexus exists between the motivation of the gift and the employee's public duties. In this case, all of the foregoing employees of Fernald School had substantial official responsibility over purchases and contracts between Fernald School, Minutemen and Olympic. Therefore, the giving of a gratuity of substantial value creates an impermissible impression on the part of the general public that, in fact, those gratuities were motivated for or because of official acts, rather than other reasons.

Based on the foregoing facts, 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 and terms agreed to by Mr. Young:

1. That he pay to the Commission the sum of $500 as a civil penalty for violating G.L. c. 268A, §3(a); and

2. That he waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this agreement or any related administrative or judicial proceeding to which the Commission is a party.

DATE: December 13, 1983

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 219

IN THE MATTER
OF
JOSEPH C. McGINN

Appearances:
Sally C. Reid, Esq.: Counsel for Petitioner, State Ethics Commission

Joseph C. McGinn: **pro se**

Commissioners:
Brickman, Burns, McLaughlin, Mulligan

DECISION AND ORDER

I. Procedural History

The Petitioner filed an Order to Show Cause on September 6, 1983, alleging that the Respondent, Joseph C. McGinn, had violated M.G.L. c. 268B, §5[1]/ by failing to file his Statement of Financial

[1]/M.G.L. c. 268B, §5 states in relevant part:

(c) Ever public employee shall file a statement of financial interests for the preceeding 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. . .

. . .

(g) Failure of a reporting person to file a statement of financial interests within ten days after receiving notice 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.

Interest for 1982 (Statement) within ten days of receiving from the Commission a Formal Notice of Delinquency.

Pursuant to notice, an adjudicatory hearing was conducted on November 3, 1983 before Commissioner Joseph I. Mulligan, a duly designated presiding officer. See, M.G.L. c. 268B, §4(c). The parties waived the filing of post-hearing briefs and oral argument before the full Commission. In rendering this Decision and Order, each participating member of the Commission has considered the evidence and arguments presented by the parties.

II. Findings of Fact

1. The Respondent, Joseph C. McGinn, was a District Attorney for Worcester County from March, 1981 until December, 1982.

2. In November, 1982 the Respondent was designated by the District Attorney for the Middle District as a person in a "major policy-making position"[2]/ for the year 1982 and was required to file a Statement for 1982 on or before May 1, 1983.

4. On May 10, 1983, the Respondent received from the Commission a Formal Notice of Delinquency (Notice) requiring him to file his Statement within ten days of receipt of the Notice.

5. The Respondent failed to file his 1982 Statement within ten days of receipt of the Notice.

6. The Commission initiated a preliminary inquiry on June 23, 1983 pursuant to the Respondent's failure to file his 1982 Statement and thereafter authorized the initiation of adjudiatory proceedings.

7. The Respondent filed his 1982 Statement on July 7, 1983, 30 days after the expiration of the ten-day period contained in the Notice.

8. The Respondent admitted receiving the Commission's Notice but did not offer a reason for failing to file his 1982 Statement as required.

III. Decision

The failure of a reporting person to file a Statement within ten days after receiving a notice of delinquency constitutes a violation of M.G.L. c. 268B, §5. The elements necessary to establish a M.G.L. c. 268B, §5 violation are that: (1) the subject was a public employee (as defined by the statute) during the year in question; (2) the subject was notified in writing of his delinquency and the possible penalties for failure to file a statement; (3) the subject did not file a statement within ten days of receiving notice. Inasmuch as the Respondent conceded at the adjudicatory hearing that he failed to file his 1982 Statement within ten days of receiving the Commission's Notice, the Commission concludes that the Respondent violated M.G.L. c. 268B, §5.

SANCTION

Under M.G.L. c. 268B, §4(d), the Commisison may order an individual who violates M.G.L. c. 268B to pay a civil penalty of not more than $2,000.00 for each violation. In cases involving Statements which are filed late, the Commission imposes a fine based solely on the number of days which elapse after the expiration of the 10-day period following the Commission's Notice.[3]/ While the Commission does retain the discretion to adjust a civil penalty in recognition of mitigating circumstances, none of the factors warranting mitigation are present in this case.[4]/ In particular, the Respondent did not demonstrate a serious, good faith effort to comply as expeditiously and fully as possible after being put on notice of the filing requirement. Compare, **In the Matter of David Kopelman,** 1983 Ethics Commission 124.

IV. Order

On the basis of the foregoing, the Commission concludes that Joseph C. McGinn violated M.G.L. c. 268B, §5. Pursuant to the authority granted it by M.G.L. c. 268B, §4(d), the Commission hereby orders Mr. McGinn to pay a civil penalty of $500.00.[5]/

DATE: December 21, 1983

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[2]/For the purposes of M.G.L. c. 268B, 930 CMR 2.02(12) defines major policy making position(s) as:

a) the executive or administrative head or heads of a governmental body;

b) all members of the judiciary;

c) any person whose salary equals or exceeds that of state employee classified in step one of job group XXV of the general salary schedule contained in Massachusetts General Laws c. 30, §46 and who reports directly to said executive or administrative head;

d) the head of each division, bureau or other major administrative unit within such governmental body; and

e) persons exercising similar authority.

[3]/On April 12, 1983, the Commission adopted a schedule for the imposition of civil penalties on those who fail to file timely Statements within ten days after receipt of a Notice. The schedule calls for a daily fine of $10.00 per day for the first 10 working days and $20.00 per working day thereafter.

[4]/The Respondent asserts that the resulting fine in this matter is too severe for the violation involved. In essence, he argues that his violation of M.G.L. c. 268B, §5 is procedural in nature rather than substantive, and that he therefore, is entitled to a fine lesser in degree than one which might be imposed for a violation of M.G.L. c. 268A. The Commission concludes that this type of distinction is irrelevant.

[5]/The Respondent had demonstrated that full payment of this fine in a single transaction would impose financial hardship on him because he is in the process of establishing a private law practice. Accordingly, the Commission will allow the Respondent to make five monthly payments of $100.00 each to commence 30 days after he is notified of this Decision and Order and to continue every 30 days thereafter until the fine is paid in full. This type of Decision is in keeping with a prior Decision and Order where financial hardship was demonstrated. Compare, **In the Matter of Thomas Chilik,** 1983 Ethics Commission 130.

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 David J. Walsh**
(January 11, 1983)

A municipal water commissioner violated the conflict law by accepting payment from the town for three private construction jobs, by approving two of the payments, and by billing the town for tires purchased for his personal use.

By accepting payment from the town for private work he performed, the employee violated Section 20 which prohibits a municipal employee from having a financial interest in a contract with the municipality. By approving two of the payments, he violated Section 19 which prohibits a municipal employee from participating in a matter in which he has a financial interest. By billing the town for his tires, even where he eventually reimbursed the town, he violated the Standards of Conduct in Section 23(d) which prohibit a public employee from "using his official position to secure an unwarranted privilege for himself."

By the terms of the Disposition Agreement, the employee agreed to pay a $2,000 civil penalty for these violations.

***In the Matter of Patrick F. Jordan**
(February 4, 1983)

A selectman violated Section 3(b) of the conflict law by accepting items of substantial value given to him because of his official duties. Specifically, the selectmen received financial assistance, in the form of loans and loan guarantees, from a developer whose site plans were subject to approval by the board of selectmen.

By the terms of the Disposition Agreement, the selectmen agreed to pay a civil penalty of $1,000 and an additional $900 forfeiture of the economic advantage he gained as a result of the violation. He must also refrain from participating in matters coming before the selectmen in which the developer has a financial interest until his outstanding debt to the developer has been repaid.

***In the Matter of Donald S. Pottle**
(February 4, 1983)

The director of a state training program violated §4 of the conflict of interest law by accepting pay from private firms for conducting private training sessions which were nearly identical to those offered by the state.

The employee also violated several of the Standards of Conduct contained in Section 23 by accepting his state salary for time during which he was also paid by the private firm and by directing interested persons and firms who had contacted him about the state program to the private training courses.

By the terms of the Disposition Agreement, the employee agreed to pay a total of $6,500 in fines and damages for these violations.

***In the Matter of Eugene J. Mahoney**
(March 14, 1983)

A member of a local Board of Assessors violated the conflict law by improperly lowering the assessment on property in which he and his family had a financial interest, and by repeatedly trying to purchase for $1,000 property offered for sale at $25,000 by a company which was seeking substantial assessment abatements from the Board of Assessors.

By lowering the assessment on property owned by a Trust of which he and his family were the sole beneficiaries, the employee violated Section 19 of the conflict law. Section 19 prohibits a municipal employee's participation in matters in which he or his family have a financial interest.

Section 3(b) of the conflict law prohibits a municipal employee from soliciting anything of substantial value for or because of his official responsibilities or actions. The employee violated this section by trying to purchase property owned by a company which had several potentially valuable abatement applications pending before the Board of Assessors.

By terms of the Disposition Agreement, the employee agreed to pay $2,000 in civil penalties for violation of Sections 19 and 3(b), $3,150 to the municipality as reimbursement for the amount of his tax savings resulting from the improperly lowered assessment, and $4,850 to the Commission for costs incurred in investigating these violations.

In the Matter of Fred J. Matera
(March 22, 1983)

A state attorney violated Section 4(c) of the conflict law by representing a private party before a local conservation commission on a wetland issue. Section 4(c) prohibits a state employee from acting as attorney for anyone other than the state in connection with any particular matter in which the state has a direct and substantial interest. Because the Wetlands Protection Act requires the involvement of the Department of Environmental Quality Engineering in local determinations about the use of wetlands, these decision are "matters of direct and substantial interest to the state".

By the terms of the Disposition Agreement, the employee agreed to pay a $500 civil penalty for this violation and not to collect any legal fee for his work on this matter.

In the Matter of Andrew P. Quigley
(March 22, 1983)

A city employee who is also a newspaper owner/publisher, violated Section 20 of the conflict law by having a financial interest in advertising contracts between his paper and the city. Section 20 prohibits a city employee from having, except under certain conditions, a financial interest in contracts with his own municipality.

By the terms of the Disposition Agreement, the employee agreed to pay a $500 civil penalty and to submit to the Commission within 30 days satisfactory proof of his compliance with the conflict law.

***In the Matter of Robert O'Brien, John Kennedy and Edward Welch**
(March 24, 1983)

The chairman of a municipal water commission and two water department employees violated the conflict law by allowing water department employees to inspect and repair the chairman's wooden deck during normal department working hours when they were being paid by the city.

Though each of them played a different role in this incident, they agreed, in separate Disposition Agreements, that their conduct violated the Standards of Conduct in Section 23 of the conflict law.

The chairman of the water commission had water department employees inspect his property and make repairs on it during their normal working hours. By so doing, he used his position to secure an unwarranted privilege as prohibited by Section 23. By terms of his Disposition Agreement with the Commission, he agreed to pay a $2,000 civil penalty for this violation.

The two department employees agreed that by allowing department employees to inspect and perform repairs on private property owned by the chairman and by failing to notify the other members of the commission about this incident, they had violated two of the Standards of Conduct in Section 23 of the conflict law. These Standards prohibit a public employee from (1) using his position to secure an unwarranted privilege for himself or others and (2) giving a reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties.

Both employees were penalized by the water commission for their improper actions; one by the loss of two weeks' pay and one by the loss of one weeks' pay.

In the Matter of Ralph Serra
(May 5, 1983)

An employee of a water district violated Section 20 of the conflict law by collecting $7,220, through his private business, from the rental of his backhoe to that same water district. Section 20 prohibits a municipal employee from having a financial interest in a contract made by an agency of his city or town. Since the employee was hired by the water district after he was already performing the private contract work and since the water district commissioners approved the contract, no fine was assessed.

In the Matter of Warren H. Rhodes
(May 5, 1983)

A selectman violated the Standards of Conduct set out in Section 23 of the conflict law by accepting golfing privileges at a local golf club extended to him because he was a selectman. Section 23, among other things, prohibits a municipal employee from using his official position to secure an unwarranted privilege. By the terms of the Disposition Agreement, the selectmen agreed to stop playing golf at that club without paying the greens fee. (He had paid back the greens fees he should have paid for prior golfing.)

In the Matter of Arthur L. Sweetman
(May 5, 1983)

A regional vocational school has a student work program which provides student labor to interested parties for repair, alteration and construction projects. The superintendent of the school violated Section 19 of the conflict law by signing shop orders for work on property which he or members of his immediate family owned. Section 19 prohibits a municipal employee from participating in a particular matter in which, among others, he or members of his immediate family has a financial interest. By the terms of the Disposition Agreement, the superintendent was ordered to cease and desist this practice unless he received the requisite approval from the regional school committee.

***In the Matter of Christing Shane**
(May 5, 1983)

The Director of the Office of Staff Training, Manpower Planning and Development for the Department of Mental Health violated the Standards of Conduct contained in the conflict of interest law by improperly accepting an honorarium for work performed while also being paid by the Commonwealth. She was invited to participate in a week-long workshop in Atlanta sponsored by Georgia's Department of Mental Health. She requested and received approval from her supervisor to attend the workshop. Even though she had been paid by the Commonwealth while at the conference, she later accepted a $1,500 honorarium from Georgia. By the terms of the Disposition Agreement, she was required to pay a $500 penalty and make restitution to the Commonwealth in the amount of $1,000, i.e. two-thirds of the honorarium. She was allowed to retain that portion of the honorarium representing payment for activities performed on her own time.

In the Matter of Andrew P. Clifford
(May 24, 1983)

An employee of the City of Boston violated Section 20 of Chapter 268A by working for a company that contracted with the City. Since his compensation was derived from funds paid to the company by the City, he had a prohibited interest in a city contract. By the terms of the Disposition Agreement, he was required to pay a penalty of $100.

In the Matter of William G. Jones
(May 24, 1983)

The superintendent of two municipal water districts violated Section 19 and Section 20 of Chapter 268A. He violated Section 19 by participating in matters in which he had a financial interest (the hiring by the district of his own private backhoe service) and in which a member of his immediate family had a financial interest (the recommendation that the water district commissioners hir his son as a laborer). The superintendent violated Section 20 by having a financial interest in contracts with each of the districts (i.e., contracts between his private backhoe service and each district for emergency repair and new installation work). By the terms of the Disposition Agreement, he was required to pay fines totalling $1,000.

In the Matters of William G. Slaby and Michael C. Mannix
(May 24, 1983)

In a city one alderman was the father-in-law of a second alderman. They both violated Section 19 of Chapter 268A by participating in a matter in which the father-in-law had a financial interest. The matter involved was the denial of a zoning change allowing a gas station at a certain location in the city. Section 19 prohibits a municipal employee from participating in particular matters in which, among others, he or a member of his immediate family has a financial interest. The father-in-law violated Section 19 because he leased a gas station in that area and the zoning change would have resulted in increased competition. The son-in-law violated Section 19 because a member of his immediate family (the other alderman) had a financial interest in the matter. By the terms of the Disposition Agreement, the father-in-law was required to pay a civil penalty of $100.

In the Matter of Paul V. Studenski
(June 23, 1983)

The mayor of Brockton violated §19 of the conflict of interest law by signing on behalf of the City a contract with a company for which, in his private capacity, he was employed as audit manager. Section 19 prohibits a municipal employee from participating in a particular matter in which, among others, a business organization by which he is employed has a financial interest. In the Disposition Agreement the mayor also acknowledged that he gave "reasonable basis for the impression that [the company] could unduly enjoy his favor as mayor . . . and that he could be unduly affected in the performance of his official duties. . ." in violation of the Standards of Conduct set out in §23. By the terms of the Disposition Agreement, the mayor agreed to pay a civil penalty of $500.

In the Matter of Robert N. Scola
(June 23, 1983)

A district court judge violated the Standards of Conduct set out in §23 of G.L. c. 268A by assigning defendants who appeared before him to a program given by a corporation employing his daughter. The defendants had to pay a fee to the corporation. The judge's daughter was the only paid employee of the program. By the terms of the Disposition Agreement, the judge agreed to pay a civil penalty of $250.

In the Matter of Roger B. Whitcomb
(June 23, 1983)

A court officer violated the Standards of Conduct set out in §23 of G.L. c. 268A by using his official position to secure unwarranted privileges for himself. Specifically, he conducted a portion of his private constable business at the courthouse while on duty as a court officer. By the terms of the Disposition Agreement, he agreed that he would not 1) accept documents or payments related to his constable activities in the courthouse, 2) use the courthouse telephones to conduct his constable business, 3) discuss his constable business with either clients or individuals served with process by him or his firm at the courthouse and during court hours, 4) perform constable and court officer duties simultaneously during court sessions, nor 5) use the courthouse copier, regardless of whether he replaces the paper used.

In the Matter of Fletcher Smith, Jr.
(July 25, 1983)

A Selectman violated Section 20 of the conflict law by having a financial interest in his printing firm's contracts with his town and violated Section 19 by approving the town's payments to his printing company under those contracts.

Section 20 prohibits a municipal employee, except under certain conditions, from having a financial interest in a contract with his municipality. Section 19 prohibits a municipal employee from participating in a matter in which he and certain other people and entities close to him have a financial interest.

By the terms of the Disposition Agreement, the selectman agreed to pay a civil penalty of $350 for these violations.

* **In the Matter of Elizabeth Buckley**
(September 12, 1983)

A city employee violated the Standards of Conduct in Section 23 by using city stationery to further her own private interests. Section 23, among other things, prohibits a municipal employee from using her official position to secure an unwarranted privilege.

By the terms of the Disposition Agreement, the employee agreed to pay a civil penalty of $500.00 for this violation.

* **In the Matter of David E. May**
(October 21, 1983)

A Selectman violated the conflict law by participating in approval of a contract between the town and his wife's employees' union and by taking action as a selectman and as an electric light department commissioner on behalf of his son. The selectman acknowledged violating Section 19 by voting to approve a contract in which his wife had a financial interest. He also acknowledged that he violated the Standards of Conduct in Section 23(2) (3) by, among other things, twice requesting, as a selectman, that the town manager prepare a memorandum to be used in his son's defense of a speeding charge, thereby giving a "reasonable basis for the impression that he was unduly affected" by his son's interests.

The Selectman has agreed to pay civil penalties totaling $500 for these violations.

* **In the Matter of Charles Young**
(December 13, 1983)

A private cleaning contractor doing business with the Department of Mental Health violated the conflict of interest law by providing theatre tickets and other gratuities to state employees who had official responsibility for purchasing and contracts involving his businesses.

In the Agreement he acknowledged violatint Section 3 of the law which prohibits anyone from giving, offering or promising anything of substantial value to any state employee for or because of the employee's official actions.

By the terms of the Disposition Agreement, the contractor agreed to pay a civil penalty of $500 for these violations.

Included are:

1. Selected Advisory Opinions issued in 1983 (Excluded are those which merely restate the statutory provisions or offer no new discussion of the law. The text of any advisory opinion not included is available from the Commission.)

2. Commission Advisories issued in 1983.

3. Summaries of all Advisory Opinions issued in 1983.

Cite advisory opinions as follows:
EC-COI-83-(number)

CONFLICT OF INTEREST OPINION NO. EC-COI-83-1

FACTS:

You are a member of the board of selectmen in the Town of ABC (Town) and are interested in applying for the position of executive secretary to the board of selectmen.

QUESTION:

Following your resignation as a member of the board of selectmen, what is the waiting period after which you will be eligible for appointment to the executive secretary position?

ANSWER:

You will be eligible for appointment six months after resigning your membership on the board of selectmen.

DISCUSSION:

Prior to the enactment of St. 1982, c. 107[1]/ any member of a municipal board or commission who sought a position under that board or commission was ineligible for appointment to that position until the expiration of thirty days from the termination of his service as a commission or board member. G.L. c. 268A, §21A. The thirty-day waiting period for eligibility for appointment was not limited to selectmen and included any member of a municipal board or commission. See, **Starr v. Board of Health of Clinton,** 356 Mass. 426, 429 (1969), and could be waived through approval at an annual town meeting. In 1982 the General Court enacted St. 1982, c. 107 in response to judicial and Commission decisions holding that selectmen could not have a financial interest in an employment contract with their town. G.L. c. 268A, §20, See, **Walsh v. Love,** Norfolk Superior Court Civil Action No. 132687 (July 2, 1981); EC-COI-80-89. The legislation was addressed specifically to selectmen and allows selectmen under certain conditions to hold an additional town position. However, c. 107 also adds a condition that "no member [of a board of selectmen] shall be eligible for appointment to such additional position while a member or for six months thereafter." Insofar as c. 107 establishes a longer waiting period for the eligibility of selectmen for appointment to a second municipal position than found in §21A, the statutes conflict. Inasmuch as c. 107 does not reference §21A or otherwise indicate how conflicts between the two provisions should be reconciled, the Commission must apply principles of statutory construction to resolve the inconsistency.

As a general principle, the Commission is obliged to construe the provisions of c. 268A, where possible, "so as to constitute a harmonious whole," **Town of Dedham v. Labor Relations Commission,** 365 Mass. 392, 402 (1974);EC-COI-81-75, and to give a workable meaning to c. 268A. **Graham v. McGrail,** 370 Mass. 133, 140 (1976). The Commission also assumes that the General Court did not intend, by passing c. 107, to engage in a futile act. **Commonwealth v. Wade,** 372 Mass. 91, 95 (1977). It is well-setled that where a conflict appears between two statutes, it is the duty of courts (and administrative agencies) to give affect to the legislative intent in such a way that the later action may not be futile; the earlier enactment must give way. **Rennert v. Board of Trustees of State Colleges,** 362 Mass. 740, 743-745 (1973). **Doherty v. Commissioner of Administration,** 349 Mass. 687, 690 (1965). Additionally, the Supreme Judicial Court has stated that, "[i]f a general statute and a specific statute cannot be reconciled, the general statute must yield to the specific statute. This is particularly true where, as here, the specific statute was enacted after the general statute." **Pereira v. New England LNG Co., Inc.,** 364 Mass. 109, 118-119 (1973).

On the basis of these principles, the Commission concludes that the six month waiting period contained in §20 and inserted by c. 107

[1]/The provisions of c. 107 are as follows:

This section shall not prohibit an employee or an official of a town from holding the position of selectman in such town nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office. Provided that no such member may vote or act on any matter which is within the purview of the agency by which he is employed or over which he has official responsibility, and *provided further that no member shall be eligible for appointment to such additional position while a member or for six months thereafter.* Any violation of the provisions of this paragraph which has substantially influenced the action taken by any municipal agency in any matter shall be grounds for avoiding, rescinding or cancelling the action on such terms as the interest of the municipality and innocent third parties require. No such selectman shall receive compensation from more than one office or position held in a town, but shall have the right to choose which compensation he shall receive. (emphasis added)

prevails over the shorter waiting period appearing in §21A. The scope of §21A, which was enacted in 1967, includes any member of a board or commission of a city or town. On the other hand, the scope of c. 107, a 1982 enactment, is limited to one specific office in a town. Moreover, c. 107 presumptively reflects the General Court's view that a longer waiting period is desirable in light of the authority and visibility which accompanies the office of selectmen. While it would have been preferable for the General Court to have recognized the statutory conflict and to have legislatively resolved the inconsistency during the passage of c. 107, the Commission finds that the resolution of the conflict is governed by the principles expressed in **Pereira, supra.** Accordingly, your period of eligibility for the executive secretary position will be governed by the six-month waiting period of c. 107 rather than the thirty-day period contained in §21A.

DATE AUTHORIZED: January 11, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-4

FACTS:

You are one of five members of the Worcester Civic Center Commission (WCCC), an unpaid commission appointed by the Worcester City Manager, subject to approval by the Worcester City Council. The WCCC governs the operation of the Centrum, the municipally-owned civic center which is used to house large-scale musical and athletic performances.

On October 28, 1982, the WCCC adopted a policy (the policy) governing the distribution of tickets to Centrum events. Under this policy, certain federal, state and municipal officials were allowed to reserve up to 15 or 20 tickets (depending on their positions) within seven days after the tickets went on sale, by calling a WCCC staff person.[1]/ These individuals had to pay for the tickets in full within the seven-day period, and did not receive any preferential seating. The policy simply guaranteed them tickets, even for sellout performances, without having to wait in line for them, since the tickets were kept aside from those sold to the public during the seven-day period, and reserved for the officials.

You have indicated that the WCCC voted on December 12, 1982 to terminate the policy pending receipt of an advisory opinion from the Ethics Commission (Commission) on whether or not the policy presented a conflict of interest.

QUESTION:

It is permissible under G.L. c. 268A for the WCCC to give, and for municipal and state officials to receive, ticket reservation privileges not accorded to the general public?

ANSWER:

No.

DISCUSSION:

Although the Commission does not ordinarily issue advisory opinions on municipal matters, it is doing so in this matter because it has received several inquiries related to the situation you have presented, and both municipal and state officials are involved in the situation.

As a member of the WCCC, you are a municipal employee, as are the city councillors, and the city manager, for purposes of the conflict of interest law.[2]/ As such, you are subject to the code of conduct contained in §23 of c. 268A, particularly the following:

> [No officer or employee of a state, county or municipal agency shall]. . .
>
> (d) use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others;
>
> (e) 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. . .

[1]/The city councillors, civic center commissioners, city manager and local congressman each received up to 20 tickets per event; the local state representatives and senators each received up to 15 tickets per event. Thus, you are in a potential position of both promulgating this policy and benefiting from it.

[2]/G.L. c. 268A, §1(g).

Those who benefit from the reservation policy include the individuals who appoint the members of the WCCC, and the members themselves. It is apparent that they are receiving the benefit because of their official positions; in fact, the policy confers the benefit according to position rather than name. Generally, the Commission has closely questioned gratuities distributed according to public position or functions,[3]/ since they are often preceived by the public as improper[4]/ and they diminish public confidence in the impartiality and fairness of government officials; indeed, this concern is at the heart of §§23(d) and (e).

The central issues here are whether the policy is an *unwarranted* privilege and whether or not there is reasonable basis for the impression that (1) in granting the benefit of the policy, the WCCC is unduly affected by the positions of the recipients; or (2) the recipients unduly enjoy the WCCC's favor; or (3) those receiving the benefits can be improperly influenced by the WCCC; or (4) those receiving the benefits unduly enjoy the WCCC's favor.

The Commission concludes that the policy does grant a benefit which is unwarranted and undue. This conclusion is based on the fact that it is a gratuity based primarily on position, given by a public entity which is expected to serve the public at large without favoritism. Under this policy, those who serve the people are treated better than the people themselves. The Commission considers this favoritism to exceed nominal courtesy in view of the large number of tickets obtainable under the policy, and the obvious desirability (and relative scarceness) of tickets for some events.[5]/ For these reasons, the Commission advises the WCCC not to resume the practice.[6]/

DATE AUTHORIZED: January 11, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-11

FACTS:

You are a member of the school committee of Town A in a region of the state. Each town in the region has a local school committee which oversees the operation of the elementary schools in the respective towns. These local committees also appoint from their ranks representatives to the Regional High School Committee (RHSC), a body which operates the regional high school in the region. You are the Town A representative to the RHSC.

All teachers, high school and elementary, are covered by the same collective bargaining contract. Representatives from high school teachers and the elementary school teachers negotiate jointly with representatives of each of the local school committees and the RHSC. Your wife is a teacher in the Town B elementary school and is covered by this collective bargaining contract.

Recently, a regional high school teacher applied to the RHSC, pursuant to the contract, for a sabbatical. Under the contract, each town school committee and the RHSC is authorized to grant or deny such a sabbatical independently.

QUESTION:

1. How does the conflict of interest law apply to you in your dual roles in light of your wife's employment as a teacher in one of the towns and the collective bargaining agreement common among the RHS teachers and the elementary school teachers in the towns?

2. Can you participate, as an RHSC member, in the consideration of the sabbatical leave request of a regional high school teacher?

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[3]/See, e.g. **In the Matter of George A. Michael,** Commission Adjudicatory Docket No. 137, Decision and Order (September 28, 1981) pg. 31; EC-COI-80-28.

[4]/As you noted in your request for an opinion, local newspapers have taken a very strong stand against the policy of the WCCC, for this very reason. See **Worcester Telegram,** November 26, 1982, editorial: "No Centrum Favoritism."

[5]/On this point, the Commission points to a recent newspaper article which reported that the 13,500 tickets for a particular concert at the Centrum were sold out in four hours, leaving some 3,500 people seeking tickets; tickets were later being sold by "scalpers" at up to $125 apiece. **Boston Globe,** December 12, 1982, page 72. Such facts may raise questions under c. 268A, §3, which prohibits a public official from receiving (or anyone from giving) something of substantial value for or because of official acts. However, because the Commission is unwilling to speculate on the market value of tickets for any particular event, and it already finds the policy to be prohibited under §23, it does not reach the §3 issue.

[6]/The conclusion here applies equally to WCCC members as both givers and recipients of the benefit, and to municipal and state officials who receive the benefit, since all are covered by G.L. c. 268A.

ANSWER:

1. You may not participate in either capacity in any particular matters in which your wife would have a financial interest.
2. Yes.

DISCUSSION:

As a Town A school committee member you are a municipal employee as defined in the conflict of interest law, G.L. c. 268A, §1(g), and, as a result, are subject to that law. Section 19 prohibits you from participating as a Town A school committee member in any particular matter[1]/ in which any member of your immediate family has a financial interest. Although your wife is employed as a teacher in a town other than Town A and not under the day-to-day authority of Town A's school committee or the RHSC, the contract negotiations unite these two committees and the Town B school committee. Therefore, §19 would prohibit you from participating in these negotiations on behalf of the Town A school committee because these negotiations would be related to the contract which is a particular matter in which your wife has a financial interest. Similarly, using the example you presented, if the matter of your wife's sabbatical leave were to come before you, you would also be prohibited from participating.[2]/ See, **Graham v. McGrail,** 370 Mass. 133 (1976).

Section 19, however, only prohibits your participation where your wife has a financial interest. Therefore, even though your wife may be covered by contract terms resulting from the same negotiations and identical to those which apply to a teacher in either town seeking sabbatical leave, the independence of each local committee precludes your wife from having a financial interest in the decision on whether to grant such a leave to a teacher in another town.

The law applies similarly to you as a member of the RHSC. In advisory opinion EC-COI-82-25 (enclosed), the Commission declared that a regional school district (RSD) is an "independent municipal agency" rather than a subdivision or instrumentality of any or all of the member towns. This conclusion was based on the autonomy of operation of RSD's and the fact that their function is to provide a service normally provided by cities and towns. As a result, RSD committee members and employees are still subject to the provisions of the conflict law applicable to "municipal employees." Therefore, §19 also applies to you as an RHSC member in connection with matters in which your wife would have a financial interest. However, based on the facts you present, it is unlikely that any matter coming before you as an RHSC member, other than contract negotiations, would fall into this category. You should be aware that the §19 restriction applies not only to the negotiations themselves, but also to any planning or strategy discussions or decisions regarding those negotiations of either the Town A school committee or the RHSC.

Should any matter arise in the future concerning which you have a question whether your wife has a financial interest, you should seek guidance from the Town A Town Counsel or this Commission.

DATE AUTHORIZED: January 11, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-12

FACTS:

You are an employee of the state Department of Revenue (DOR) and an attorney. Your DOR duties involve [description of duties omitted]. You have no involvement with the DOR's Division of Local Services which is concerned with local real estate taxes and their assessment.

Your wife's automobile was involved in an accident and, as a result, the company which insured the auto assessed an insurance premium surcharge. Your wife has filed an appeal with

[1]/For the purposes of 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. G.L. c. 268A, §1(k).

[2]/Section 19 provides the opportunity for exemption from its application upon approval of a municipal employee's appointing official. However, as an elected official, you are unable to avail yourself of this exemption. See, **District Attorney for the Hampden District v. Grucci,** 1981 Mass. Adv. Sh. 2125, 2128 n. 3. And, although not required by §19, it would be desirable for you to place on the public record the reasons for your abstention whenever §19 would prohibit your participation.

the Massachusetts Merit Rating Board (Board), a state agency. See, G.L. c. 6, §183. You would like to represent your wife in her appeal.

You also own a home which you built in the Town of (Town) in 1967. Your sister-in-law's (wife's sister's) husband built a similar home in the same area one year earlier. In July of 1982, the Town increased the assessment of these two homes. You and your sister-in-law's husband filed applications for abatements with the Town which were not granted. You both have now filed appeals with the state Appellate Tax Board (ATB), a quasi-judicial agency within, but not subject to the supervision of, the DOR. See G.L. c. 58A, §§1 et seq. You intend to represent yourself in the proceedings. However, because of the numerous similarities in these two properties, you expect that the appeals may be consolidated either by the member of the ATB hearing the cases or by motion of the Town assessors. If so, you will be placed in the position of appearing not only on your own behalf, but also on behalf of your sister-in-law's husband.

QUESTION:

While you remain employed by the DOR, may you

a) represent your wife in her action before the Massachusetts Merit Rating Board; and/or

b) represent your sister-in-law's husband in the case before the ATB?

ANSWER:

a) Yes.
b) No.

DISCUSSION:

As an employee of DOR, you are a "state employee", G.L. c. 268A, §1(q), and, as a result, subject to the conflict of interest law. Section 4(c) of that law prohibits you from appearing as agent or attorney for anyone other than the state in connection with any "particular matter"[1]/ in which the state is a party or has a direct and substantial interest.

The Massachusetts Merit Rating Board's proceedings and determinations regarding insurance surcharge appeals would be particular matters within the scope of §4, and ordinarily you would be prohibited by §4 from representing non-state parties in relation to these proceedings and determinations. However, §4 provides an exemption from its provisions for a state employee acting with or without compensation, as agent or attorney for or otherwise assisting or aiding a member of his immediate family as long as a) he has neither participated in nor had any official responsibility for the matter and b) the state official responsible for his appointment gives his approval. "Immediate family" is defined in §1(e) as the state employee, his spouse and their parents, brothers, sisters and children. Therefore, your representation of your wife before the Massachusetts Merit Rating Board is not prohibited by §4, provided that you receive approval from your appointing official.

On the other hand, the definition of immediate family does not include your sister-in-law's husband. The Commission, in accord with conflict opinions of the Attorney General, has held that decisions made by municipal assessors concerning the revaluation of real property are particular matters of direct and substantial interest to the state. EC-COI-79-7; Atty. Gen. Conf. Op. No. 741. Therefore, §4(c) prohibits you from appearing as agent or attorney for anyone other than the state in connection with such particular matters. Since your sister-in-law's husband does not qualify for the exemption for assisting immediate family members, nor any other exemption in §4, you may not appear on his behalf before the ATB. Section 4(c) does not prohibit you from representing yourself before the ATB because you are not "acting as *agent* or *attorney*" for someone other than the Commonwealth, but rather, are appearing on your own behalf.

DATE AUTHORIZED: January 11, 1983

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[1]/For the purposes of G.L. c. 268A, "particular matter" is defined as any judicial or other proceeding, application, submission, request for ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court. G.L. c. 268A, §1(k).

CONFLICT OF INTEREST OPINION NO. EC-COI-83-13

FACTS:

The Massachusetts Council on the Arts and Humanities (MCAH) is a state agency created by Chapter 589 of the Acts of 1966 (G.L. c. 15, §40 et seq.) which makes competitive awards of state funds to cultural organizations to support programs which are judged to be of public benefit.[1]/ In 1982 you were selected to receive MCAH funds through a project completion award, under the terms of which you are to be paid from the award money for certain work, after that work has been performed. You have not yet been paid any money from this award, and have only performed a small part of the work to be funded by it.

Following your selection as a grant receipient, you learned of a part-time job opening on the MCAH staff; you were subsequently interviewed and offered the position, which you later assumed.

QUESTION:

Does the conflict of interest law, G.L. c. 268A, permit you to receive grant monies which originate with MCAH, while you are employed by MCAH?

ANSWER:

No, except for payments made for work done before you started the MCAH staff position.

DISCUSSION:

As a staff member of MCAH, you are a state employee[2]/ subject to G.L. c. 268A; because your position is part-time, you are a special state employee as that term is defined in G.L. c. 268A, §1(o).

Section 7 of G.L. c. 268A states:

> A state employee who has a financial interest, directly or indirectly, in a contrace 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 shall be punished [by a fine or imprisonment or both.]
>
> . . .
>
> This section shall not apply . . . (d) to a special state employee who does not participate[3]/ in or have official responsibility for any of the activities of the contracting agency and who files with the state ethics commission a statement making full disclosure of his interest and the interests of his immediate family in the contract, or (e) to a special state employee who files with the state ethics commission a statement making full disclosure of his interest and the interests of his immediate family in the contract, if the governor with the advice and consent of the executive council exempts him.

The grant which you have been awarded is funded by MCAH (a state agency) pursuant to a contract between [identifying information deleted] and MCAH. Your award thus constitutes an indirect financial interest in that contract.[4]/ (Identifying information deleted). Although the grant was decided upon in 1982 you have not actually received the grant monies prior to assuming the job at MCAH, and have performed only a part of the work for which the money is to be received. Thus, to an extent, your financial interest in the grant will run concurrently with your state employment.[5]/ Because you now participate as a staff member in the activities of MCAH, the state agency whose contract funds you grant, you do not qualify for the exemption in clause (d) of §7. Neither have you been exempted by the governor and the executive council as described in clause (e). Therefore, you cannot receive grant monies which derive from MCAH funds for work done while you are also employed by MCAH.[6]/

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[1]/See generally, EC-COI-81-118.

[2]/See G.L. c. 268A, §1(q); EC-COI-82-182; 81-118.

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

[4]/See, e.g., EC-COI-82-41; 81-149; 81-106; 79-5; Atty. Gen. Conf. Op. Nos. 893; 798.

[5]/In November, 1982, you served on an advisory panel of the MCAH. Because that service ended prior to the grant award, this opinion will not address the issue of whether that service also constituted state employment. Compare, EC-COI-82-157; 82-81.

[6]/The fact that the grant award preceded your entry into state employment does not change this result, since the operation of the statute does not depend on whether you were personally involved in the award decision. See, William G. Buss, Jr., **The Massachusetts Conflict of Interest Statute: An Analysis,** 45 B.U.L. Rev. 299, 366 (1965); EC-COI-82-29.

However, you may receive compensation for work you performed under the grant prior to starting in your state position, i.e. from December 5, 1982 through January 25, 1983. In Attorney General Conflict Opinion No. 104 (June 4, 1963) the Attorney General addressed a similar situation and ruled:

> If, and you indicate you will, you terminate all connection with the [prior matter]prior to your appointment [as a state employee], there would be no violation of [the conflict of interest law]. In this situation the value of your services to the date of [starting the state job] must be liquidated prior to your appointment as a state employee. *As long as the amount owed for services rendered prior to your appointment is liquidated before you become a state employee, then the mere fact that payment is deferred would not constitute a violation under the Act. I should caution, however, that the determination of your fee prior to your appointment must be bona fide, for if you were to receive a fee based upon services or events which occurred subsequent to your appointment, you [would be in violation].* (emphasis added)

The Commission concludes that the situation addressed in the above opinion is sufficiently analogous to yours to allow you to receive a limited amount of compensation from the Foundation award, pursuant to the conditions set forth by the Attorney General.[7]/

DATE AUTHORIZED: February 4, 1983

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[7]/The only situation in which the Commission has deviated from this holding and allowed a prior contract to continue to completion has been where the immediate discontinuation of the contract would cause undue hardship on innocent third parties who were not themselves state employees. See, e.g., EC-COI-82-12, note 1; 81-189, note 6; 80-122. Compare, Atty. Gen. Conf. Op. No. 833. Such extenuating circumstances are not present in the situation you have described, however.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-15

FACTS:

You are an employee of ABC, a regional transit authority under G.L. c. 161B, §2. In (date omitted) you participated in a review panel that was established by the Transportation Systems Center (TSC) to assist the Urban Mass Transportation Administration (UMTA) in the development and use of [certain products] in the transit industry. Your participation in the project was solicited by TSC and included the review of several TSC-produced reports and attendance on (dates omitted) of all-day workshops held at TSC in Cambridge. All your activity in this project was conducted on your own time and not on ABC time, and you were paid an honorarium of $200 and travel expenses of $40. TSC is an agency of the Department of Transportation (DOT) and is funded by DOT. DOT also funds ABC in the form of operating assistance and capital grants. ABC is involved with UMTA in a project which is studying the use of computer technology in the transit industry. This project has been ongoing for a year and will continue until [date omitted]. As an employee of ABC you have been meeting approximately two times a month with officials from UMTA since the inception of the project, and will continue to do so until the end of the study.

QUESTIONS:

1. May you keep the honorarium?
2. May you keep the reimbursement for your travel expenses?

ANSWERS:

1. No.
2. Yes.

DISCUSSION:

As a full-time employee of ABC you are a state employee as that term is defined in G.L. c. 268A, §1(q). See, EC-COI-81-119; 79-91 [regional transportation authorities are state agencies for the purposes of G.L. c. 268A]. Section 23 of Chapter 268A prohibits state employees from accepting other employment that will impair their independence of judgment in the exercise of their official duties, or from giving, by their conduct, reasonable basis for the impression that any person can improperly influence them or unduly enjoy their favor in the performance of those duties. It further prohibits state employees from using their official positions to secure unwarranted privileges for themselves or from pursuing a course of conduct which will raise suspicion among the public that they are likely to be engaged in violations of their trust.

On the basis of these prohibitions, the Commission concludes that you may accept honoraria for speaking engagements only if *all* the following requirements are met:

(1) State supplies or facilities not available to the general public are not used in the preparation or delivery of the address.

(2) State time is not taken for the preparation or delivery of the address.

(3) Delivering the speech is not part of your official duties.

(4) Neither the sponsor of the address nor the source of the honorarium, if different, is a person or entity with which you might reasonably expect to have dealings in your official capacity. (See, EC-COI-80-28, 82-74).

According to the information you have provided, you satisfy requirements (1) through (3). However, you do not satisfy requirement (4) as both TSC and UMTA are entities with which you have dealings in your official capacity as an employee of ABC. Because you do not satisfy all of the requirements for accepting honoraria, you must return the $200 to TSC. However, Chapter 268A would not preclude your accepting reimbursement from the sponsor of the address for nominal expenses actually incurred in addressing the workshop even where the requirements listed above are not met. Therefore, you may keep the $40 for reimbursement of your travel expenses.

DATE AUTHORIZED: February 4, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-16

FACTS:

You are an employee of the state Department of Public Works (DPW). You also work part-time for XYZ, a private land surveying company. You currently do surveys of privately-owned land on a fee-for-service basis for XYZ. You are listed in XYZ brochures as an associate member of the firm but you have no involvement in the management of the corporation.

The DPW requires that companies bidding to furnish survey crews to the DPW have a surveyor associated with the company. XYZ would like to submit bids to the DPW to supply survey crews. You would be XYZ's surveyor for these surveys and would get a percentage of the firm's revenue.

QUESTIONS:

1. May you serve as the surveyor for XYZ in connection with surveys conducted for the DPW?

2. If not, may you continue to perform surveys of private land on a fee-for-service basis?

ANSWER:

1. No.
2. Yes.

DISCUSSION:

As an employee of the DPW, you are a state employee as defined in the conflict of interest law. G.L. c. 268A, §1(q). Section 4(a) of the conflict law prohibits you from being compensated by anyone other than the state in connection with a particular matter[1]/ in which the state is a party or has a direct and substantial interest. The surveys performed by XYZ for the DPW would be particular matters in which the state is a party. If you were to receive a percentage of XYZ's fee

[1]/For the purposes of G.L. c. 268A, "particular mater" 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. G.L. c. 268A, §1(k).

for acting as surveyor in connection with such a survey, you would violate §4(a) by receiving compensation from someone other than the state in connection with such a particular matter. Therefore, you are prohibited from being paid by XYZ for any services rendered as a surveyor in connection with DPW surveys.[2]/ Moreover, you should not be listed as XYZ's surveyor in its bids to the DPW.

Surveys of private property, however, are not particular matters in which the state is a party or has a direct and substantial interest. Therefore, you would not be prohibited from continuing to perform such surveys on a fee-for-service basis for XYZ.

DATE AUTHORIZED: February 4, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-17

FACTS:

You are a marine archaeologist. You are interested in serving as a member of the Board of Underwater Archaeological Resources (Board). It is the responsibility of the Board to encourage the discovery, reporting and preservation of historical, scientific, and archaeological information about underwater archaeological resources located within the inland and coastal water of the Commonwealth. G.L. c. 6, §108. Divers who find artifacts, abandoned property, treasure trove or sunken ships which have remained unclaimed for one hundred years or more, which are valued at five thousand dollars or more, and which are within the inland and coastal water of the Commonwealth, must apply for a permit from the Board for the salvage and removal of these underwater archaeological resources. **Id.** If the permit is approved, the Board then oversees the salvage and recovery operations, decides whether the diver can keep the artifacts he finds, and establishes the monetary and historic value of the artifact. The Commonwealth is entitled to keep twenty-five percent of the monetary value of the artifact. The diver usually hires one or more marine archaeologists to aid him in the recovery operation.

QUESTION:

Would G.L. c. 268A restrict your consulting activities while you also serve as a Board member?

ANSWER:

Yes, pursuant to the conditions set forth below.

DISCUSSION:

In your capacity as a member of the Board, you would be a state employee within the meaning of G.L. c. 268A, §1(q). As an unpaid Board member, you would be a "special state employee" under G.L. c. 268A, §1(o) and are therefore subject to the prohibitions of G.L. c. 268A, albeit in a less restrictive way.

Sections 4(a) and 4(c) prohibit state employees other than in the proper discharge of their official duties from receiving compensation from, or acting as the agent for anyone other than the Commonwealth or a state agency in connection with any particular matter[1]/ in which the Commonwealth or a state agency is a party or has a direct and substantial interest. As a special state employee you may not receive compensation from or act as the agent for anyone other than the Commonwealth or a state agency in relation to a particular matter (a) in which you have participated as a state employee or (b) which is or within one year has been a subject of

[2]/Section 7 of G.L. c. 268A prohibits you from having a financial interest in a contract made by a state agency. This section would also prohibit you from receiving a percentage of XYZ's fee resulting from its contract with the DPW.

[1]/G.L. c. 268A, §1(k) defines particular matter 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."

your official responsibility[2]/ or (c) which is pending in the state agency in which you are serving, provided that you have served for more than sixty days during the prior three hundred and sixty-five day period.

The application for a Board permit, the decision to grant the permit, decisions regarding the oversight of the salvage operation and the distribution of the bounty are all particular matters which would be within your official responsibility as a Board member. Therefore, you may not receive compensation from a permit holder or act as his agent in connection with any underwater excavation which is granted a permit by the Board. This, in effect, limits you to participating only in those excavations which are less than one hundred years old and worth less than $5,000 and would not come before the Board.[3]/

DATE AUTHORIZED: February 4, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-19

FACTS:

You have been recently appointed to serve as an unpaid member of the Massachusetts Convention Center Authority (Authority). The Authority is empowered to acquire and operate the John B. Hynes Veterans Memorial Auditorium and the Boston Common Parking Garage for the purpose of promoting the economic development of the Commonwealth by developing and operating a convention center suitable for accommodating major national and international conventions. St. 1982, c. 190, §31. The Authority is discussing enlarging the Hynes Auditorium and building a sports arena to attract more conventions and tourists to the Boston area. You have been invited by the Greater Boston Convention and Tourist Bureau (Bureau) to attend a reception in Washington, D.C., for corporate and association executives and travel writers and professionals from throughout the Washington area. The Bureau is a business group made up of local hotel and motel owners and area businessmen who fund, along with the state, projects to promote tourism. The purpose of the function in Washington is an intensive sales effort aimed at generating increased interest in Boston as a meeting and travel destination. The Bureau has invited you, as a Board member, to the function and has offered to take responsibility for your travel and accommodations should you choose to attend.

In your Board capacity, you participate in decisions which have a major impact on the constituency which comprises the Bureau. Additionally, the Bureau is considering applying for funding from the Authority.

QUESTION:

Does G.L. c. 268A permit you to receive free travel or accommodations from the Bureau to attend the Washington function?

ANSWER:

No.

DISCUSSION:

In your capacity as an Authority member, you are a state employee for the purposes of G.L. c. 268A. See, EC-COI-82-150. Section 23 contains standards of conduct which apply to all state employees. Section 23(d) prohibits the use or attempted use of official position to secure unwarranted privileges or exemptions for yourself or others. Section 23(e) proscribes conduct which gives reasonable basis for the impression that any person can improperly influence or unduly enjoy a state employee's favor or that the state employee is unduly affected by the kinship, rank, position, or influence of any party or person.

In view of the impact which Authority decisions, such as the enlargement of the Hynes Auditorium, will have on the Bureau constituency and in view of the likelihood that the

[2]/G.L. c. 268A, §1(i) defines official responsibility as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action."

[3]/Although the Board's enabling statute, G.L. c. 6, §179, requires that a marine archaeologist be a Board member, nothing in that statute authorizes the "proper discharge of [your] official duties" to include consulting with divers on matters under the official responsibility of the Board. EC-COI-81-74.

Authority will be considering a funding application from the Bureau, your acceptance of a free trip from the Bureau would give a reasonable basis for the impression that you would unduly favor the Bureau in carrying out your Authority responsibilities. A major purpose of G.L. c. 268A is to prevent situations where the loyalty that a state employee owes to the Commonwealth alone may become clouded by private considerations. This principle is particularly applicable where a valuable gift, such as a free trip to Washington, is made by a private organization which is directly involved in the decisions which an employee makes in his state capacity. Moreover, the application of G.L. c. 268A in this situation removes the temptation of state employees to exploit the availability of a free trip from private parties with whom they deal in their official capacity.[1]/

DATE AUTHORIZED: February 4, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-20

FACTS:

You are an attorney employed in the legal department of state agency, ABC. Prior to 1983, XYZ, the head of ABC, fired two ABC employees. Those employees have filed a civil suit against ABC and XYZ alleging that they were wrongfully discharged. ABC has retained a private law firm (Firm) to represent it in this action, but the Firm has declined to represent XYZ because of a potential conflict of interest. The Attorney General has also refused to represent XYZ. Meanwhile, the plaintiff-employees moved for default against XYZ and the judge granted the motion after thirty days, during which XYZ was still unrepresented by counsel.

At this point you consulted with ABC's general counsel who agreed orally to your representing XYZ in this litigation, as part of your ABC duties, for no extra compensation besides your usual salary. Pursuant to this, you have appeared for XYZ before the judge and sought removal of the default (which the judge has since allowed) and filed answers on XYZ's behalf. You are not currently aware of any actual conflict between the interests of XYZ and the ABC. The answers filed by both XYZ and the ABC in this case have taken the position that XYZ acted within his authority when he discharged the two plaintiff-employees.

QUESTION:

Does the conflict of interest law, G.L. c. 268A, permit you to represent XYZ while you are employed by the ABC?

ANSWER:

Yes, subject to the conditions set forth below.

DISCUSSION:

As a legal counsel at ABC, you are a state employee as that term is used in G.L. c. 268A, §1(q), and subject to the restrictions in that law. In particular, §4(c) of G.L. c. 268A is applicable to your situation:

> §4(c): No state employee shall, otherwise than in the proper discharge of his official duties, act . . . as agent or attorney for anyone in connection with

[1]/The conclusion reached here does not mean it is improper for you to attend such a reception in your official capacity where the Authority pays your expenses. Chapter 268A issues are raised, however, whenever state officials' expenses are paid for by members of the private sector with whom they have official dealings. Cf. EC-COI-82-99.

any particular matter[1]/ in which the commonwealth or a state agency is a party or has a direct and substantial interest.

In your representation of XYZ you are acting as attorney for someone in connection with a particular matter (a judicial proceeding) in which a state agency (the ABC[2]/) is a party, and in which the state agency has a direct and substantial interest. Thus, the propriety of your representation, under G.L. c. 268A, rests on whether you are acting "in the proper discharge of [your] official duties."

You have advised the Commission that ABC's general counsel has agreed orally to your representation of XYZ. It would appear that your representation would therefore comply with the exemption for representation "in the proper discharge of [your] official duties," particularly where your representation would be in relation to actions which XYZ took while serving as the head of ABC.

However, there is no written statement describing or approving your duties and responsibilities in this matter; moreover, under (citation omitted) it is the prerogative of [other ABC officials] to appoint and employ officers and employees of the ABC and to fix their condition of employment. For these reasons, before proceeding any further on XYZ's behalf, you should secure the written affirmation of the other ABC officials that your representation of XYZ is within the proper discharge of your official duties.[3]/ See EC-COI-81-89, note 2; 80-96.

DATE AUTHORIZED: February 4, 1983

[1] For the purposes of 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. G.L. c. 268A, §1(k).

[2] [identifying footnote omitted].

[3] The Commission is only empowered to issue opinions regarding your obligations under the conflict of interest law. Other statutes or regulations, such as the Code of Professional Responsibility, may also be applicable, and you should contact the appropriate office for rulings on those requirements.

COMMISSION ADVISORY 83-1

The purpose of this first Advisory is to alert state officials and employees to the potential conflict of interest problems which are created whenever a state official or employee uses the private services of a vendor or contractor over whom he exercises official state responsibility. Examples of such private services would include the performance of private legal or accounting work as well as maintenance or repair work. Under G.L. c. 268A, §23(e), a state employee is prohibited from engaging in conduct which "gives reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of official duties." A major purpose of §23(e) is to avoid situations where employees engage in conduct which raises questions about the credibility and impartiality of their work as state employees. The Commission has consistently applied the §23(e) prohibitions whenever public employees have had private financial dealings with the same parties with whom they deal as public employees.[1]/

The principles of §23(e) are especially applicable to state officials and employees whose official responsibility includes decisions with respect to the hiring and salary of consultants and vendors as well as the monitoring of their performance. By using the private services of the same vendors and consultants over whom he simultaneously has official responsibility, the official gives a reasonable impression that he can be improperly influenced by the vendor or consultant or that the vendor or consultant will unduly enjoy his favor in the performance of his duties. Even if the decision to use the private services is made out of friendship or because of a "job well-done," or if actual favoritism or special treatment by either the state official or the vendor/consultant cannot be established, the conduct may nevertheless create an impression of favoritism or special treatment.

[1]/See, e.g., **In the Matter of William L. Bagni, Sr.**, Commission Adjudicatory Docket No. 124, Decision and Order (January 29, 1981) [state ispector 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].

To avoid creating an impression of improper influence under §23(e), the safest course for a state official would be to refrain altogether from using the private services of a vendor/consultant over whom he has official responsibility. Should it become necessary to conduct private dealings with such a vendor/contractor, the employee should notify his appointing authority and seek a formal advisory opinion from the Commission on the propriety of the arrangement under §23(e) These steps should be taken before the state employee participates in his official capacity in matters relating to the vendor/contractor.

DATE AUTHORIZED: February 4, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-25

FACTS:

You were recently appointed to the head of state agency ABC. As such, you are responsible for administering and enforcing provisions of law relative to certain state and municipal matters. These provisions also involve funding from federal agency DEF.

You are also a partner in a partnership which has a financial interest in a contract made by ABC. ABC has previously delegated the day to day administration of the contract to GHI, a private corporation for which you formerly served as an officer.

Because of your position at ABC, you intend to propose that the partnership's contract utilize a public agency JKL which would delegate the day to day administration of the contract to GHI. ABC's only role in this transfer would be the approval of the contract between DEF and JKL. This and any other decisions in this matter would be delegated by you to the assistant head of ABC. You also would withdraw as general partner and relinquish any responsibility for management of the Partnership.

QUESTION:

1. Will the proposed course of action regarding transfer of the Contract satisfy G.L. c. 268A and, if so, during what time period must this transfer be accomplished?

2. May you participate either as a general or limited partner in the Partnership after the transfer?

ANSWER:

1. Yes, but you must comply with the conditions set forth below. You should proceed with your proposed course of action during the next 30 days.

2. Assuming that you comply with these conditions, you may participate as a general and/or limited partner.

DISCUSSION:

a) **Section 7**

As ABC head you are a "state employee" as defined in the conflict of interest law. G.L. c. 268A, §1(q). As such, you are subject to §7 of that law which prohibits a state employee from having a financial interest in a contract made by a state agency. As a general and/or limited partner in the Partnership, you have a financial interest in the Contract. As long as ABC, a state agency, is a party to that Contract, you are prohibited from having a financial interest in it.

Once you complete the transfer you propose, neither ABC nor any other state agency will be a party to the Contract. You will therefore no longer have a financial interest in a contract made by a state agency and the prohibition of §7 will not apply. This transfer should be completed within thirty days of your receipt of this opinion.

b) **Section 6**

Section 6 of G.L. c. 268A prohibits you from participating in a particular matter[1]/ in which you or a business organization in which you are serving as a partner has a financial interest. Should such a matter come before you, you must advise your appointing official and the Ethics Commission of the nature and circumstances of the particular matter and make full disclosure of the financial interest. Your appointing official must then either 1) assign the matter to another employee, 2) assume responsibility for it himself, or 3) make a written determination that the interest is not so substantial as to be deemed likely to

[1]/For the purposes of 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. G.L. c. 268A, §1(k).

affect the integrity of the services which the Commonwealth may expect from you, giving copies to you and to the Commission.

The approval by ABC of the Contract between DEF and JKL is a particular matter in which both you and the Partnership have a financial interest. Therefore, you must comply with the procedures outlined in §6 when that matter comes before you at ABC and refrain from any participation in that matter unless your appointing official makes and files a written determination pursuant to §6.

c) **Section 23**

Section 23 of the conflict law provides general standards of conduct applicable to all state employees. Section 23(d) prohibits the use or attempted use of your official position to secure unwarranted privileges or exemptions for yourself or others. Section 23(e) proscribes conduct which gives reasonable basis for the impression that any person can improperly influence or unduly enjoy your favor in the performance of your official duties.

The authority you exercise over local matters is very broad. Similarly, GHI, which serves as day-to-day administrator of contracts awarded by ABC, is subject to your authority. The exercise of your public authority over GHI or JKL while each of those agencies administers your private partnership's Contract, as well as your prior employment by the latter, would give reasonable basis for the impression that GHI or JKL would unduly enjoy your favor as ABC head and would raise questions concerning the credibility and impartiality of your treatment of those agencies.

The provisions of §6, discussed above, address these concerns in matters in which you or a business organization in which you are a partner have a financial interest by requiring disclosure to your appointing official and requiring that official to take some action. This procedure should also be used by you in connection with matters involving GHI and JKL. Therefore, you should disclose to your appointing official your private relationship with these two agencies and your public responsibilities affecting them. That official should then either 1) assign that responsibility to another employee, 2) assume the responsibility himself, or 3) make a written determination, like that in §6, that the interest is not substantial enough to affect you in the performance of your official duties.

DATE AUTHORIZED: February 22, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-26

FACTS:

You are a field auditor with the Department of State Auditor (Department). The Department is responsible for conducting periodic audits of accounts of state agencies, including state agency ABC. G.L. c. 11, §12. The Department also has an ongoing contract with the federal agency, DEF, to conduct audits on specified federal projects.

A Town is involved in a construction project which is funded by DEF (75%), ABC (15%) and the balance by a municipal bond issue. The Town has offered you an after-hours part-time consulting position to assist in the paperwork and accounting until the completion of the project in late 1983. The position involves reviewing bills and fees submitted by engineers, contractors and others; determining which bills are eligible for federal or state grant funding, and preparing monthly reports and funding applications to the DEF and ABC. These submissions would be the basis upon which ABC and DEF would determine whether to pay these bills and fees. You would also be expected to set up accounting ledgers for the Town to distinguish the federal and state bills.

QUESTION:

Does G.L. c. 268A permit you to accept the part-time consulting position with the Town while you are employed by the Auditor's Department.

ANSWER:

Yes, subject to certain limitations described below.

DISCUSSION:

As a field auditor of the Department, you are a state employee within the meaning of G.L. c. 268A, §1(q) and are therefore subject to the restrictions of G.L. c. 268A, the conflict of interest law. Section 4, which is the restriction most directly applicable to your situation, prohibits you from receiving compensation from or acting as agent for any non-state party 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 term "particular matter" is defined in §1(k) in relevant part, as "any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding. . ." The restrictions of §4 reflect the principle that state employees should not assist non-state parties in their dealings with state government. Prior to 1980, §4 was applied to prohibit state employees from outside employment with municipalities where the commonwealth had a direct and substantial interest in the matters on which the employees worked in their municipal capacity. See, EC-COI-79-123. In response, the General Court amended §4 in 1980 to allow, in certain instances, the following "municipal exemption:"

> This section shall not prohibit a state employee from holding an elective or appointive office in a city, town or district, nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office. No such elected or appointed official may vote or act on any matter which is within the purview of the agency by which he is employed or over which such employee has official responsibility. St. 1980, c. 10.

Since the passage of the "municipal exemption," the Commission has examined whether a state employee's duties as a municipal employee come within the purview of his state agency and has prohibited proposed municipal employment on several occasions in light of the "purview" language. See, EC-COI-82-173; 82-164; 82-89; 82-39.

Bearing these provisions in mind, the Commission advises you that your consultant arrangement with the Town will be subject to the following limitations.

a) **ABC**

You are prohibited by §4 from that portion of your consultant arrangement which would involve the preparation of submissions to ABC because the Town's funding submissions to ABC would be particular matters of direct and substantial interest to ABC a state agency. You would not be eligible for the "municipal exemption" of §4 because your state agency [the Auditor's Department] is responsible for periodically auditing ABC and the Town's funding submission would therefore be within the purview of the Auditor's authority.

b) **DEF**

Section 4 would not prohibit your rendering services for the Town in relation to the federal DEF reimbursement because currently no state agency is a party to or has a direct and substantial interest in the federal reimbursement for the project. This situation may change because the Auditor's Department has an ongoing contract with DEF to conduct audits on selected programs which involve both state and federal funds. Inasmuch as there is no *current* arrangement for the Auditor to review DEF funding, §4 does not prohibit you from rendering services in relation to DEF. However, should the facts change and the Auditor be assigned to the Town project, then your services would be prohibited by §4 in a similar fashion to the ABC related services.

c) **Town**

To the extent that your proposed consultant services involve purely municipal accounting and do not require the preparation of submissions to ABC or DEF your services would be permissible under §4. Compare, EC-COI-82-33. In the event that your accounting work were to be reviewed by a state agency and therefore fall under §4, you would be eligible for the "municipal exemption" because the scope of the Auditor's Department authority under G.L. c. 11, §12 does not include the review of municipal account.

DATE AUTHORIZED: February 22, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-27

FACTS:

You are a psychiatrist and the full-time head of ABC, a facility of the Department of Mental Health (DMH). As ABC head, you act under the general direction of the Commissioner of DMH, and your duties include

1. directing all activities at ABC (professional, administrative and maintenance operations);
2. developing the institution's program, and the operating policies and procedures necessary to implement it;
3. conferring with the DMH Commissioner and his staff on problems, new methods and policies;
4. attending medical staff meetings, coordinating the work of various ABC departments and supervising the medical care of patients;
5. inspecting the work of ABC departments, and investigating the condition of and recommending improvements in ABC's physical plant;
6. supervising the training program for technical and professional personnel, giving lectures and conducting classes for students and advising them on these and special research projects;
7. planning and directing research activities of the institution;
8. public relations, including attending meetings, giving lectures and preparing and presenting papers;
9. preparing ABC's budget, disbursements and annual report; and
10. other administrative tasks, such as personnel duties, patient admissions and interviews with patients' relatives.

ABC currently has agreements under which it serves as a teaching hospital for DEF University and GHI University, and a similar agreement has recently been signed by ABC and JKL University; you signed the latter agreement on (date omitted) on behalf of ABC, and that program will start in the near future. Under the DEF and GHI agreements, you are a clinical assistant professor at both medical schools (uncompensated) and give lectures to students and faculty. Under the JKL agreement, you will have similar duties and will not be compensated separately by JKL for those duties. JKL has also offered you the position of Chairman of a Department (the Department). This offer was not part of the agreement mentioned above, but was made prior to the execution of that agreement. If you accept this position, you will not leave your ABC position to do so, but rather you will hold the two posts concurrently. The offer would require you to commit twenty to twenty-six hours a week to administrative, supervisory and academic duties at JKL. The salary for the position would be x and would not derive either directly or indirectly from any state funds, but rather would come entirely out of teaching funds of JKL School of Medicine. The Department encompasses certain clinical, educational and research activities and these activities are carried out at various health care institutions including a DMH facility and a municipal facility of the City of Boston. As envisioned in the offer, your JKL duties would include:

1. administrative and academic management of a department and division;
2. clinical conferences and staff supervision at a hospital;
3. reorganization of a service at a hospital;
4. planning and negotiating for development of inpatient and day hospital services for adolescents at a DMH facility which would result in much more extensive involvement by the JKL there; and
5. development of ABC as a major site for clinical, educational and research activities of the Department.

You would have authority to decide the amount of time that various Department activities could and should be carried out at the various institutions. In addition to all the above, you would have the option of maintaining a clinical practice as part of a group practice referred to as the "fully funded full-time plan of the Department." Although some of the units at which you would supervise JKL faculty and staff are funded by the state or are state agencies under contract with the Department, you would not be providing psychiatric or other services under any state contracts. Further, you state that JKL would not be compensating you for any duties which you were already obligated to perform (and were compensated by the Commonwealth to perform) as head at ABC.

Since your receipt of the JKL offer, you have communicated with the Commissioner of DMH by letter in an effort to establish the conditions under which he would approve your concurrent service as ABC's head and the Chairman of the JKL Department. The terms set forth by the Commissioner are as follows:

1. You must designate a senior clinician as Clinical Director of ABC;

2. Your compensation from the Commonwealth for your ABC duties would be reduced to four-fifths (4/5) of your full-time salary;

3. You would be expected to work a minimum of 32 hours a week directly for ABC, of which an average of 25 hours a week as a minimum would be during usual business hours and either at ABC or engaged in activities directly related to the performance of your responsibilities as Superintendent;

4. Whenever not on-site at ABC you would be expected to be readily available by electronic page or telephone for all but approximately 15 hours a week; and

5. You must obtain written approval from the State Ethics Commission.

You have not accepted the JKL offer, pending the receipt of this opinion.

QUESTION:

1. Does G.L. c. 268A permit you to accept the JKL position while remaining the head of ABC?

2. If the answer to (1) were no, and you resigned your ABC position to accept the JKL position, would G.L. c. 268A preclude your fulfillment of any of the JKL responsibilities described above?

ANSWER:

1. Yes, with certain restrictions.

2. In view of the answer to (1), it is unnecessary to reach this question.

DISCUSSION:

In your current position at ABC, you are a state employee as that term is used in the conflict of interest law. G.L. c. 268A, §1(q). If you were to comply with the terms set forth by the DMH Commissioner, in particular that which reduced your ABC hours to 32 a week (of which only 25 would be during usual business hours), you would become a special state employee, as defined in G.L. c. 268A, §1(o) (2) (a),[1]/ and thereby subject to more lenient treatment under some provisions of that statute.

Section 4 of G.L. c. 268A states:

> (a) 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[2]/ in which the commonwealth or a state agency is a party or has a direct and substantial interest.
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> . . .
>
> (c) No state employee shall, otherwise than in the proper discharge of his official duties, act . . . 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.
>
> . . .
>
> A special state employee shall be subject to paragraphs (a) and (c) only in relation to a particular matter (a) in which he has at any time participated[3]/ as a state employee, or (b) which is or within one year has been a subject of his official responsibility,[4]/ or (c) which is pending in the state agency in which he is serving. . .

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[1]/"Special state employee, [means] a state employee. . . (2) who is not an elected official and (a) occupies a position which . . . by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours. . ." G.L. c. 268A, §1(o)(2)(a).

[2]/"Particular matter" means any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court. G.L. c. 268A, §1(k).

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

[4]/"Official responsibility" means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i).

With respect to §4(a), you have stated through your attorney that JKL will not compensate you to perform any services called for in its contracts with state agencies or facilities. You have also stated that JKL will not compensate you separately for duties which may arise from the JKL-ABC affiliation agreement (e.g. for teaching duties if you are named a clinical professor pursuant to that agreement). Avoidance of such compensation will, to some extent, keep you within the bounds of §4(a).

However, the restrictions of §4(a) have wider application to the facts you have presented. For example, among the JKL duties you will be expected to perform are the planning and negotiating for the development of certain services at a DMH facility, and the development of ABC as a major site for JKL Department activities; incidentally, you also would decide the allocation of JKL activities among various health facilities (including ABC). To the extent that these responsibilities relate to DMH facilities such as ABC, your decisions on these matters will constitute particular matters of direct and substantial interest to DMH, a state agency, and you may not be compensated by JKL in relation to them.

Moreover, §4(c) will prohibit you from acting as JKL's agent in dealing with the Commonwealth in these matters, i.e. in dealing with officials at DMH, in relation to agreements or contracts between those entities and JKL. Although the arrangements between JKL and those entities might generally be characterized as cooperative enterprises which are established for mutual benefit, nevertheless these agreements must be negotiated at arm's length to assure that the best interests of each party are protected. For that reason, §4 prohibits you from acting as the agent for JKL in these matters while you remain employed by DMH. This is true despite your anticipated status as a special state employee of DMH: the exemptions contained in the statutory excerpt cited above are inapplicable, since the matters at issue are pending in the state agency (DMH) in which you serve and, in the case of the JKL-ABC agreement, you have already participated in the matter as ABC representative.[5]/

Section 6 of G.L. c. 268A states:

> 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 immediate 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.
>
> Any state employee whose duties would otherwise require him to participate in such a particular matter shall advise the official responsible for appointment to his position and the state ethics commission of the nature and circumstances of the particular matter and make full disclosure of such financial interest, and the appointing official shall thereupon either
>
> (1) assign the particular matter to another employee; or
>
> (2) assume responsibility for the particular matter; or
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> (3) make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the commonwealth may expect from the employee, in which case it shall not be a violation for the employee to participate in the particular matter. Copies of such written determination shall be forwarded to the state employee and filed with the state ethics commission by the person who made the determination. Such copy shall be retained by the commission for a period of six years.

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[5]/For reasons similar to those explained in Ethics Commission Compliance Letter No. 81-21 (July 30, 1981), pp. 9-10, and in precedent cited therein, the tenth paragraph of §4 is also inapplicable to your situation.

Section 4(c) would not prohibit you from acting as JKL agent if it were in the proper discharge of your official [DMH] duties to do so. Since the DMH Commissioner is your apointing official and sets the terms of your employment, he would have to make the necessary determination of your duties. Cf. EC-COI-83-20.

If you were to resign from DMH to take the JKL position, §5(a) would still prohibit you from acting as JKL agent or receiving JKL compensation in relation to the JKL-ABC agreement, because you already have participated in that agreement on ABC's behalf. This prohibition would apply for the duration of the ABC-JKL agreement which you signed.

Following preliminary discussions with JKL, you were offered a position at JKL pursuant to a letter written on (date omitted). At least as of that date, JKL is an "organization with whom [you are] negotiating . . . concerning prospective employment." Thus, unless you follow the procedures described in the second paragraph of §6, above,[6]/ you may not participate as a state employee in any particular matter in which JKL has a financial interest.[7]/ For instance, if the ABC-JKL agreement affects the financial interests of JKL in some way, you may not participate in it on behalf of ABC unless you have first received written permission from the DMH Commissioner.[8]/

Section 7 of G.L. c. 268A prohibits a state employee from having a direct or indirect financial interest in a state contract. However, since you have indicated that none of your JKL salary will derive directly or indirectly from state contract monies, your proposed course of action will comply with §7.

Finally, §23 contains general standards of conduct applicable to all public employees. Under §23(a), you may not accept other employment which will impair your independence of judgment in the exercise of your official duties. The Commission has used this provision sparingly to prohibit outside employment, and has done so primarily to forbid outside employment with an entity which the public employee regulates in his public position.[9]/ In view of the fact that your position vis-a-vis JKL, and that §§4 and 6 will prevent you from acting for both parties in those situations where their interests are most likely to diverge, the Commission does not consider your acceptance of the JKL offer to be prohibited by §23(a).

Section 23(b) and (c) state that no public employee shall

> (b) accept employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority.
>
> (c) improperly disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.

The Commission cannot speculate as to circumstances that may arise and warrant application of these provisions, but nevertheless sets them forth here to serve as general guidance.[10]/

Section 23(d) prohibits you from using or attempting to use your official position to secure unwarranted privileges or exemptions for yourself or others. Again, the Commission cannot address here every hypothetical situation which might implicate this provision. Nevertheless, based upon the information provided with your opinion request, the Commission draws your attention to several areas in which you must be careful to observe §23(d):

> 1. in allocating your time and resources, as ABC superintendent, among the students and staff of JKL, DEF and GHI you must scrupulously avoid granting unwarranted consideration to JKL interests, over those of DEF and GHI and
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> 2. to a large extent, your acceptance of the JKL position under the DMH Commissioner's terms will require you to self-police your adherence to those terms (e.g. with regard to the number of hours per week in which you are fulfilling ABC responsibilities); and you must take care to meet those obligations fully.[11]/

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[6]/Your letter requesting an advisory opinion is confidential, under G.L. c. 268B, §3(g), and therefore does not constitute public disclosure for the purposes of G.L. c. 268A, §6. Neither does the correspondence between you and the DMH Commissioner which you attached to your request since it makes no mention of the pending agreement between ABC and JKL nor your role in that agreement. The Commission utilizes standard forms for §6 disclosures and determinations, which are publicly available pursuant to G.L. c. 268B, §3(d) and (e).

[7]/This advisory opinion is intended to address only the prospective application of G.L. c. 268A to your actions.

[8]/Although the Memorandum of Agreement between JKL and ABC makes reference to financial requirements it is unclear from the face of that document what those financial matters might be. Should you need clarification of this §6 application, you should seek further advice from the Commission.

[9]/See, e.g., EC-COI-81-151; 81-133; 80-17; Compare, EC-COI-81-137.

[10]/Although G.L. c. 268A, §23 is now applicable only to current state employees, c. 612 of the Acts of 1982 (effective March 29, 1983) will amend that section, making subsections 23(b) and (c) applicable to former state employees as well. Should you leave your DMH position, you should consult the amended text of those provisions.

[11]/Among the ABC responsibilities which you called to the attention of the DMH Commissioner in your letter to him, you included consultation with public groups, attendance at meetings, delivering lectures, and preparing and presenting papers at various conferences. The Commission notes that it has previously interpreted §23 as prohibiting the receipt of any honoraria or outside (non-state) compensation for such activities, if they are part of one's official state duties. See EC-COI-82-22; 80-28.

Finally, §23(e) states:

> [No state employee shall] 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.

As mentioned in the discussion of §23(d) above, you must scrupulously avoid the appearance of any favoritism toward JKL over other institutions with which ABC is associated. To do otherwise would give reasonable basis for the impression that your employment relationship with JKL improperly influenced your performance of official duties at ABC.[12]/

DATE AUTHORIZED. February 22, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-28

FACTS:

Since 1980, you have been an employee of an agency (the Agency) within the Executive Office of Environmental Affairs (EOEA), in the Department of Environmental Management. Your position there is part-time and is compensated on a per-diem basis; you are also reimbursed for expenses.

You are also a public member of the ABC Committee (Committee), a state entity also under the EOEA. You were appointed to the Committee in December, 1978 by the Governor. This position is part-time and unpaid.

From 1979 to August, 1982, you were a member of another state board (the Board), also under the EOEA. Your position there was part-time and you received only reimbursement of expenses. While serving on the Board, in approximately June, 1981, you approved (along with other members of the Board), an order, concerning the use of certain lands in a particular town (Town).

From 1964 to September of 1982, you were one of seven members of the Town's Conservation Commission (Commission), a municipal agency established pursuant to G.L. c. 40, §8C, for the promotion and development of the natural resources and for the protection of watershed resources of that town. Under G.L. c. 40, §8C, the Commission is empowered to receive gifts, bequests or devises of interests in real property in the name of the town, subject to the selectmen's approval, and to purchase interests in land with sums available to it. Commission members have been designated as "special municipal employees" for purposes of G.L. c. 268A, the conflict of interest law, and are appointed by the board of selectmen.

From 1972 until this month, you were also an agent of the Town's Board of Health; in that position you were not classified as a special municipal employee, nor were you involved in Commission matters.

For the last several years, you have been active in various capacities in a private, nonprofit, unincorporated, voluntary association of the conservation commissions of Massachusetts, dedicated to the education of commission members. It is a charitable organization under the Internal Revenue Code and is supported by annual dues paid by the member commissions, and small grants from public and private sources.

For the last several years, you have solely held full title to 23 acres of undeveloped land in the Town. After acquiring title, you discussed with the Commission, the selectmen and others the possibility of selling the land to the Town for conservation purposes, but no commitments or concrete plans were made. When Proposition 2½ passed in 1980, and the selectmen made it clear that the Town would not pursue purchase of the land, you selected another member of the Commission, who was a builder, to develop plans for building condominiums on the property. The proposed development subsequently went before the Town's Board of Appeals, Planning Board

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[12]/ In essence, this opinion concludes that you may accept the chairmanship of the JKL Department as long as you observe all of the restrictions outlined in this discussion. Nevertheless, the Commission seriously questions whether, *as a practical matter*, it will be possible for you to observe faithfully these restrictions, i.e. to avoid, in both positions, involvement in matters which touch on the interests of both employers. The Commission also is concerned that the multiplicity of your outside professional commitments may jeopardize the fulfillment of your ABC responsibilities, but notes that this is a matter to be addressed primarily by your appointing official (the DMH Commissioner) in his supervisory capacity, rather than by the conflict of interest law.

and the Commission in 1982; although you were a Commission member at the time of the Commission hearing in March, 1982, you were not present at that hearing nor did you ever participate in the matter as a Commission member. At that hearing, a large group of citizens strongly protested the development of the parcel, and the Commission voted to seek acquisition of the 23 acres by the Town for conservation purposes instead. Your agreement with the developer was subsequently dissolved for reasons unrelated to the hearing, and you were again free to offer the land for sale. In August of 1982, you wrote to the Commission informing it of your willingness to sell the parcel to the Town for conservation purposes; on the same date, you wrote to the Board of Selectmen, disclosing your financial interest in the proposed purchase/sale and requesting a waiver under G.L. c. 268A, §20(d).

In August, 1982, the Commission (without your participation) voted to have two appraisals made of your property. You subsequently met with the appraisers separately, and also supplied a Commission employee with information on the character of the land, its uses, restrictions and title. This information was already public due to the March, 1982 hearing. That employee made out, in your presence, an application to the commonwealth for "self-help" funding of the contemplated purchase. When the appraisals arrived at the Commission office, you happened to be at the office and were told the amounts. You arranged thereafter the delivery of the completed self-help application to the state Division of Conservation Services (DCS) in Boston, but you did not make the delivery yourself. The application deadline was that same day. (You resigned from the Commission the next month).

G.L. c. 132A, §11, the "Self Help Act," establishes a program by which the Secretary of EOEA (the Secretary) may assist towns, which have established conservation commissions, in acquiring lands for conservation purposes. The program is administered by the Division of Conservation Services (DCS) in EOEA. The Act provides that the Secretary may use state funds to reimburse a town for money expended by it in establishing an approved project under the program, up to a maximum of 80 percent of the cost. Prior to receiving such reimbursement, the town (1) must file an application containing plans and information; (2) must receive the Secretary's approval of the application; (3) must have appropriated, transferred from available funds, or have voted to expend from its conservation fund an amount equal to the total cost of the project; and (4) must have completed the project to the satisfaction of the Secretary in accordance with the approved plans. The program is one of reimbursement for funds actually expended; thus, the municipality must first come up with the total cost of the project. If the town has incurred indebtedness in acquiring the land, the state reimbursement must be applied to that indebtedness. A town may not obtain a self-help grant unless the town meeting has first passed a vote authorizing the purchase of a particular parcel of land, but that vote may be conditioned upon federal or state reimbursement. A completed application must be on file before property is acquired; the project will then receive preliminary approval before the town votes, if it meets requirements and funds are available. While reserving its right to react to changed situations, the Division has never gone back on a preliminary approval if the municipality has taken action based on such approval.

In determining whether or not to approve a project for self-help funds, the Director of DCS and the Secretary solicit the recommendations of an evaluation committee; one of the places on that committee is held by a representative of the non-profit association with which you are associated. However, you are not that representative, and neither you nor the association determines what position that representative will take on any particular self-help application. The application which the Town submitted to fund the purchase of your land has been rejected without prejudice due to lack of a third appraisal. You anticipate that the application may be resubmitted by the Town in the future.

As one involved in conservation matters on these various levels, you have in the past advocated, both individually and as an officer of the association, funding of the EOEA budget, of the various self-help programs, and the Agency's budget. You are not a registered lobbyist, however.

Neither your position with the Agency nor your position on the Committee (nor your former membership with the Board) entails any participation in EOEA's funding, under the self-help program, of the purchase of conservation lands

under G.L. c. 132A, §11. In each of those positions you serve no more than approximately 15 or 20 days in any given year.

QUESTION:

Does the conflict of interest law permit you to sell your land to the Town for conservation purposes? If so, can that sale be funded by a self-help grant from EOEA while you serve on two entities within the EOEA?

ANSWER:

You may sell your land to the Town, but whether or not the sale may be funded by a self-help grant will depend on the terms of the Town's vote to enter into the sale.

DISCUSSION:

Since your resignation from the Commission and the board of health positions, you are a former municipal employee for purposes of the conflict of interest law, G.L. c. 268A. As a current employee of the Agency and the Committee, you are a state employee under that law;[1]/ but because you serve only part-time on those boards, you are a special state employee in each of those positions, as that term is used in G.L. c. 268A.[2]/

As a former municipal employee, you are subject to §18 of G.L. c. 268A, which states:

> (a) A former municipal employee [may not] knowingly [act] as agent or attorney for, [nor receive] compensation directly or indirectly from anyone other than the same city or town in connection with any particular matter[3]/ in which the city or town is a party or has a direct and substantial interest and *in which he participated*[4]/ *as a municipal employee while so employed*. . .
>
> (b) a former municipal employee [may not], within one year after his last employment has ceased, [*appear*] *personally* before any agent of the city or town *as agent* or attorney *for anyone other than the city or town* in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest and which was under his official responsibility as a municipal employee at any time within a period of two years prior to the termination of his employment. . . (emphasis added)

There are two particular matters at issue in your situation: first, the contract for the sale of your land to the Town, and, second, the Town's application for self-help funding for that purchase.

Your proposed conduct will comply with §18(a) because (1) you have not participated as a municipal employee in the negotiations for the sale of your land to the Town; rather, you absented yourself from meetings in which that sale was voted upon or discussed; (2) while you may have participated in the Town's previous application for self-help funds to purchase your land, your participation was not in your capacity as a municipal employee but as owner of the land, it was not substantial,[5]/ and it related to an application which was subsequently rejected by EOEA. The Town will have to submit a new application in the next funding cycle to receive reimbursement if it should in fact purchase your land; previous Ethics Commission opinions have ruled that each such application or renewal is a separate particular matter.[6]/ Since you are no longer a municipal employee you will not be participating in the future as an employee in any renewed self-help application which may result in reimbursement for the purchase of your land.

Section 18(b) prohibits your appearing personally as an agent for a non-town party before a town agency, in connection with certain particular matters. However, in prior interpretation of this language the Ethics Commission has indicated that appearance as an "agent" necessarily implies that one appears on behalf of another entity; for this reason, the Commission has not read this language so as to prohibit appearances on one's own behalf.[7]/ If you appear before any agencies of the Town regarding your land, you will do so solely as representative for yourself and not for any trust, partnership, corporation or third party; you will not thereby violate §18(b).

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[1]/G.L. c. 268A, §1(q).

[2]/G.L. c. 268A, §1(o)(2).

[3]/"Particular matter" is defined in G.L. c. 268A, §1(k) and includes a proceeding, application, contract, decision or determination.

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

[5]/You provided information which was already publicly available, and you arranged physical delivery of the application.

[6]/See EC-COI-81-98; 81-50.

[7]/See EC-COI-85-12.

As a current state employee, you must also comply with §§4, 6 and 7 of G.L. c. 268A. Under §4(a),

> 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.

If you sell your property to the Town, you will be compensated by the Town (someone "other than the commonwealth or a state agency"). As noted above, the contract for sale is a particular matter under G.L. c. 268A. Because you anticipate that the Town will seek self-help funds for the purchase, requiring preliminary approval by EOEA before the purchase is made, the commonwealth has a direct and substantial interest in the purchase, regardless of whether the funding is subsequently given. However, you qualify for an exemption from §4 which provides:

> A special state employee shall be subject to paragraphs (a) and (c) only in relation to a particular matter (a) in which he has at any time participated as a state employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the state agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special state employee who serves on no more than sixty days during any period of three hundred and sixty-five consecutive days.[8]/

Applying this paragraph to the facts you have provided, the Ethics Commission finds that (a) you have not participated in the particular matter as a state employee. Neither your position with the Agency nor that on the Committee has involved any action or participation in c. 132A, §11 land purchases for conservation purposes or funding of such purchases. In your former position on the Board, you participated in signing a restriction order which affected lands in the Town, including yours, but that restriction order was unrelated to the purchase now being contemplated. (b) You have not had official responsibility as a state employee for c. 132A, §11 purchases of conservation land, or funding of those purchases. (c) The contemplated land purchase and self-help funding, if they are pursued, *will* be particular matters which will be pending in the state agency in which you serve, EOEA.[9]/ However, your combined service in EOEA positions does not in the aggregate amount to sixty days during any one-year period, so this clause does not apply to prevent you from receiving compensation from the Town for your land.

Section 6 of G.L. c. 268A prohibits a state employee from participating as a state employee in a particular matter in which he has a financial interest. From your description of your duties with the Agency and on the Committee, it appears that there would be no opportunity for you to participate in the self-help funding process for the land purchase since it would in no way come before those bodies; thus §6 imposes no substantive restrictions on your activities in those positions.

Section 7 of G.L. c. 268A states:

> 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, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.
>
> . . .
>
> This section shall not apply . . . (d) to a special state employee who does not participate in or have official responsibility for any of the activities of the contracting agency and who files with the state ethics commission a statement making full disclosure of his interest and the interests of his immediate family in the contract, or (e) to a special state employee who files with the state ethics commission a statement making

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[8]/For reasons similar to those discussed in relation to §18(b) above regarding "acting as agent," this opinion does not discuss the application of §4(c) to your situation.

[9]/Although the self-help program is administered by DCS, which is another agency within EOEA and one in which you do not serve, by terms of the statute the actual funding is given by the Secretary of EOEA. For this reason, this opinion considers the self-help funding application to be pending in the state agency in which you serve (in your Agency and Committee positions), namely, in EOEA.

full disclosure of his interest and the interests of his immediate family in the contract, if the governor with the advice and consent of the executive council exempts him. . .

Before the Commission can apply §7 to you, it must first determine whether the potential for state funding of the land purchase gives you a financial interest in a state contract. This determiniation depends on the terms of the Town's vote to acquire your land.

As described in the statement of facts above, the self-help program is one of reimbursement for money already spent. Events occur in the following order:

1. The town meeting votes on whether to acquire the land and whether to seek self-help money from the state.
2. If it has voted yes on both questions, the town submits an application for self-help money before it buys the land. If DCS gives the town a preliminary approval, the preliminary approval occurs before the purchase does, but no state money is transferred to the town at that stage.[10]/
3. The land is purchased and paid for by the town.
4. The town receives up to 80 percent reimbursement from the state.

If the Town votes to buy your land, you obviously will have a financial interest in a contract with the Town, since you are sole owner of the land. When the Town pays you, it does so out of Town money and uses no state funds. (It is only afterwards that the Town receives state money). That transaction does not necessarily give you a financial interest in the Town's subsequent receipt of state money, and does not necessarily invoke §7.

However, the Town *may* vote to buy your land *on the condition* that it will receive self-help money,[11]/ i.e. it can vote to appropriate money and also apply for self-help and, if it receives a negative response from EOEA, to abandon the purchase. If the vote is so conditioned, then the refusal of EOEA to grant self-help money means no purchase occurs. In this situation, the prospective seller clearly has a direct financial interest in the EOEA decision and reimbursement; and if the seller is a state employee, he must comply with §7. If, however, the vote is not conditional and the sale will proceed *regardless* of self-help funding, then the seller's financial interest is only in his contract with the town, not the state, and §7 is not implicated.

Because the town meeting has not yet occurred and no vote has been taken on this matter, the Commission cannot tell you whether the anticipated sale will violate §7. If the Town's vote to purchase your land is unconditional, you will be in compliance. If it is conditional, you must satisfy one of the exemptions in §7.[12]/ You would not qualify for the exemption in clause (d) cited above, because, although you are a special state employee, you *do* participate in the activities of the contracting agency. EOEA. (See footnote 9). Therefore, the only exemption available to you would be (e), the gubernatorial exemption.

Finally, §23 of G.L. c. 268A contains general standards of conduct which are applicable to all state employees. In particular, §23(c) prohibits you from improperly disclosing confidential information acquired by you in the course of your official state duties or using such information to further your personal interests. You therefore cannot use confidential information, which you might obtain in the course of your EOEA activities, to assure the Town in advance that its self-help funding application will or will not be approved. Section 23(d) prohibits you from using or attempting to use your official positions (at EOEA) to secure unwarranted privileges or exemptions for yourself or others. Under this provision, you cannot use or attempt to use your influence within EOEA to secure the self-help funding for the Town's purchase of your land. You should also avoid any lobbying, whether formal or informal, on behalf of funding for the self-help program generally, while the Town has a self-help application pending for your land.

DATE AUTHORIZED: February 22, 1983

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[10]/Not all self-help applications are approved.

[11]/See Opinion of the Attorney General, October 31, 1975.

[12]/Under St. 1982 c. 612, G.L. c. 268A, §7 will be amended to include several additional exemptions, effective 3/29/83. However, those exemptions are not included in this discussion because on their face they do not apply to the facts you have presented.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-30

FACTS:

The recently-enacted Federal Job Training and Partnership Act (Act), P.L. 97-300, 96 Stat. 1322 (Oct. 13, 1982) is designed to help prepare youth and unskilled adults for entry into the labor force and to afford job training to those economically disadvantaged individuals and other individuals facing serious barriers to employment who are in special need of such training to obtain productive employment. **Id**, §2. Like the Comprehensive Employment and Training Act (CETA) which it replaces, the new legislation works primarily through a locally-based program delivery system to provide remedial education, training, and employment assistance to low income and unemployed youth and adults.

The implementation of the Act will proceed along the following stages:

1. The Governor will select a state job training coordinating council (State Council) comprised of representatives of business and industry, state agencies, local government, community-based organizations, and labor organizations. **Id**, §122.

2. The major responsibilities of the State Council will include:

a) Proposing to the Governor service delivery areas (SDA's) within the guidelines contained in the Act;

b) Recommending a Governor's coordination and special services plan for the state, including criteria to coordinate related state and local programs;

c) Recommending the planned allocations and use of resources authorized under the Governor's grants;

d) Providing overall management, guidance and review for all related programs in the state, and approving local SDA plans;

e) Developing appropriate linkage with other programs, and coordinating activities with local Private Industry Councils (PICs);

f) Developing a state job training report;

g) Reviewing the operation of programs conducted in each SDA and making recommendations for improving such programs;

h) Recommending variations in national performance standards to reflect the condition of the state's economy;

i) Reviewing and commenting upon the state plan developed for the State Employment Service Agency, as well as those developed by other state agencies providing employment, training, and other related services; and

j) Identifying, in conjunction with other state agencies, the employment, training and vocational education needs throughout the state, and assessing the extent to which related programs represent a consistent, integrated, and coordinated approach to meeting such needs.

3. Following the approval of an SDA, the chief elected local official(s) in the service area will determine the number of members of and will select members of the Private Industry Council (PIC) for the service delivery area.[1/] A majority of the PIC membership will be selected from representatives of the private sector, with the remaining members selected from educational agencies, organized labor, community-based organizations, economic development agencies, and the public sector. **Id**, §102.

4. The PIC will be responsible for providing policy guidance and oversight with respect to activities under the job training plan for its service delivery area in partnership with the unit or units of local government within the area. The PIC will determine procedures for the development of the job training plan and will select grant recipients to administer the job training plan. The plan will identify the entities which will administer the program and receive

[1/] Following the determination of the initial number of PIC members, subsequent size determinations will be made by the PIC members themselves.

grant funds, describe the services to be provided and propose a budget. **Id,** §104. In carrying out its responsibilities, the PIC may hire staff and accept contributions and grant funds from public and private sources. **Id,** §103.

5. Each job training plan must be approved by the PIC and by the appropriate chief elected official or officials. **Id,** §102. Following local approval, the job training plan must be submitted to the General Court and Governor. Upon approval by the Governor and United States Secretary of Labor, funds may be appropriated to the service delivery area. **Id,** §104.

6. Funding for the programs will originate with Congressional appropriations, **Id,** §3, and will be paid into the treasury of the Commonwealth. G.L. c. 29, §§2C, 6B. Following approval of the job training plan, appropriate funds will be released through the Secretary of Economic Affairs to the entity designated as the grant recipient.

As of this date, the Governor has selected approximately fifty individuals to serve on the State Council. The State Council has preliminarily recommended the designation of sixteen areas as SDA's. Ten of the sixteen areas are identical to areas established for the implementation of the predecessor CETA statute. The selection of members for each PIC has not, as yet, taken place.

QUESTIONS:[2]/

1. Are members of the State Council state employees for the purposes of G.L. c. 268A, §1(q)?
2. Are members of either the State Council or PIC subject to the financial disclosure requirements of G.L. c. 268B?

ANSWERS:

1. Yes.
2. No.

DISCUSSION:

1. **Status of State Council Members As State Employees**

G.L. c. 268A defines a state employee 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. . .

G.L. c. 268A, §1(q) (emphasis added). Prior opinions issued by the Commission have applied criteria to analyze what constitutes "performing services for a state agency."[3]/ Among those criteria are:

> 1. the impetus for the creation of the position (by statutes, rule, regulation or otherwise);
> 2. the degree of formality associated with the job and its procedures;
> 3. whether the holder of the position will perform functions or tasks ordinarily expected of government employees, or will he or she be expected to present outside, private viewpoints; and
> 4. the formality of the person's work product, if any.

On the basis of these precedents, the Commission concludes that State Council members perform services for a state agency.

The status of the State Council as a mandatory, permanent component to the implementation of the Act in Massachusetts distinguishes it from those temporary, **ad hoc** advisory committees which the Commission has regarded as exempt from the definition of state agency. Compare, EC-COI-80-49, 82-81, 82-139. Moreover, the formality of the State Council's responsibilities and work product, as enumerated in the facts, **supra,** and the accountability which the State Council has for the implementation of the Act involving the expenditure of state funds, warrants, if not compels, the conclusion that the State Council is a state agency and members appointed to the State Council are state employees under G.L. c. 268A, §1(q).

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[2]/You also ask whether the PIC members are either state or municipal employees for the purposes of G.L. c. 268A. This question will be answered in a subsequent opinion.

[3]/See EC-COI-83-21, 82-81, 80-49, 79-12.

Although the Commission does not possess the authority to rule on constitutional questions (which are within the appropriate domain of the judiciary), the Commission does not believe that Congress, either expressly or impliedly, intended to preclude the Commission from applying its conflict of interest laws to individuals performing services as State Council members under the Act. The sole reference to limitations on conflict of interest activities, appearing in §141(f) of the Act, prohibits any council member from voting "on the provision of services by that member (or organization which that member directly represents) or vot[ing] on any matter which would provide direct financial benefit to that member." This prohibition, which is substantively similar to the restrictions on participation of government employees under G.L. c. 268A, §§6, 13, 19, does not purport to preclude the application of G.L. c. 268A where appropriate.[4]/ Not only does the Act lack any explicit provision pre-empting states from applying such statutes, but also the Act apparently permits such application. See, e.g., §126 ["Nothing in this Act shall be interpreted to preclude the enactment of state legislation providing for the implementation, consistent with the provisions of this Act, of the programs assisted under this Act"]. Moreover, the Act reflects an overall Congressional scheme under which the administration and implementation of the Act has been delegated to the states. Accordingly, the Commission does not believe that a pre-emptive intent can be implied under the Act. Compare, **Maryland v. Louisiana,** 101 S. Ct. 2114 (1981) [pre-emption implied only where state law creates obstacles to accomplishing Congressional purposes]; **Katherine Gibbs v. F.T.C.,** 612 F. 2d 658 (2d Cir. 1979) [no pre-emption absent clear indication of Congressional intent or conflict between state and federal statutes, particularly where the field of regulation is occupied by the states]; **Westinghouse Electric Co. v. Maryland,** 520 F. Supp. 539 (1981).[5]/

2. **Status of State Council and PIC Members Under G.L. c. 268B**

G.L. c. 268B requires all individuals who qualify as "public employees" under G.L. c. 268B, §1(o) to file a statement of financial interests with the Commission. Excluded from the definition of "public employee" is "any person who receives no compensation other than reimbursements for expenses." G.L. c. 268B, §1(o); 930 CMR 2.02(15). Accordingly, as long as members of the State Council and PIC remain unpaid (other than for expense reimbursement), the financial disclosure requirements of G.L. c. 268B will not be applicable to them. EC-FD-80-2.

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[4]/An examination of the legislative history of this paragraph reveals minor differences in the scope of participation prohibition contained in the respective Senate and House versions of the bill which was enacted as P.L. 97-500. Neither the bills nor the conference committee report which reconciled the differing versions raises the issue of preclusion of state enforcement of existing conflict of interest provisions. See, 1982 U.S. Cong. and Admin. News, 2750.

[5]/The scope of this opinion is limited to the jurisdiction of G.L. c. 268A to State Council members. In view of the unpaid status of State Council members, they would be "special state employees" under G.L. c. 268A, §1(o) and therefore subject to certain less restrictive prohibitions under G.L. c. 268A in addition to other limitations which they share with full-time state employees. If any State Council member has a question over the application of G.L. c. 268A to a particular set of facts, he or she should submit to the Commission a request for an advisory opinion.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-33

FACTS:

You are an attorney in private practice. Between (dates omitted) you worked as a staff attorney for the Department of Social Services (DSS). In your state position, you regularly represented DSS social workers in custody cases. You were also responsible for legal research, advising social workers on legal issues, and training social workers on DSS policy. As a general rule, you did not work on the cases of social workers other than those assigned to you.

In your private practice, you have been appointed by the ABC Probate Court to represent six children who are the subjects of separate custody petitions filed by DSS. None of these cases was pending in DSS before you left. You have also been appointed by the Court to represent a child who is the subject of a DSS custody petition, whose case was pending as a social service matter in DSS prior to your termination of state employment. During your employment with DSS, you were not involved in this case because it was not assigned to any of the social workers whom you regularly represented.

QUESTION:

May you represent the children in the above matters without violating the conflict of interest law, G.L. c. 268A?

ANSWER:

Yes.

DISCUSSION:

As a former employee of DSS, the provisions of G.L. c. 268A, §5 apply to you. Section 5(a) prohibits a former state employee from receiving compensation from or acting as attorney for anyone other than the Commonwealth or a state agency, in connection with any particular matter[1]/ in which the Commonwealth or a state agency is a party or has a direct and substantial interest, and in which he participated[2]/ as a state employee.

Section 5(b) prohibits a former state employee for one year from appearing personally before any court or agency of the Commonwealth in connection with any particular matter which was under his official responsibility[3]/ during the last two years of his state employment. This section goes beyond those matters in which you participated and turns on your authority in connection with any matter.

The custody petitions filed by DSS are particular matters in which a state agency, DSS, is a party and has a direct and substantial interest. However, your representation of the children in the custody petitions will not violate §5(a) or (b). Since six of the petitions were not pending in DSS during your state employment, you could not have participated in the matters or had official responsibility for them while you were a DSS employee. With respect to the petition that was pending in DSS during your state employment, since it was not assigned to a social worker with whom you worked, you did not participate in or have official responsibility for the matter while a DSS employee.

As of March 29, 1983, an amendment to §23 of G.L. c. 268A will take effect which will apply certain provisions of that section to former state employees. A former state employee will be prohibited from accepting or engaging in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority and from improperly disclosing materials within the exemptions to the definition of public records as defined by G.L. c. 4, §7 which were acuired by him in the course of his official duties and from using such information to further his personal interests. See, St. 1982, c. 612, §16. Therefore, your activities in the private sector will be regulated by these additional limitations.

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[1]/General Laws, c. 268A, §1(k), defines "particular matter" as any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy . . . decision, determination, finding, but excluding enactment of general legislation by the general court.

[2]/General Laws, c. 268A, §1(j) defines "participate" as participate in agency action or in a particular matter personally and substantially as a state . . . employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation, or othersise.

[3]/General Laws, c. 268A, §1(i), defines "official responsibility" as the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-34

FACTS:

You are a member of a state agency ABC and also an attorney engaged in the private practice of law. Among your statutory powers as an ABC member is the investment of ABC funds. In practice, the ABC staff will prepare investment guidelines and recommendations and will submit them to you and other ABC members for your review and approval. Since 1967 you have performed private conveyancing work for the XYZ Bank (Bank). You are one of approximately Q attorneys to whom the Bank refers conveyancing work, and you estimate that the income from the referrals represents ten percent of your income as an attorney. The Bank is interested in receiving investments from ABC.

QUESTION:

Does G.L. c. 268A permit you to participate as an ABC member in deciding whether to invest funds in the Bank?

ANSWER:

Yes, subject to certain limitations described below.

DISCUSSION:

As an ABC member, you are a state employee for the purposes of G.L. c. 268A.[1]/ Under G.L. c. 268A, §6, you are prohibited, in relevant part, from participating[2]/ in your ABC capacity in any particular matter[3]/ in which a business organization for which you serve as an employee has a financial interest. The Bank is a business organization for the purposes of §6, and, by voting to invest ABC funds with the Bank, you would be participating in a particular matter in which a business organization has a financial interst. The Commission concludes, however, that your private attorney relationship with the Bank does not rise to the status of "employee" sufficient to invoke the participation prohibitions of §6. This conclusion is based on the comparatively small portion of your income attributable to services which you perform for the Bank and the relative infrequency of those services. However, should your situation change and a more substantial portion of your time and income be attributable to the Bank, then you would be regarded as an employee for the purposes of §6. Compare, Attorney General Conflict Opinion No. 101; EC-COI-80-43 (members of a group who, by their conduct, give the appearance of being partners will be treated as such for the purposes of §6). This result would apply irrespective of whether the relationship is regarded as that of an independent contractor for other purposes.

Although G.L. c. 268A, §6 does not preclude your participation as an ABC member in investment decisions involving the Bank, you should be aware that G.L. c. 268A, §23 imposes restrictions on your activities. The first paragraph of §23 prohibits a state employee from using or attempting to use his official position to secure unwarranted privileges for himself or others and from, 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, or that he is unduly affected by the kinship, rank, position or influence of any party or person. You would not run afoul of these provisions just because the Bank received investments from ABC. However, if the Bank were the only recipient or were a recipient of a substantial portion of ABC's investments and if you were to have voted to make those investments, then §23 issues would be raised. To avoid even the raising of such issues, the safest course on your part would be to refrain altogether from participating in such votes whenever the Bank is competing for those investments. Otherwise, it would have to be examined whether the investments were made on objective criteria applicable equally to all banks or whether your private relationship with the Bank played any role.

DATE AUTHORIZED: March 22, 1983

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[1]/As an unpaid member, you would be a "special state employee" under G.L. c. 268A, §1(o) and therefore subject to certain less restrictive provisions of G.L. c. 268A. For the purposes of this opinion, your status as a special state employee is not relevant.

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

[3]/"Particular matter" means any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court. G.L. c. 268A, §1(k).

CONFLICT OF INTEREST OPINION NO. EC-COI-83-35

FACTS:

You are a full-time employee in state agency ABC (ABC). You have the opportunity to work two evenings per week as a part-time employee for state agency DEF (DEF) after March 29, 1983.

QUESTION:

May you accept the part-time position with the DEF while employed full-time by the ABC?

ANSWER:

Yes, provided your hiring and employment are in compliance with G.L. c. 268A, §7(b) as amended by St. 1982, c. 612.

DISCUSSION:

As a full-time employee of ABC, you are a "state employee" as defined in the conflict of interest law and, as a result, are subject to the provisions of that law. See G.L. c. 268A, §1 et seq.

Section 7 of the conflict law prohibits a state employee from knowingly having a financial interest in a contract made by any state agency. Your employment arrangement with the DEF would constitute a contract for §7 purposes and your compensation for services would be a financial interest in it.

Chapter 612 of the Acts of 1982 amended various provisions of the conflict of interest law. Among those amendments was a change in the criteria set out in G.L. c. 268A, §7(b) which, if satisfied, exempts the otherwise proscribed financial interest from the §7 prohibition. This amendment goes into effect on March 29, 1983 and, therefore, your question must be examined in light of this change.

As amended, the prohibition in §7 does not apply

> to a state employee other than a member of the general court who is not employed by the contracting agency and who does not participate in or have official responsibility for any of the activities of the contracting agency, if the contract is made after public notice or where applicable, through competitive bidding, and if the state employee files with the state ethics commission a statement making full disclosure of his interest and the interests of his immediate family in the contract, and if in the case of a contract for personal services (1) the services will be provided outside the normal working hours of the state employee, (2) the services are not required as part of the state employee's regular duties, the employee is compensated for not more than five hundred hours during a calendar year, and (3) the head of the contracting agency makes and files with the state ethics commission a written certification that no employee of that agency is available to perform those services as a part of their regular duties.

As you can see, various conditions must be satisfied before this exemption applies to any contract, with certain additional criteria applicable when, as in your case, the contract is for personal services.

As an ABC employee, you are not employed by the contracting agency DEF nor by an agency which regulates the activities of the DEF and you do not participate in or have official responsibility for any of the activities of the DEF. The exemption also requires you to file a statement with the Ethics Commission making full disclosure of your interest in this contract. The services you will provide for the DEF will be outside your normal working hours, and you state that they are not required as part of your regular duties at the ABC. You further state that you will not be compensated pursuant to this contract for more than 500 hours during any calendar year. Finally, the head of the DEF must file with the Ethics Commission a certification that no employee of that agency is available to perform the duties for which you would be hired as a part of their regular duties, and the contract must be awarded after "public notice."

The term "public notice" is not defined in the conflict of interest law. As the agency authorized to enforce that law, the Ethics Commission possesses the authority to interpret it, as well. **Grocery Manufacturers of America, Inc. v. Department of Public Health,** 379 Mass. 70, 75 (1979). Any such interpretation of "public notice" must take into account the pairing of the term in the statute with "competitive bidding"[1]/ and the stated purpose of the drafter that "the general public [have] equal access to the contract through notice. . ."[2]/ Generally, §7 is designed to eliminate the public impression that state employees have an "inside track" to procure state jobs and contracts. Where applicable, the mechanics of the competitive bidding process are sufficient to meet that goal. Such competition is not appropriate in many personal service employment arrangements. Therefore, a process other than competitive bidding, but addressing the concerns satisfied by that mechanism, must be adopted. Where a state agency seeks to hire an individual for an agency position, the "public notice" requirement is satisfied by the agency advertising that availability of the position at least two weeks prior to filling the position in one newspaper of general circulation in the area serviced by the contracting agency.

This procedure is similar to notice requirements set out in other state statutes,[3]/ and meets the goal of facilitating public access to state contracts which the "public notice" concept was intended to achieve.

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[1]/"Competitive bidding" is defined in G.L. c. 268A, §1(b).

[2]/Summary Statement Accompanying H. 1235, p. 10 (1982) (amendment adopted in St. 1982, c. 612, as proposed).

[3]/See, e.g., G.L. c. 34, §17 (county contracts); G.L. c. 236, §28 (sale of land on execution).

CONFLICT OF INTEREST OPINION NO. EC-COI-83-36

FACTS:

You are a member of the state Board of Regents of Higher Education (Regents). As such, you are one of fifteen members who oversee public higher education in Masachusetts. See generally G.L. c. 15A, §1 et seq.

You are also an unpaid chairman of a non-profit corporation known as ABC which was formed to design and implement certain programs. One of the ABC's projects would involve the sale of XYZ product to participating universities.

ABC would like to offer XYZ to public higher education institutions in the Commonwealth and has been invited to make a presentation to the Public Colleges' and Universities' Presidents' Council. This group consists of the presidents or chancellors of Massachusetts public community colleges, state colleges and universities.

QUESTION:

May you remain a member of the Regents and Chairman of ABC while ABC solicits participation in XYZ by public institutions of higher education?

ANSWER:

Yes, provided you comply with the guidelines outlined below.

DISCUSSION:

As a member of the Regents, you are a state employee as defined in the conflict of interest law and, as a result, are subject to the provisions of that law. See generally G.L. c. 268A, §1 et seq. Because your position on the Regents is unpaid, you are also a "special state employee," G.L. c. 268A, §1(o)(l), and, where specified, certain sections of the conflict law will apply to you in a less restrictive manner.

Section 6 of Chapter 268A prohibits you from participating as a member of the Regents in any "particular matter"[1]/ in which a business organization in which you are an officer or director has a financial interest. The statute further provides that if such a matter arises in which you would normally be required to participate, you must advise the official responsible for appointment to your position and the Ethics Commission of the nature and circumstances of the particular matter and make full disclosure of the financial interest involved. That official must then either a) assign the particular matter to another employee, or b) assume responsibility for the particular matter himself, or c) make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Commonwealth may expect from you. Copies of this determination must be sent to you and to the Ethics Commission.

Non-profit corporations, like ABC, are business organizations for purposes of §6. See EC-COI-81-22. And, the decision to participate in XYZ and to fund that participation would be a particular matter in which ABC would have a financial interest. Should this decision come before you as a member of the Regents, you must comply with the provisions of §6.[2]/

As a special state employee, you are prohibited by G.L. c. 268A, §4 from receiving compensation from or acting as agent or attorney for anyone other than the Commonwealth (such as ABC) in relation to a particular matter a) in which you have participated as a state employee or b) which is or within one year has been a subject of your official responsibility[3]/ or c) which is pending in the state agency in which you are serving, provided that you serve for more than sixty days during the prior three hundred and sixty-five day period.

Although it is unclear at this time what your role as a member of the Regents may be in connection with the decision to participate in XYZ, it is possible that this particular matter may come under your official responsibility as a member of the Regents. As a result, §4 would prohibit you from appearing before any state agency on behalf of ABC's efforts to promote XYZ. This prohibition is buttressed by the application of §23 of the conflict of interest law.

Section 23 of Chapter 268A provides certain standards of conduct which apply to all state employees. Section 23 (d) prohibits the use or attempted use of your official position to secure unwarranted privileges or exemptions for yourself or others. Section 23(e) proscribes conduct which gives reasonable basis for the impression that anyone can improperly influence or unduly enjoy your favor in the performance of your official duties, or that you are unduly affected by the kinship, rank, position or influence of any party or person.

Because of your broad authority as a member of the Regents over the public higher education system, you have substantial influence over the members of the Public Colleges' and Universities' Presidents' Council. If you were to advocate participation in XYZ either as a representative of ABC or as a member of the Regents, you could be perceived as being unduly influenced in favor of ABC because of your association with it. Further, you may be said to be using your official position to grant an unwarranted privilege to ABC by giving the approval and support of a member of the Regents to XYZ. Therefore, you should not in any way advocate participation in XYZ either as Chairman of ABC or as a member of the Regents to any persons who are subject to your authority in the latter position.

DATE AUTHORIZED: March 22, 1983

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[1]/For the purposes of 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. G.L. c. 268A, §1(k).

[2]/Participation encompasses more than just the act of voting on a particular matter. To preside over a vote is to participate in it, as is participation in "work sessions" formulating the matter for vote. **Graham v. McGrail**, 370 Mass. 888, 891 (1976).

[3]/For the purposes of G.L. c. 268A, "official responsibility" is defined as the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action, G.L. c. 268A, §1(i).

CONFLICT OF INTEREST OPINION NO. EC-COI-83-37

FACTS:

On (date omitted), you became an employee of a state agency (XYZ) and as such, you also became a Board Member of another state agency (ABC). (citation omitted). Prior to this employment, you were one of two general partners of the DEF Partnership. You were also a general and limited partner of the RST Limited Partnership. The business of these partnerships is (description omitted). Pursuant to this end, on (date omitted) both partnerships entered into a contract with ABC, a state agency, for long-term financing of the business. The availability of ABC funding for businesses involving (description omitted) was publicized through newspapers and state pamphlets. A public hearing was also held to inform the public of your business. The contract represents an Agreement between ABC, another entity, DEF and RST. Under the terms of the contract, (description of Agreement omitted). Over the next few months additional funding for the business will be solicited from the public.

After learning of your state employment, you took steps to divest yourself of any interest you had in DEF and RST. On (date omitted), you assigned your rights, title and interests in the two partnerships to your wife and gave her an irrevocable power of attorney. Your wife is a part-time state employee. She gave no consideration for the assignment and, prior to receiving it, was not involved in the business. Your wife became a limited partner in DEF and a general and limited partner in RST. You indicate that your wife received the assignment as a gift because a dollar value of your interest in the business was impossible to ascertain at this time, and further, because she is someone whom you can trust to operate the business. Due to the speculative financial value of the business, you also indicate that you were unable to sell your interests to your partner or to any other individual.[1]/

QUESTION:

1. Does the assignment of your interest in the business to your wife represent complete divestiture of your financial interest in a contract made by a state agency for the purpoes of complying with G.L. c. 268A, §7 of the conflict of interest law?

2. Are you eligible for an exemption under §7 as amended by St. 1982, c. 612, §5?

ANSWER:

1. No.
2. Yes, subject to certain conditions.

DISCUSSION:[2]/

I. **Imputation of Spouse's Financial Interest In a Contract Made by a State Agency**

As an employee of XYZ, you are a state employee as that term is defined in §1(q). As such, you are prohibited from having a direct or indirect financial interest in a contract made by a state agency. G.L. c. 268A, §7. The contract between ABC and DEF and RST is a contract made by a state agency. Notwithstanding the assignment transaction that took place between you and your wife, thereby giving her a direct financial interest in the ABC contract, the Commission concludes that you retain an indirect financial interest in the contract in violation of §7. As a general rule, §7 does not automatically attribute a spouse's financial interest in a state contract to the state employee. See EC-COI-80-105, 80-60, 80-39, 80-25. However, the Commission does recognize that there may be instances as in this case, where such attribution is warranted (see EC-COI-82-128) and the Commission will not allow an individual to circumvent the conflict of interest law by transferring assets to members of his immediate family.[3]/ **In the Matter of John Buckley,** Commission Adjudicatory Docket No. 108, Decision and Order, pg. 19 (May 7, 1980).

[1]/From the information provided, it is unclear whether anyone other than your partner and your wife was approached regarding the purchase of your interest in this business.

[2]/Since the Commission concludes that the assignment of your interests to your wife does not comply with G.L. c. 268A, but that you may comply with §7 as amended by St. 1982, c. 612, §5, this opinion will not discuss the applicability of the law to your wife.

[3]/For the purposes of G.L. c. 268A, "immediate family" is defined as the employee and his spouse, and their parents, children, brothers and sisters. G.L. c. 268A, §1(e).

In prior Attorney General Conflict Opinions and Commission Advisory Opinions, dealing with spouses' contracts, it was not the assignment of an interest in the contract by a state employee that gave rise to the spouse's financial interests. In those opinions, the spouse was either engaged in his own business or shared an interest in the business with the state employee. Therefore, this case is distinguishable from previous rulings in this area, since your wife was not involved in the business prior to the assignment. Further, there is no indication that she has any background, expertise, or interest in this field of business. Notwithstanding the speculative financial value of the business, the public will be solicited for funding but your wife was not requested to contribute even a nominal sum as consideration for the assignment. Under these facts, it is clear that the assignment to your wife was made, in part, on the basis that she is someone on whom you can rely to handle the business in the same manner as yourself. Moreover, by having day-to-day contact with your wife, there is no evidence to support the assignment as an "arm's length" transaction. In view of the circumstances surrounding the assignment, the Commission concludes that you can "fairly" be said to still have a financial interest in the business. See Buss, **The Massachusetts Conflict of Interest Statute: An Analysis,** 45 Boston University Law Review 299, 375 (1965). Cf. **Starr v. Board of Health of Clinton,** 356 Mass. 426 (1969).

II. Eligibility For An Exemption Under §7 As Amended by St. 1982, c. 612, §5

As of March 29, 1983 an amendment to §7 will take affect. This new section permits a state employee, other than a member of the general court, to maintain a financial interest in a contract made by a state agency where the following requirements are fulfilled.

> a) The employee is not employed by the contracting agency or an agency which regulates the activities of the contracting agency;
>
> b) he does not participate[4]/ in or have official responsibility[5]/ for any of the activities of the contracting agency;
>
> c) the contract is made after public notice; and
>
> d) the employee files with the Commission a statement making full disclosure of his interest and the interests of his immediate family in the contract.

In applying the provisions of this amendment to your situation, the Commission concludes that as of March 29, 1983, you will be in compliance with §7 if you file the appropriate disclosure and follow the guidelines set out below.[6]/

As a state employee, you or your designee are statutorily required to serve as a Board Member of ABC. (citation omitted). However, your service to ABC under these circumstances does not make you an employee of that agency. Pursuant to its own enabling legislation, ABC is not under the supervision or control of XYZ, **Id.** Therefore you also are not employed by an agency which regulates the activities of ABC.

A broader discussion is necessary regarding your participation in and your official responsibility for the activities of ABC. In your position on ABC, you can abstain from participating in matters in which you, or an immediate family member, have a financial interest. Notwithstanding this abstention, as a Board Member, you would still have official responsibility for such matters since this term addresses your authority in connection with a matter and not whether that authority is exercised. EC-COI-83-29; 83-9; Buss, **The Massachusetts Conflict of Interest Statute: An Analysis, supra,** at 321. However, the Commission concludes that in the circumstances of this case, you can absolve yourself of official responsibility over any ABC activity since the enabling legislation of ABC allows you to designate an individual to serve in your place and since service on the Board is independent of your day-to-day duties as an employee of XYZ. To do so, you must designate an individual to serve in your place and adhere to the following guidelines (such action on your part will be tantamount to resigning from the position):

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[4]/For the purposes of G.L. c. 268A, "participate" is defined as participate in agency action or in a particular matter personally and substantially as a state employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

[5]/For the purposes of G.L. c. 268A, "official responsibility" is defined as the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i).

[6]/This conclusion remains the same whether you keep your interest in the partnerships or continue the assignment transaction with your wife.

1. Your designee on ABC should be chosen by your appointing official.

2. The designation should be irrevocable for as long as you remain a state employee.

3. The designee should abstain from participating in matters in which you or the partnerships have a financial interest.

In addition to complying with the §7(b) exemption, these guidelines will ensure that the designation is free from the appearance of an impropriety in violation of §23, as amended by St. 1982, c. 612, §14. This section prohibits a state employee from 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 order to avoid the appearance that your designee will unduly favor your business before ABC, he should be an individual who has no relationship to you and, therefore, is not accountable to you for his actions.

The final requirement of the §7(b) exemption is the public notice provision. For the purposes of §7, the public notice requirement was established to assure that the general public has equal access to state contracts. With respect to this provision, the Commission concludes that the ABC application process and public education efforts offer the vestiges of openness that are contemplated by the amendment. Cf. EC-COI-81-97. When ABC acquired the authority to fund businesses such as yours, it made a conscientious effort to inform the public of the availability of funds. Information was published in state pamphlets and newspapers of general circulation. ABC participated in educational seminars held by other state agencies, and sent representatives to inform officials of cities and towns of this program. Moreover, before final approval is rendered by ABC, the applicant must comply with a process that is geared toward public awareness. In addition to notifying the city or town in which the business is located, the applicant must participate in a public hearing held by ABC for the purpose of gathering public comment regarding the business.

In view of these facts, if you file the appropriate disclosure with the Commission and follow the guidelines above, you will be in compliance with §7 as amended by St. 1982, c. 612, §5.

DATE AUTHORIZED: March 22, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-38

FACTS:

You are an elected member of the Town Council of a Town (Town), which adopted a Town Council form of government pursuant to G.L. c. 43B. Prior to that time, the Town had been governed by a board of selectmen and a town meeting. Under the provisions of the Home Rule Charter (Charter) adopted by the Town pursuant to G.L. c. 43B, the voters have elected a fifteen-member, unpaid, Town Council which serves as the legislative body of the Town. **Charter.** The Town Council possesses the authority to appropriate funds, to select a town administrator who acts as the chief executive officer for the Town, **Id.,** and to ratify all appointments recommended by the town administrator. Since 1978, neither the offices of member of the board of selectmen nor town meeting member have been in existence. In addition to your Town Council position, you are a full-time member of the Town Fire Department.

QUESTION:

Does G.L. c. 268A permit you to have a financial interest in your Fire Department position while. you maintain your membership on the Town Council?[1]/

ANSWER:

No.

[1]/Your fact situation also raises a question over whether your simultaneous service as a Town Council member and Fire Department member violate a provision in the Charter which prohibits Town Councillors from holding an appointive, administrative office of the town in excess of half-time. Since the Commission possesses the authority to interpret G.L. c. 268A and c. 268B and cannot provide guidance over this issue, you should refer the matter to Town Counsel.

DISCUSSION:

1. **Status as Municipal Employee**

Initially, the Commission advises you that, as Town Councillor, you are a "municipal employee" within the meaning of G.L. c. 268A, §1(g).[2]/ Although you are required to perform services as Town Councillor only on a biweekly basis, the part-time nature of your services does not exempt you from the scope of G.L. c. 268A. The "municipal employee" definition is all-inclusive and covers individuals who provide part-time service to a municipal agency, even if they receive no compensation. See, Buss, **The Massachusetts Conflict of Interest Law: An Analysis,** 45 B.U. Law Rev. 299, 311 (1965); **United States v. Mississippi Valley Generating Company,** 364 U.S. 520, 552 n. 15 (1961); EC-COI-82-96.

The Commission also concludes that, by serving as Town Councillor, you are performing services for a "municipal agency."[3]/ The scope of the definition of municipal agency is not limited to the executive branch of municipal government but includes the legislative branch as well, unless expressly exempted by statute. See, **Buss, supra,** at p. 311; EC-COI-82-96. Inasmuch as the General Court has expressly exempted only elected town meeting members from the definition of "municipal employee," other municipal legislative officials remain included within the definition. See, **Legislative Research Council Report Relative to Conflict of Interest Law and Separation of Powers,** 1975 House Doc. No. 6475, p. 68; EC-COI-82-96 [town moderators are subject to G.L. c. 268A]. Nor is the office of Town Councillor sufficiently comparable to the office of town meeting member so as to share the exemption of elected town meeting members from G.L. c. 268A, §1(g). To the contrary, the Massachusetts appellate courts, in reviewing charters similar to the Town, have regarded the Town Council as functionally equivalent to a City Council whose members are not subject to exemption under G.L. c. 268A, §1(g). **Chadwick v. Scarth,** 6 Mass. App. Ct. 725, 726-730 (1978); See, generally, **Opinion of the Justices,** 365 Mass. 655 (1974); **Opinion of the Justices,** 220 Mass. 601, 610 (1918):

> "It is an immaterial circumstance that . . . the name 'town' is retained as descriptive of the municipal organization. It is the substance of the thing done, and not the name given to it, which controls." (as quoted in **DeDuca v. Town Administrator,** 368 Mass. 1, at 9, n. 6 (1975)).

2. **Financial Interest in a Municipal Contract**

Under G.L. c. 268A, §20, municipal employees may not have a financial interest in a contract made by an agency of the same municipality. Your employment contract as a member of the Fire Department would constitute a financial interest in a municipal contract within the meaning of §20. See, **In the Matter of Henry M. Doherty,** Commission Ajudicatory Docket No. 155, Decision and Order (November 18, 1982) p. 5; EC-COI-80-118. Accordingly, you would be prohibited from maintaining your employment arrangement with the Fire Department while you remain a Town Councillor unless you were able to comply with one of the exemptions in §20. Although there are two exemptions which are potentially relevant to your situation, the Commission advises you that you are eligible for neither exemption.

(a) Under G.L. c. 268A, §20 ¶(b), (inserted by St. 1982, c. 612, effective March 29, 1983) a municipal employee may have a financial interest in a second municipal contract if the

> employee . . . is not employed by the contracting agency or an agency which regulates the activities of the contracting agency and . . . does not participate in or have official responsibility for any of the activities of the contracting agency, if the contract is made after public notice or where applicable, through competitive bidding, and if the municipal employee files with the clerk of the city or town a statement making full disclosure of his interest and the interest of his immediate family;

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[2]/"Municipal employee," a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, 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. G.L. c. 268A, §1(g).

[3]/"Municipal agency," 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.

and if in the case of a contract for personal services (1) the services will be provided outside the normal working hours of the municipal employee, (2) the services are not required as part of the municipal employee's regular duties, the employee is compensated for not more than five hundred hours during a calendar year, (3) the head of the contracting agency makes and files with the clerk of the city or town a written certification that no employee of that agency is available to perform those services as part of their regular duties, and (4) the city council, board of selectmen or board of aldermen approve the exemption of his interest from this section, . . .

You would not be eligible for this exemption because your full-time employment with the Fire Department exceeds five hundred hours annually and because of the role which the Town Council plays in the approval of both personnel appointments and the budget of the Fire Department.

(b) Section 20 also contains the following exemption, inserted by St. 1982, c. 107:

> This section shall not prohibit an employee or an official of a town from holding the position of selectman in such town nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office. Provided that no such member may vote or act on any matter which is within the purview of the agency by which he is employed or over which he has official responsibility, and provided further that no member shall be eligible for appointment to such additional position while a member or for six months thereafter. Any violation of the provisions of this paragraph which has substantially influenced the action taken by any municipal agency in any matter shall be grounds for avoiding, rescinding or cancelling the action on such terms as the interest of the municipality and innocent third parties require. No such selectman shall receive compensation for more than one office or position held in a town, but shall have the right to choose which compensation he shall receive.

Prior to the enactment of St. 1982, c. 107, it was unlawful for an employee of the Town to hold the office of Town selectman and to receive compensation for both positions, See, G.L. c. 268A, §20; **Walsh v. Love,** Norfolk Superior Court Civil Action No. 132687 (July 2, 1981) which held that the teacher-selectman arrangement violated §20; EC-COI-81-89. In response to this prohibition, the General Court considered proposals during the 1982 legislative session to allow the dual status of selectman and employee, as well as broader proposals permitting any employee of a city, town or district to hold an elective office in such city, town or district. See, 1982 House Doc. No. 1657. During the consideration of these bills, the General Court substituted for the broader proposal a bill which applied the §20 exemption solely to members of boards of selectmen (See, House Doc. No. 5877); this more limited version was enacted into law as St. 1982, c. 107.

On the basis of this background, the Commission concludes that the intent of the General Court in enacting c. 107 was to create an exemption limited solely to members of boards of selectmen, and that the General Court did not intend to include members of Town Councils or other elected municipal officials within the scope of the exemption. This conclusion is based on the plain language of c. 107 as well as the context in which c. 107 was enacted - namely as a vehicle to allow an exemption for selectmen under §20 in view of prior administrative and judicial rulings to the contrary. While there is precedent for disregarding the plain meaning of a statute where the interpretation leads to an irrational result, **Board of Appeals of Hanover v. Housing Appeals Committee,** 363 Mass. 339, 355 (1973), the omission of Town Councillor and other elected municipal officials from the c. 107 exemption does not lead to an irrational result. To the contrary, the continuation of the §20 prohibition to Town Councillors reflects a reasonable legislative judgment that elected municipal officials who exercise legislative powers comparable to City Councillors, (see **Chadwick v. Scarth, supra**) should remain subject to the provisions of §20. The General Court was aware of the existence of Town Councils and, on other occasions, has seen fit to address specific situations affecting municipalities which

have adopted a Town Council form of government. See, e.g., G.L. c. 4, §4A; G.L. c. 40, §5. The determination of whether to extend the §20 exemption to Town Councillors and other elected municipal officials rests with the General Court. **Boylston Water Dist. v. Tahanto Regional School Dist.**, 353 Mass. 81 (1967).[4/]

DATE AUTHORIZED: March 22, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-40

FACTS:

You are a Superintendent of a state facility (ABC). As such, you are responsible for the deposit of certain ABC funds into bank accounts. Since 1974, the ABC has deposited these funds in a Bank (Bank). These accounts are the only business which the ABC does with the Bank.

Since 1977, you have been one of the corporators of the Bank. As such, you are part of a group which is intended to represent a cross-section of the depositors of the Bank. Although corporators are generally unpaid for their service, some may be named to committees set up to address particular policy issues or decisions. Committee members normally serve about two hours annually and are paid per hour.

QUESTION:

May you simultaneously serve as a corporator of the Bank and Superintendent of the ABC while, in the latter position, you have responsibility for deposit of certain ABC funds and those funds are currently deposited in the Bank?

ANSWER:

Yes, provided you comply with the guidelines described below.

DISCUSSION:

As Superintendent at ABC, you are a "state employee" for purposes of the conflict of interest law. G.L. c. 268A, §1(q).

1. **As Superintendent of ABC**

Under G.L. c. 268A, §23(e), you may not, by your conduct, give reasonable basis for the impression that any person can improperly influence or unduly enjoy your favor in the performance of your official duties, or that you are unduly affected by the kinship, rank, position or influence of any party or person. This section attempts to assure that the decisions made by a public official are unaffected by those persons or entities with whom that official is associated in her private capacity.

While nothing in G.L. c. 268A, or more particularly §23(e), would prohibit outright your simultaneously serving as Superintendent and corporator, your ability to make decisions as a public official which will benefit the bank, i.e. to deposit ABC funds, requires that certain safeguards be imposed. The Commission has adopted a disclosure procedure which requires that you immediately notify your appointing official of your connection with the Bank and your public responsibilities which may affect it. Your appointing official should then either (1) assume those responsibilities himself, (2) assign them to another employee, or (3) make a written determination that the interest of the Bank is not so substantial as to affect the integrity of the services which the Commonwealth may expect from you. Compare G.L. c. 268A, §6; also see EC-COI-83-25. Your compliance with this disclosure procedure should effectively address the concerns raised by your dual positions.

[4/]The Commission notes that bills are pending in the General Court which would expand the §20 exemption. See, House Doc. No. 5519 (1983); Senate Doc. No. 1167 (1983).

2. **As Corporator of the Bank**

Section 4 of the conflict law prohibits you from being compensated by or acting as agent for anyone other than the Commonwealth in connection with a "particular matter"[1]/ in which the Commonwealth or a state agency is a party or has a direct or substantial interest. Although you do not present any facts implicating this provision, you should be aware that its terms proscribe your being paid by the Bank, or appearing before any state agency on the Bank's behalf, in connection with particular matters in which the state has a direct and substantial interest (e.g. Banking Commission audits). You should keep this provision in mind and conduct your activities as a corporator in accord with its terms.[2]/

DATE AUTHORIZED: March 22, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-42

FACTS:

You formerly served as an executive in a state regulatory agency, ABC. In that capacity you were responsible for drafting and implementing regulations in a certain business field. You determined whether businesses were in compliance with the regulations and, where appropriate, established a compliance program for these businesses. You now serve as an officer in Association XYZ (XYZ), a trade organization in that field of business, which provides input to state legislative and regulatory bodies and which also assists member businesses in implementing related laws and regulations. Your responsibilities are primarily in this latter area.

QUESTIONS:

1. In your XYZ capacity can you advise two member businesses on their compliance with certain programs which you established while employed by ABC?
2. Can you represent XYZ in proposing amendments to state regulations which you authored while employed by ABC?
3. Can you provide legislative testimony on behalf of XYZ dealing with issues related to its field of business?
4. Can you accept an invitation to serve on a state advisory committee (Advisory Committee)?

ANSWERS:

1. No.
2. Yes.
3. Yes, subject to certain limitations.
4. Yes, although you will become a state employee and therefore subject to certain restrictions under G.L. c. 268A in your Advisory Committee capacity.

DISCUSSION:

a) **Limitation on Activities on Behalf of XYZ**

1. Upon your departure from ABC, you became a former state employee and are therefore subject to the provisions of G.L. c. 268A, §5. Section 5 prohibits a former state employee from acting as the agent or attorney for, or receiving compensation from anyone other than the state in connection with a particular matter[1]/ in which the state is a party or has a direct and substantial interest and in which he participated[2]/ while a state employee. Applying this provision to the facts of your case, you are permanently barred from receiving compensation from XYZ

[1]/For the purposes of 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. G.L. c. 268A, §1(k).

[2]/In advisory opinion EC-COI-81-87, the Commission ruled that a member of the Board of Trustees of a state college was prohibited by §§23(d) and 23(f) of G.L. c. 268A from simultaneously being employed as President of a bank in which the college deposited substantial funds. Your case is distinguishable because the nature of your position as corporator is clearly different from that of a compensated bank president and the fact that there is a great difference in the sums of money on deposit.

[1]/For the purposes of 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. . . G.L. c. 268A, §1(k).

[2]/For the purposes of G.L. c. 268A, "participate" is defined as participate in agency action or in a particular matter personally and substantially as a state, . . . employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

relating to advising two member businesses on whether their business program is in compliance with ABC corrective programs, because you established the compliance programs for these businesses while you were employed by the ABC. This restriction would apply to both your receipt of compensation from XYZ and to your acting as agent for XYZ in relation to the compliance programs.

2. You may represent XYZ in proposing amendments to state regulations which you authored dealing with [enumerated business matters]. The Commission has previously held that activities with respect to regulations do not rise to the level of "particular matters" unless the former employee's activities attack the validity of the very regulations which the employee authored. See EC-COI-81-34. Therefore, as long as your representation is in relation to amendments to these regulations rather than an attack on the validity of the regulations, your activities will be permissible under §5.

3. In general, you may provide legislative testimony on behalf of XYZ dealing with issues of interest to it, subject to certain limitations. The representation prohibition of §5(a) applies only to particular matters in which you participated as an ABC employee, and would therefore include *only* special legislation. You would be permitted to testify with respect to the enactment of general legislation, which is excluded from the definition of particular matter under §1(k).[3]/

You should also be aware that §5(b) imposes additional restrictions on your representational activity on behalf of XYZ. Under §5(b), you are prohibited until one year after the date you left ABC from appearing personally before any court or agency of the Commonwealth in connection with any particular matter which was under your official responsibility during the last two years of your state employment. This section goes beyond those matters in which you participated and turns on your authority in connection with any matter. Accordingly, §5(b) will prohibit your appearances before ABC, any other state agency, the General Court, or a state court regarding matters which were under your official responsibility dating back to two years before your resignation.[4]/

b) **Advisory Committee**

4. If you were to accept an invitation to serve on Advisory Committee, a permanent statutory advisory body established under [statute cited], which meets periodically and plays a role in the implementation of a particular state program, you would become a special state employee and would be subject to the restrictions of §4 on your XYZ activities. See, EC-COI-82-157. As a special state employee you would be prohibited by §4 from receiving compensation from or acting as agent or attorney for XYZ in relation to any particular matter in which the Commonwealth is a party or has a direct and substantial interest and in which a) you have participated or b) have or have had official responsibility during the previous one-year period while on the Committee.[5]/ Although your membership on the Committee does not raise any particular problems because your XYZ activities would not involve matters in which you would either participate or have official responsibility for as a Committee member, you should be aware of the §4 restrictions should such a matter arise.

DATE AUTHORIZED: March 22, 1983

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[3]/Proposed laws which are temporary, which do not amend the General Laws or which would apply to a particular individual or business are examples of special legislation. See, Sands, 2 Sutherland Statutory Construction §40.01 et seq. (4th ed., 1975); EC-COI-82-169. You may contact the Commission should you need further assistance in ascertaining whether a particular bill is general or special legislation under §1(k).

[4]/The one year bar appearing in §5(e) on your activities as an XYZ legislative agent would not be applicable to you as long as your activities were before agencies other than ABC.

[5]/Section 4 also restricts special state employees from being paid by or acting as agent for private parties in relation to matters pending in their state agency (in your case the [name of relevant Executive Office]), provided that the employee serves in such capacity for more than sixty days annually. You wold not be subject to this additional restriction because your annual service as a Committee member does not exceed sixty days.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-43

FACTS:

You are a member of the General Court. As such, you hold positins on two legislative committees: the Ways and Means Committee (Ways and Means) and the ABC Committee. In the former position, you play a significant role in the recommended approval and disapproval of legislation concerning state expenditures involving state supplies, property, personnel and unions. In the latter position, you are empowered to [description of ABC Committee responsibilities omitted].

You are also employed by DEF, a banking and investment firm. You are currently undergoing training so you may begin to act as a broker for DEF. As such, you will be involved in buying and selling common and preferred stock, corporate and municipal bonds and various other financial instruments. You will also be acting as a broker in connection with money market funds, mutual funds, Keough plans, IRA's and other investment plans.

QUESTION:

What limitations does the conflict of interest law impose upon you as a member of the legislature and as an employee of DEF?

ANSWER:

Your activities in each position should be conducted in accordance with the guidelines set out below.

DISCUSSION:

As a member of the General Court, you are a "state employee" as defined in G.L. c. 268A, §1(q), and are subject to the provisions of the state conflict of interest law.

Section 6 of the conflict law prohibits participation[1]/ by a state employee in his official capacity in any particular matter[2]/ in which, in relevant part, either he or a business organization by which he is employed has a financial interest. Should such a matter arise in which the employee would normally be required to participate, the section provides that he must disclose the nature and circumstances of the particular matter and the financial interest to the Ethics Commission and to "the official responsible for appointment to his position." The latter must then take steps to eliminate the potential violation.[3]/

Although general legislation is specifically excluded from the definition of particular matter, the term has been held to include "special" legislation. Atty. Gen. Conf. Op. No. 578; EC-COI-79-111. And, the prohibition in §6 applies not only to matters which arise in the normal course of your duties, but also to determinations and decisions of state agencies into which you interject yourself as a member of the General Court. See **In the Matter of James J. Craven,** Commission Adjudicatory Docket No. 110, Decision and Order, pp. 13-16 (June 18, 1980), aff'd. **sub nom. Craven v. Vorenberg,** Suffolk Superior Court Civil Action No. 43269 (further appeal pending). You should also note that the financial interest contemplated by §6 is not one shared by a substantial segment of the public, but one which is distinctly attributable to you or DEF.[4]/

Section 23 of the conflict law contains standards of conduct which apply to all state employees. Section 23(d) proscribes the use or attempted use of your official position to gain unwarranted privileges or exemptions for yourself or others. Section 23(e) prohibits a course of conduct which gives reasonable basis for the impression that any

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

[2]/"Particular matter" means any judicial or other proceeding, application, submission, request for ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court. . . G.L. c. 268A, §1(k).

[3]/As an elected official, you have no "official responsible for [your] appointment," so this provision of §6 does not apply to you.

[4]/Section 6A of the conflict law applies only to persons who hold a position for which they are nominated at a state primary or chosen at a state election. The section requires that whenever in the discharge of his official duties such an official is required knowingly to take an action which would substantially affect his financial interest, unless that effect is no greater than the effect on the general public, that official must file a written description of the action and the potential conflict of interest with the Ethics Commission. This section is distinguishable from §6 because its application is not limited to particular matters and it does not prohibit the official from taking the action. Although the question you ask does not specifically implicate the provisions of §6A, you should be aware of its terms and should comply with its conditions should appropriate fact situations arise.

person may improperly influence or unduly enjoy your favor in the performance of your official duties, or that you are unduly affected by the kinship, rank, position or influence of any party or person. These sections will apply to you in regard to certain parties to whom you may wish to offer your products and/or services.

The Commission has previously determined that the attempted sale of goods or services by a state official to state employees over whom he has authority exploits an inherent pressure on those employees resulting from that authority. See EC-COI-82-64; 82-124. Therefore, sales which would be a product of such pressure would be unwarranted privileges secured by you and DEF from the use of your official position. Accordingly, you would be prohibited from seeking or accepting business from legislative employees over whom you have supervisory authority, as well as members of their households.

Similarly, you would give reasonable basis for the impression that you may be unduly influenced in the performance of your duties as a legislator if you were to benefit in your private employment from the use of your services by persons or organizations having regular or reasonably foreseeble matters before you as a legislator. Because of the broad nature of your question and the numerous variables which may come into play, the Commission will not attempt to address each and every possible set of circumstances which may arise. However, certain categories can be identified and discussed, to wit:

> 1) persons or organizations from whom you should not seek or accept employment in your DEF role at all;
>
> 2) situations not subject to such a proscription but where your activities as a legislator will be limited if the individuals involved fall within your authority as a legislator; and
>
> 3) individuals or groups which are so removed from your authority that no limitations will apply.

There are others whose particular circumstances prevent them from being classified among the above groups. The Commission cannot speculate on such cases. Should you need further guidance, you should seek another advisory opinion when such a case arises.

As a member of the legislature generally, and of Ways and Means specifically, you have significant authority in connection with legislative approval of various matters involving expenditures of state funds. Among these are recommendations regarding the state budget, approval of union contract cost items, and salary increases for the state personnel in unclassified positions. Because of the effect this authority may have on the decision by certain parties to purchase your services, you are prohibited from seeking or accepting business from them. This group would include the titled or administrative head of a state agency, persons whom you know have primary responsibility for an agency's budget, and those whom you know appear on behalf of an agency in matters before Ways and Means. Unions representing state employees (including the Boston Carmen's Union) are also among this group, as are state employees holding unclassified positions. These are examples of persons or groups whom you are prohibited from offering your service.

[Discussion of limitations as an ABC Committee member omitted]. Otherwise, you are not prohibited by G.L. c. 268A from seeking or accepting business from members of the General Court or from their campaign committees.

Among those to whom you are free to offer your services are state employees covered by state salary schedules, county and municipal unions with whom you have no regular dealings as a member of the General Court and judges. Generally, elected or appointed county and municipal employees are also included in this group. However, should anyone of the aforementioned individuals or groups have a matter in which they have a distinct and unique interest before you in the legislature, you should not offer your services or, if you are already doing business with them, you should take no action as a member of the legislature in connection with that matter. If you are unsure how to act in a particular situation, you should feel free to seek further guidance from the Commission.

Finally, you should not use state equipment, supplies or personnel in the pursuit of your private employment. To do so would result in the receiving of an unwarranted privilege as a result of your position in the legislature in violation of §23(d). See, EC-COI-82-112.

DATE AUTHORIZED: March 22, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-47

FACTS:

Pursuant to G.L. c. 130, §52, the board of selectmen of a town bordering on coastal waters may control the taking of shellfish within the town and make regulations in regard to times, places, methods, purposes, uses, sizes, quantities and any other particulars connected with such taking. The Board of Selectmen (Board) of the Town of ABC has assumed this authority over shellfish taking in the Town. From time to time, the Board makes decisions establishing the number of shellfishing licenses to be granted in a given year, residency and other eligibility requirements for obtaining such licenses, the amount of shellfish which may be taken by licensees, and the times during which shellfishing grounds shall be open. The Board also issues licenses and supervises the Town shellfish constable. The Board may also open and close shellfishing grounds in response to certain emergency conditions, such as "red tide" or other contamination.

You are a member of the Board. Your primary occupation, however, is as a commercial shellfisherman, and you are licensed as such by the Board. Your commercial shellfishing license is one of only X such licenses currently granted by the Board. Annual renewals of these licenses are granted automatically upon application by a licensee.

QUESTION:

May you serve as a member of the local governmental body (the Board) which among other responsibilities regulates all aspects of shellfishing in the Town while your primary occupation is as a commercial shellfisherman licensed by that body?

ANSWER:

Yes, but you are prohibited from taking certain actions as a member of the Board, as outlined below, in connection with the regulation of shellfishing by the Town.

DISCUSSION:

As a Board member, you are a "municipal employee" as defined in the conflict of interest law and, as a result, are subject to the provisions of that law. G.L. c. 268A, §1 et seq.

Section 19 of the conflict law, in relevant part, prohibits you from participating[1] as a selectman in any particular matter[2] in which you have a financial interest. The section further provides that it shall not be a violation if the particular matter involves a determination of general policy and your interest, or that of your immediate family, is shared with a substantial segment of the population of the municipality. See, St. 1982, c. 612, §11.

Many of the actions taken by the Board in regard to shellfishing involve decisions which, by definition, are "particular matters." See n.2, below. As a commercial shellfisherman, you have a financial interest in many of these matters. Clearly, you have a financial interest in the issuance of your license and decisions to open and close shellfish grounds. Because your commercial shellfishing license is one of only X issued by the Town and you rely on shellfishing as your primary occupation, the financial interest you have in these particular matters is not one shared by a substantial segment of the public because of its significance to your livelihood. As a result, §19 prohibits your participation in these matters as a member of the Board. Compare, **Graham v. McGrail,** 370 Mass. 133, 139 (1976) [the interest of a school employee in his own compensation is a financial interest not shared with a substantial segment of the public].

Section 23 of the conflict law contains standards of conduct which apply to all municipal employees. This section prohibits the "use or attempted use of [your] official position to secure

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

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

unwarranted privileges or exemptions for [yourself] or others." You have an interest, arguably non-financial, in matters such as the establishment of the maximum number of commercial licenses granted annually and the residency or other eligibility requirements for those commercial licenses. To exercise your power as a Board member in connection with these matters would give you the unwarranted privilege of regulating and limiting access to the town resource from which you make your living. Similarly, when you exercise your authority over the shellfish constable as a Board member, you receive the unwarranted privilege of supervising the public officer who is responsible for enforcing the statutes and regulations governing your private occupation. In order to assure that the shellfish constable can carry out his duties unaffected by your authority over him, you should abstain from any matters before the Board related to that position. Compare, EC-COI-83-25. And, you are prohibited from participating in any Board action relative to commercial shellfishing. You may, however, participate as a Board member when the effect of a matter is limited to non-commercial (e.g. "family-use" licenses) shellfishing regulations or licenses.

DATE AUTHORIZED: April 12, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-48

FACTS:

You are Area Director of an Area of the Department of Social Services (DSS). As such, you, in consultation with your area board, prepare and submit to the Commissioner of Social Services an "annual plan for the operation and development of its programs" and you prepare and submit to the Commissioner "the proposed budget for the area for programs to be supported at the area level." G.L. c. 18B, §12. You and your staff also review proposals made by Area vendors in response to Requests for Proposals (RFP) which your office circulates. After reviewing these proposals, your office recommends to the DSS Regional Director which proposals should be funded by DSS contracts. The total value of vendor contracts handled by the Area is approximately $2 million.

You are also an unpaid member of the Board of Directors (Board) of ABC, a private agency which currently contracts with DSS. In particular, the ABC has contracts with DSS totalling between $300,000 and $400,000. These contracts represent one-half of the ABC's annual income. You do not review any ABC proposals, nor do you make any recommendations regarding ABC Programs. All technical advice sought by the ABC staff regarding DSS contracts is given by Area Office staff members other than yourself. You state that, as a member of the ABC Board, you do not participate in any way in discussions or decisions related to proposals or contracts involving DSS or any other state agency.

QUESTION:

May you serve on the Board of the ABC while Area Director of the Area?

ANSWER:

Yes, provided that you comply with the following restrictions.

DISCUSSION:

As Area Director, you are a state employee, G.L. c. 268A, §1(q), and, as a result, are covered by the conflict of interest law. As such you are prohibited by §6 from participating[1]/ as a DSS employee in any "particular matter"[2]/ in which a business organization[3]/ for which you are a

[1]/For the purposes of G.L. c. 268A, "participate" is defined as participate in agency action or in a particular matter personally and substantially as a state, . . . employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

[2]/For the purposes of 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. . . G.L. c. 268A, §1(k).

[3]/The term "business organization" includes non-profit corporations. EC-COI-81-22.

director has a financial interest. That section further provides that when your duties would otherwise require you to participate in such a matter you must file with your appointing official and the Commission a written disclosure of the nature and circumstances of the particular matter and the business organization's financial interest therein. Your appointing official may then either assign the matter to another employee, assume responsibility for the matter himself or make a written determination that the financial interest involved is not so substantial as to affect the integrity of your service as a state employee. Copies of that determination must be sent to you and the Commission.

Accordingly, under §6 you will be prohibited from participating as Area Director in any particular matter in which the ABC has a financial interest unless you were to receive the written determination from your appointing official described above. Examples of particular matters to which the §6 prohibitions and disclosure requirements would apply include:

1. funding applications submitted by the ABC,
2. recommendations made by your office to the DSS Regional Director concerning funding applications submitted by the ABC,
3. funding applications submitted by other organizations which are competing with the ABC for DSS funding (see EC-COI-81-118; 82-95; 82-98; 82-115),
4. approval of payments to the ABC,
5. determinations regarding ABC compliance with the terms of its contracts with DSS,
6. determinations regarding compliance by other organizations with the terms of their contracts with DSS in situations where it could reasonable be forseen that if a contract was terminated for non-compliance, the ABC would seek that funding, and
7. preparation and submission to the Commissioner of the proposed budget for the Area's programs, if the ABC were to receive any funding from that budget.[4]/

Section 23 of the conflict law contains standards of conduct which apply to all state employees and are also applicable to your situation. The second paragraph of that section prohibits the use or attempted use of your official position to gain unwarranted privileges for yourself or others and proscribes the pursuit of a course of conduct which gives reasonable basis for the impression that anyone can improperly influence or unduly enjoy your favor in the performance of your official duties. Accordingly, you should not attempt to influence in any way Area Office decisions and determinations involving the ABC. You should not question or interfere with any Area Office staff evaluations or recommendations concerning services provided by the ABC. Generally, you must avoid any conduct which may lead to the impression that you are influenced in the performance of your duties as Area Director by your position on the Board of the ABC. See EC-COI-82-69.[5]/

You also should be aware of §4(c) which prohibits you from acting as agent for anyone other than the state in connection with any particular matter in which a state agency is a party or has a direct and substantial interest. Since DSS is a party to the contract with the ABC you should not appear before DSS on behalf of the ABC or otherwise act as the spokesperson for the ABC in connection with that contract (nor before any other state agency on behalf of ABC). Appearance includes not only personally appearing but also signing any contracts or correspondence between the ABC and DSS. See EC-COI-81-156.

DATE AUTHORIZED: April 12, 1983

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[4]/You state that at the present time the ABC contracts with DSS are funded by the Regional Office and not by the Area Office.

[5]/To the extent that Commission opinion EC-COI-82-90 established a per se prohibition against someone in your position from serving on the board of an area vendor under contract with DSS, it is overruled.

CONFLICT OF INTEREST OPINION NO. EC—COI-83-51

FACTS:

You are Town Counsel for the Town of (Town). The three members of the Town's Board of Health are elected by the Town and compensation is provided for those positions. One or more current members of the Town Board of Selectmen may seek election to the Board of Health.

QUESTION:

May a member of the Town Board of Selectmen serve as an elected member of the Town Board of Health?

ANSWER:

Yes, but he may only be paid for one of the positions and his actions as Selectman will be somewhat restricted.

DISCUSSION:

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

Section 20 of G.L. c. 268A states:

> A municipal employee who has a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, in which the city or town is an interested party of which financial interest he has knowledge or has reason to know, shall be punished by [a fine or imprisonment].
>
> . . .
>
> This section shall not prohibit an employee or an official of a town from holding the position of selectman in such town nor in any way prohibit such employee from performing the duties of or receiving the compensation provided for such office. Provided that no such member may vote or act on any matter which is within the purview of the agency by which he is employed or over which he has official responsibility, and provided further that no member shall be eligible for appointment to such additional position while a member or for six months thereafter. Any violation of the provisions of this paragraph which has substantially influenced the action taken by any municipal agency in any matter shall be grounds for avoiding, rescinding or cancelling the action on such terms as the interest of the municipality and innocent third parties require. *No such selectman shall receive compensation for more than one office or position held in a town, but shall have the right to choose which compensation he shall receive.* (Emphasis added)

The first paragraph of §20 has been interpreted as including employment contracts (whether express or implied) with towns, so that a person could not simultaneously have two paid positions with the same town.[1]/ This rule has recently been modified by legislation which became effective on May 28, 1982. St. 1982, c. 107. Under the current version of the law, a person *may* serve as a selectman while otherwise employed by a municipality, but the law requires that person to choose only one salary. It also prohibits a selectman from being appointed to another town position during his term or for six months after. Because the members of the Board of Health are elected rather than appointed, this

[1]/See, eg., **Walsh v. Love**, Norfolk Superior Court Civ. Act. No. 152687, July 2, 1981 (selectman may not be employed as teacher in the same town).

latter restriction is inapplicable to the facts presented. Compare EC-COI-82-180 (elected assessor appointed to assessor/clerk position prior to election to Board of Selectmen). However, once elected to the Board of Health, the individual must choose between the salary provided for the Selectman and Board of Health positions in order to comply with the last sentence of §20. This result is consistent with the Commission's conclusion in EC-COI-82-180 that a selectman may continue to serve as an elected assessor but may receive the salary for only one of the positions.

The prohibition against the receipt of more than one salary by a selectman who holds a second elected position in the same town flows from a plain reading of the final sentence of c. 107. While the sentence contains no internal contradiction or ambiguity concerning its application to elected, as well as appointed, positions, the sentence appears to conflict in some, but not all, circumstances with language in the first sentence of c. 107. That sentence enables any elected town official to hold and receive compensation for the "office" of selectman. Given the apparent contradiction, it is the duty of the Commission to construe the statute so as to constitute a harmonious whole, **Board of Education v. Assessor of Worcester,** 368 Mass. 511, 513-514 (1975), and to give the statute a reasonable construction. **Massachusetts Commission Against Discrimination v. Liberty Mutual Ins. Co.,** 371 Mass. 186, 190 (1976). This result is best effectuated by treating the final sentence as a further proviso or condition to the language of the first sentence. To hold otherwise would have the undesirable effect of treating the General Court's clearly expressed prohibition in the final sentence as a nullity.[2]/

The final sentence of c. 107 cannot be regarded as an oversight or an unintentional choice of words. A review of the legislative history surrounding the passage of c. 107 reveals that the original version of the final sentence contained in 1982 House Doc. No. 1657 provided a clear dual salary entitlement to persons who have been elected to two or more offices in a city or town. The General Court changed this sentence in House Doc. No. 5877 to prohibit selectmen from receiving "compensation for more than one office or position." This amended version of the final sentence was retained and incorporated into c. 107. While there may be other explanations for amending the last sentence in this way, the amendment does suggest that the scope of the final sentence may have been intentional and should therefore be given effect. Moreover, the last sentence accomplishes a reasonable legislative goal of establishing a prophylatic rule to avoid the opportunity for a selectman to misuse the inherent authority of his elected position to acquire financial gain from a second elected position. Compare, EC-COI-83-1. The Commission's interpretation reflects an effort to accommodate the express intent of the final sentence. If the scope of the prohibition in the last sentence is overbroad or appears to exceed the original goal of reversing legislatively EC-COI-80-89, that problem can be easily corrected by the General Court.[3]/

You should also be aware that §20 provides that a selectman holding a second office may not vote or act on any matter which is within the purview of the agency by which he is employed, i.e. the Board of Health, or over which he has "official responsibility"[4]/ in that employment. Should a member of the Board of Selectmen be elected to the Board of Health, he should keep this provision in mind.[5]/

DATE AUTHORIZED: April 12, 1983

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[2]/Prior to the enactment of St. 1982, c. 107, the Commission had ruled in EC-COI-82-26 that holding two elected offices in a city or town did not violate §20. In view of the specific language in the final sentence of c. 107, the Commission's ruling in EC-COI-82-26 will not apply to selectmen but will continue to apply to other elected municipal offices or positions.

[3]/The Commission notes that legislation which could be amended to accomplish this goal is now pending before the General Court. See, for example, 1983 House Doc. No. 3519.

[4]/"Official responsibility" means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i).

[5]/As noted above, whether the Legislature intended this result is not free from doubt. Notwithstanding, there is a great reluctance on our part to disregard the plain reading of a statute. However, in view of the number of bills at various stages of the legislative process which address this issue, and to provide a reasonable opportunity for selectmen who have relied upon Commission adivisory opinion EC-COI-82-26 to seek alternative remedies before their local governing bodies, for a period of one year the Commission will take no action to enforce the provisions of §20 against selectmen who hold other elected positions in their town. This is similar to the approach taken in EC-COI-80-89.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-58

FACTS:

You are employed as [name of state position]. You are also an attorney and are employed on a part-time basis by a private law firm.

QUESTIONS:

1. Are you permitted to represent defendants in criminal cases in the courts of the Commonwealth?
2. Are you permitted to represent defendants in criminal cases in the Federal Court?
3. Are you permitted to represent juveniles before the Juvenile Courts of the Commonwealth?

ANSWERS:

1. No.
2. Yes, except in certain limited situations.
3. No.

DISCUSSION:

As a [name of position], you are a state employee to whom the conflict of interest law (General Laws Chapter 268A) will apply. As a state employee you may not "otherwise than in the proper discharge of [your] official duties [as a state employee], act as attorney . . . for anyone in connection with any particular matter in which the Commonwealth . . . is a party or has a direct and substantial interest." See G.L. c. 268A, §4(c). Since a criminal proceeding in state court is a particular matter, as defined in §1(k), to which the Commonwealth is a party, you may not represent defendants in such proceedings. See EC-COI-79-72. Compare **Commonwealth v. Mello,** Mass. App. Ct. Adv. Sh. (1980) 2223, 2226. This prohibition would relate to any stage of the proceeding, to cases in the District Courts as well as the Superior Court, to misdemeanors as well as felonies and to work "in connection with" a criminal case, be it as counsel of record or otherwise.*

Generally you will not be prohibited from handling criminal cases in the Federal Courts since the Commonwealth is not a party to them and does not have a direct and substantial interest in them. There may be exceptions, for instance where the Commonwealth's funds or properties are involved or where the federal prosecution is related to a pending state matter. If there is any question as to whether the Commonwealth has an interest in a particular federal prosecution in which you wish to become involved, you may seek a further advisory opinion at that time.

While proceedings in the Juvenile Courts are not criminal in nature (see G.L. c. 119, §53), they are also particular matters in which the Commonwealth is a party and has a direct and substantial interest. The Legislature has clearly declared that the care and protection of children is an important governmental interest. See G.L. c. 119, §1. The Supreme Judicial Court "has often recognized the unique character of the Juvenile Courts as forums in which, to the extent possible, the best interests of the child serve to guide disposition." **Police Commissioner of Boston v. Municipal Court of the Dorchester District,** 374 Mass. 640, 666 (1978). Two state agencies, the Department of Probation (see, e.g. G.L. c. 119, §57) and the Department of Youth Services (see, G.L. c. 119, §§55, 58 and 58(b)), play an integral part in those proceedings. Accordingly, the prohibition set out in G.L. c. 268A, §4 would apply and you may not represent juveniles before the Juvenile Courts of the Commonwealth. See also EC-COI-79-116.

DATE AUTHORIZED: May 5, 1983

*Accordingly, questions 1 through 7, and 11 set out in your opinion request are answered in the negative and questions 8 and 9 are answered in the affirmative.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-59

FACTS:

You are a member of the General Court and a practicing attorney. A prospective law client wishes to apply to the state Department of Public Utilities (DPU) for a common carrier certificate, under G.L. c. 159B, §3.

QUESTION:

Does G.L. c. 268A permit you to appear for compensation as attorney for a private party in a DPU hearing on an application for a common carrier certificate?

ANSWER:

No.

DISCUSSION:

As a member of the General Court, you are a state employee as that term is defined in G.L. c. 268A, §1(q), the conflict of interest law.

Section 4 of c. 268A states:

> . . .[N]o member of the general court shall personally appear for any compensation other than his legislative salary before any state agency, unless:
>
> (1) the particular matter[1]/ before the state agency is ministerial in nature; or
>
> (2) the appearance is before a court of the commonwealth; or
>
> (3) the appearance is in a quasi-judicial proceeding.
>
> For the purposes of this paragraph, ministerial functions include, but are not limited to, the filing or amendment of: tax returns, applications for permits or licenses, incorporation papers, or other documents. For the purposes of this paragraph, a proceeding shall be considered quasi-judicial if:
>
> (1) the action of the state agency is adjudicatory in nature; and
>
> (2) the action of the state agency is appealable to the courts; and
>
> (3) both sides are entitled to representation by counsel and such counsel is neither the attorney general nor the counsel for the state agency conducting the proceeding.

An application for a common carrier certificate from the DPU is not a ministerial matter. Under the governing statute, G.L. c. 159B, §3, an applicant must appear at a hearing and prove that he is "fit, willing and able properly to perform the services proposed," and also that the public convenience and necessity require the proposed service. The applicant must make a **prima facie** case even if there is no opposition presented at the hearing. Such an application is not automatically granted, but rather the DPU first must find facts which justify issuance of a certificate. Thus, an application for such a certificate is not analogous to the filing of incorporation papers or tax returns, and so is more aptly characterized as discretionary.

Moreover, a hearing on a common carrier certificate application is not a quasi-judicial proceeding as defined in c. 268A, §4. Although it can be characterized as an adjudicatory proceeding (as that term is defined in G.L. c. 30A, §1(l)), and is ultimately appealable to the Supreme Judicial Court, it does not satisfy the third criterion of "quasi-judicial proceeding." Under 220 CMR 271.02, an employee of DPU's Commercial Motor Vehicle Division may, under certain circumstances, investigate and report to the Division Director (who issues the decision) on any new common carrier certificate applications. Therefore, counsel for the state agency conducting the proceeding may conceivably appear at the hearing to oppose such an application. The "quasi-judicial" exemption set forth in §4 for legislators was primarily intended to cover administrative hearings which adjudicate rights between two non-state parties, and not the type of DPU hearing envisioned under G.L. c. 159B, §3.[2]/

DATE AUTHORIZED: May 5, 1983

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[1]/"Particular matter" means any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court. . . ." G.L. c. 268A, §1(k).

[2]/Compare EC-COI-83-31 (legislator permitted to represent client in appeal before Appellate Tax Board where opposing party was a municipal board of assessors).

CONFLICT OF INTEREST OPINION NO. EC-COI-83-61

FACTS:

On [date], you became a full-time state employee in the human services area.

Prior to becoming a state employee, you were a stockholder, officer and director in ABC Corporation (ABC), a Massachusetts corporation providing services to private sector organizations in the human services field. These organizations frequently provide services to departments of the Commonwealth on a "purchase of service" basis, for which they are paid out of Commonwealth funds. However, ABC itself has no contract with the Commonwealth or a state agency. Before assuming your state job, you resigned as officer and director, and you sold your complete interest in ABC to your former partner. As payment, you accepted a five-year personal note; the note is not secured by the stock, and the success or failure of ABC has no bearing on the enforcement of the note. You currently have no relationship of any kind with ABC nor any business relationship with your former partner, nor any agreement concerning prospective employment with ABC at the conclusion of your state service.

QUESTION:

Does your former association with ABC give rise to any restrictions on the performance of your duties as a state employee, under the conflict of interest law, G.L. c. 268A?

ANSWER:

No.

DISCUSSION:

As [name of state position], you are currently a state employee as that term is used in G.L. c. 268A. See c. 268A, §1(q).

Section 4(a) of c. 268A prohibits a state employee from receiving compensation from anyone other than the commonwealth or a state agency in relation to any particular matter[1]/ in which the commonwealth or a state agency is a party or has a direct and substantial interest. However, the payments which you will receive from your former partner do not fall within the ambit of this section, because (a) they do not fall within the definition of "compensation" in §1(a)[2]/; and (b) they do not relate to a particular matter, such as work for which the state has contracted, but rather to a private financial arrangement (an unsecured personal note of indebtedness), which is in no way contingent upon ABC's work.

Section 7 prohibits a state employee from having a direct or indirect financial interest in a contract made by a state agency. Inasmuch as ABC provides services for vendors of the state, and may be paid by those vendors with funds which originate with the state budget, ABC may be considered to have an indirect financial interest in contracts made by a state agency. While you were a shareholder in ABC, such a financial interest would have been attributed to you. However, since assuming your state position, you have severed all financial and professional connections with ABC and currently you have no connection with the firm. Moreover, as mentioned in the preceding paragraph, the personal note which you accepted for the surrender of your shares in ABC is not secured by ABC stock and is not contingent upon ABC's financial success. For these reasons, you are not considered to have any direct or indirect financial interest in state contracts, and you have complied with §7. Compare, EC-COI-83-37.

Finally, §6 of c. 268A prohibits a state employee from participating[3]/ as a state employee, in a particular matter in which to his knowledge

- he
- his partner
- a business organization in which he is serving as officer, director, trustee, partner or employee
- any person or organization with whom he is negotiating or has any arrangement concerning prospective employment

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[1]/"Particular matter" means any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court. . . G.L. c. 268A, §1(k).

[2]/"Compensation" means any money, thing of value or economic benefit conferred on or received by any person *in return for services rendered or to be rendered* by himself or another (emphasis added). G.L. c. 268A, §1(a).

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

has a financial interest. However, this provision does not restrict you from acting in a matter which might potentially affect ABC or your former partner, since they do not currently fit into any of the enumerated relationships.

Finally, §23 of c. 268A prohibits a state employee from using or attempting to use his official position to secure unwarranted privileges or exemptions for himself or others. Since you have stated that ABC has no contracts directly with state agencies, including your own agency, your official acts within that agency cannot be construed as bestowing unwarranted privileges on ABC.[4]/

DATE AUTHORIZED: May 5, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-64

FACTS:

You are an attorney and also a member of Governmental Center Commission (GCC) of the City of X (City), a municipal commission established by (citation omitted) for the purpose of "establishing, operating and maintaining a government center within the city of X " (citation omitted). The GCC is funded by appropriations from the City (citation omitted).

From 1976 to 1979, you were employed by an attorney in another city. This attorney was hired in 1982 at your suggestion to represent the GCC in a suit brought against that agency. You disclosed your prior relationship with the attorney and abstained from the vote of the GCC Commissioners which authorized his hiring. During the course of his representation, the GCC authorized payment to the attorney on several occasions, and you participated in at least one of these authorizations. The attorney has submitted his final bill and, at a meeting of four GCC members, it was voted by three members, including yourself, to pay $7,500 to the attorney. One GCC member abstained from this vote. It is possible that there will be further actions taken in the future with respect to this matter.

[4]/Of course, should these facts change in the future, you should seek further advice from the Commission.

QUESTION:

By voting to authorize payments to the attorney, would you violate the state conflict of interest law?

ANSWER:

No.

DISCUSSION:

As an appointed member of the GCC, a municipal agency, you are a municipal employee as defined in G.L. c. 268A, §1(g) and, as a result, are subject to the provisions of the conflict of interest law, G.L. c. 268A, §1 **et seq.**

Section 19 of the conflict of interest law, in relevant part, prohibits you from participating in any "particular matter"[1]/ in which you, your partner, or a business organization by which you are employed has a financial interest. You clearly have no financial interest in any payment made to the attorney since your employment relationship with him ended in 1979. Therefore, §19 does not apply to the facts you present.

Section 23 of the conflict law contains certain standards of conduct which apply to all municipal employees. That section proscribes the use or attempted use of your official position to secure an unwarranted privilege or exemption for yourself or another. It also prohibits conduct which gives reasonable basis for the impression that anyone may improperly influence or unduly enjoy your favor in the performance of your official duties.

Recently, the Commission issued a Commission Advisory regarding the use by a state employee of the private services of a vendor or contractor over whom he has official responsibility as a state employee. See Commission Advisory 83-1 (enclosed). Therein, the Commission stated that "[e]ven if the decision to use the private services is made out of friendship or because of a 'job well done,' or if actual favoritism or special

[1]/For the purposes of 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 and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property." G.L. c. 268A, §1(k).

treatment by either the state official or the vendor/consultant cannot be established, the conduct may nevertheless create an impression of favoritism or special treatment." The case you present is analogous to this situation, but somewhat reversed because your private relationship preceded the public one. The Commission advised that when a state official intends to conduct private dealings with such a vendor/consultant, the official should 1) notify his appointing authority of the impending relationship and 2) seek an advisory opinion regarding the propriety of the arrangement.

You have no current professional relationship with the attorney outside his role as attorney for the GCC. Upon suggesting him as a candidate for this position, you state that you fully disclosed to the GCC your prior relationship with the attorney and abstained from the vote authorizing his employment. There is no evidence in your request which indicates that the attorney was unqualified to handle this case or that any payments made to him were excessive in light of the work that he performed. Therefore, although it would have been preferable for you to seek an advisory opinion before participating in the authorization of payments to the attorney, your abstention from the vote to hire him, your non-participation in some of the payment authorizations, and the lack of evidence of any undue remuneration indicate that §23 was not violated by your actions and would not be violated in the future.

DATE AUTHORIZED: May 5, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-65

FACTS:

You are an employee of the Division of Capital Planning and Operations (Division). Prior to your employment with the Division, you entered into a purchase and sale agreement with the Trustee of a Realty Trust for the acquisition of residential property. Neither the Commonwealth nor any state agencies are a party to or have an interest in the negotiations concerning the property or in the property itself. In addition to his involvement with the Realty Trust, the Trustee is a registered architect and works in an architectual services firm (Firm). The Firm has contracted with the Division on previous occasions.

Contracts for designer services are subject to the jurisdiction of the Division under G.L. c. 7, §§30B-K. Under c. 7, §30G, the Designer Selection Board (DSB) provides a list of three finalists, ranked in order of qualification, from which a designer is chosen. However, a designer other than the one ranked first by DSB may be chosen, provided that a written justification of the appointment is filed with DBS (citation omitted). Part of your duties as a Division employee include participating in designer appointments.

QUESTION:

Does the conflict of interest law, G.L. c. 268A, permit you to purchase the residential property from the Trustee and still carry out your responsibilities as a Division employee with respect to the Trustee's architectural services firm?

ANSWER:[1]/

Yes, although your activities as a Division employee involving the Firm will be subject to certain limitations.

DISCUSSION:

As an employee of the Division, you are a state employee within the meaning of G.L. c. 268A, §1(q). As such, the provisions of §23 apply to you. The second paragraph of §23 prohibits a state employee from using or attempting to use his official position to secure unwarranted privileges for himself or others and from, 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, or that he is unduly affected by the kinship, rank, position or influence of any party or person. You would not run afoul of these provisions just because the Firm was chosen to provide architectural services. However, if the

[1]/The scope of the advice rendered in this opinion is prospective only and is not intended to address the application of G.L. c. 268A to conduct which occurred prior to the issuance of this opinion.

Firm were a recipient of a substantial or disproportionate number of designer contracts, particularly where the Firm was not ranked first by DSB, then §23 issues would be raised. To avoid even the raising of such issues, the safest course on your part would be to refrain altogether from participating in designer appointments whenever the Firm is competing for the contract while negotiations involving the residential property are in progress. You should follow this course of conduct until the sale has been consummated and for a reasonable period of time thereafter. Otherwise, the Commission would have to examine whether the contracts were awarded on objective criteria applicable equally to all architectural firms or whether your private relationship with the Trustee played any role. Cf. EC-COI-83-44; 83-34.

DATE AUTHORIZED: May 5, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-67

FACTS:

You are an associate professor at a Law School. You are also employed by the Law Department (Law Dept.) of a City (City) as a legal consultant under a contract for general legal services. In this role, you perform legal research projects as requested by the Law Dept. These services are limited in value to "a few thousand dollars" per year.

You have been asked to assist the plaintiff's counsel in preparing an appellate brief in a case against a Massachusetts town involving the Massachusetts Tort Claims Act, G.L. c. 258. That statute, in relevant part, concerns the liability of a municipality and its officers and employees for various acts. The determinations made regarding certain issues (e.g. limits on recovery) in this case, although not directly affecting the City upon their resolution, may, by their value as precedent, affect cases brought against the City under the Tort Claims Act. As a result, it is likely that the Law Dept. will file a brief as an **amicus curiae** in this case opposing the positions of the plaintiff.

QUESTION:

May you assist the plaintiff in this case if the Law Dept., by which you are intermittently employed as a consultant, files a brief as an **amicus curiae** in opposition to the plaintiff?

ANSWER:

Yes.

DISCUSSION:

As a consultant to the Law Dept., you are a "municipal employee," G.L. c. 268A, §1(g), and, as a result, are subject to the state conflict of interest law. G.L. c. 268A, §1 **et seq.**

Section 17 of the conflict law prohibits you from being compensated by, or acting as agent or attorney for, anyone other than the City in connection with any particular matter[1]/ in which the City is a party or has a direct and substantial interest. The case against the town is a judicial proceeding and, as such, a particular matter. The City is not a party to this case, and does not become one by filing an **amicus curiae** brief. See, **New England Patriots Football Club, Inc. v. University of Colorado,** 592 F. 2d 1196 (1st Cir., 1979); **Alexander v. Hall,** 64 F.R.D. 152 (1974). It is arguable, however, that, since the resolution of certain issues in the case may have a significant impact on litigation to which the City is a party, the City's interest in its outcome is "substantial."

In order for §17 to apply, the City's interest must be direct *and* substantial. The decision in this case will not have a direct effect on the City or any cases in which it is involved. Like any other court case to which it is not a party but which involves a law applicable to the City, the City has an indirect interest in the resolution of the case. However, such a potential effect does not give the City a direct and substantial interest for the purposes of §17. For example, the City would

[1]/For the purposes of 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 and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property." G.L. c. 268A, §1(k).

not have a direct and substantial interest in every United States Supreme Court case concerning police search and seizure procedures, despite the impact such a case may have on the City Police Department. Therefore, §17 does not prohibit you from assisting in the preparation of this brief.

Section 23 of the conflict law prohibits you from accepting outside employment which will impair your independence of judgment or which will require you to disclose confidential information which you have gained by reason of your official position or authority. In advisory opinion EC-COI-81-73, the Commission ruled that these provisions combined to prohibit a City Solicitor from representing criminal clients in cases involving police from his city, despite the conclusion that the city did not have a direct and substantial interest in the criminal case. This result would not be appropriate in your case. Because of your limited contact with the Law Dept. and because you have not worked for the City in connection with its **amicus curiae** brief, it is unlikely that your independence of judgment will be impaired in connection with your future work for the City. And, your role in assisting in preparation of the plaintiff's brief presumably will not require you to disclose any confidential information gained from your employment by the Law Dept.

Finally, the Commission stresses that it is authorized to render advisory opinions only as to the requirements of General Laws Chapter 268A and 268B. Attorneys, of course, are also subject to the Canons of Ethics and Disciplinary Rules Regulating the Practice of Law, Rules of the Supreme Judicial Court, Rule 3:07. These provisions may also bear upon the question which you ask.

DATE AUTHORIZED: May 5, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-68

FACTS:

You are a member of a local Board of Aldermen (Board) which is authorized by G.L. c. 268A, §1(n) to classify municipal positions in the City (City) as that of a special municipal employee. Currently the position of School Committee member is not classified as that of a special municipal employee and the Board is now considering making such a classification. Included in the membership of the School Committee is the Mayor, who is an **ex officio** member.

QUESTIONS:

1. May the Board single out Mr. "A", one of the seven School Committee members, as a special municipal employee while retaining regular municipal employee status for the remaining School Committee members?
2. Assuming the answer to question No. 1 is no, may the Board classify the position of School Committee member as that of a special municipal employee where the Mayor is an **ex officio** member of the School Committee?

ANSWERS:

1. No.
2. Yes.

DISCUSSION:

1. A special municipal employee is defined by G.L. c. 268A, §1(n) as

> a municipal employee who is not a mayor, a member of a board of aldermen, a member of a city council or a selectman in a town with a population in excess of five thousand persons, and whose position or employment has been expressly classified by the city council, or board of aldermen if there is no city council, or the board of selectmen as that of a special employee under the terms and provisions of this chapter. All employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a "special municipal employee" unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the

contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be "municipal employees" and shall be subject to all the provisions of this chapter with respect thereto without exception.

The second sentence of that definition clearly states that all employees who hold equivalent offices or positions must have the same classification. The classification of special municipal employee status is therefore attributable to the position which an employee holds rather than to the identity of the employee. By providing for a uniform classification for all employees similarly situated, the statute avoids the potential for arbitrariness and favoritism inherent whenever individuals can be singled out for special consideration.

2. The fact that the Mayor, who is statutorily precluded from being a special municipal employee, is also an **ex officio** member of the School Committee does not undermine the legal capacity of the Aldermen to classify the position of School Committee member as that of a special municipal employee under G.L. c. 268A, §1(n). The Mayor would, of course, remain a regular municipal employee in his capacity as Mayor should such a classification be made.

DATE AUTHORIZED: May 5, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-73

FACTS:

You are the Director of ABC, a private corporation which receives 95 percent of its funding from state sources and mostly from the Department of Mental Health. ABC runs several programs, including a Respite Care Program under which ABC employees are assigned to visit homes during the daytime on either an "as needed" basis, or under a regularly scheduled basis of four hours weekly. The Respite Care Program is carried out in the client's homes rather than in a central ABC facility, and is not run on a twenty-four hour per day basis. ABC also administers two group homes for retarded adults on a continual, uninterrupted twenty-four hour per day basis pursuant to contracts with DMH.

QUESTIONS:

1. Does the group residence home operated by ABC qualify as an appropriate facility at which full-time state employees may be employed after hours and be paid pursuant to a contract with the Commonwealth?
2. Does the Respite Care Program administered by ABC qualify as an appropriate facility at which full-time state employees may be employed after hours and be paid pursuant to a contract with the Commonwealth?

ANSWERS:

1. Yes.
2. No.

DISCUSSION:

Prior to 1983, the Commission had consistently advised state employees, vendors to state agencies and the state agencies themselves that G.L. c. 268A prohibited full-time state employees (whether from DMH or other state agencies) from being paid after hours by vendors under contracts funded by the Commonwealth. See, State Ethics Commission Compliance Letter 81-21, (July 29, 1981); EC-COI-81-141; Attorney General

Conflict Opinion No. 798. The basis for these rulings was that §7 prohibited full-time state employees from having a financial interest in a contract made by a state agency.

During the 1982 legislative session, the General Court considered proposals designed to ease the scope of the §7 prohibition - particularly with respect to second contracts with state vendors which customarily had difficulty staffing social service programs run on a twenty-four hour per day basis. As a result, the General Court enacted St. 1982, c. 612, §7 (effective March 29, 1983) which added the following new exemption to §7:

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

The Commission concludes that the group residence home operated by ABC constitutes a "facility principally funded by the state which provides similar services and which operates on an uninterrupted and continuous basis. . ." This conclusion is based on the fact that the major funding source for the home is DMH, the housing, meal and staff support services provided by ABC are similar to those provided by state facilities designed for mental health care, and the program operates on an uninterrupted, twenty-four hour per day basis.

On the other hand, the daytime Respite Care Program does not satisfy the aforementioned §7 exemption standards because employees assigned to that Program would not be "employed" by a "facility . . . which operates on an uninterrupted and continuous basis." In order to qualify for the exemption, employees must be working, at a minimum, in a program which provides round-the-clock services; the periodic daytime services offered under the Respite Care Program are not sufficiently continuous to qualify under the exemption. This conclusion is also consistent with the legislature's intent to create an exemption which would permit state employees to work in twenty-four hour human service programs which customarily have difficulty obtaining sufficient staffing. The mere fact that ABC also runs a twenty-four hour group residence home program does not provide state employees an employment opportunity to work after hours on every state-funded program run by ABC.

DATE AUTHORIZED: May 5, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-79

FACTS:

Since (year), you have served as a member of the board of selectmen of the Town of (Town). Prior to your election in (year), you held the position of Director of Health for the Town. To avoid violating the conflict of interest law as it appeared at that time,[1]/ you retired from your Director of Health position following your election as a selectman. You are now interested in returning on a part-time basis to the Director of Health position.

QUESTION:

Does G.L. c. 268A, §20 allow you to be appointed to the Director of Health position while you serve as selectman?

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[1]/G.L. c. 268A, §20 provided in relevant part, as follows:

A municipal employee who has a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, in which the city or town is an interested party of which financial interest he has knowledge or has reason to know, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

ANSWER:

No.

DISCUSSION:

In 1980, the Commission advised members of boards of selectmen that G.L. c. 268A, §20 prohibited selectmen from having a financial interest in an employment contract with an agency in the same municipality. EC-COI-80-89; 80-93. The Commission's interpretation was affirmed in **Walsh v. Love,** Norfolk Superior Court Civil Action No. 132687 (July 2, 1981) which held that a selectman violated §20 by holding employment as a teacher in the same community. In response to these rulings the General Court amended §20 to ease some of the previous restrictions on selectmen while also imposing additional limitations.

> This section shall not prohibit an employee or an official of a town from holding the position of selectman in such town nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office. Provided that no such member may vote or act on any matter which is within the purview of the agency by which he is employed or over which he has official responsibility, and provided further that no member shall be eligible for appointment to such additional position while a member or for six months thereafter. Any violation of the provisions of this paragraph which has substantially influenced the action taken by any municipal agency in any matter shall be grounds for avoiding, rescinding or cancelling the action on such terms as the interest of the municipality and innocent third parties require. No such selectman shall receive compensation for more than one office or position held in a town, but shall have the right to choose which compensation he shall receive. St. 1982, c. 107.

The immediate effect of chapter 107 was to allow municipal employees to run for and hold the position of selectmen without violating §20, provided that they limited their compensation pursuant to the conditions set out in chapter 107. However, the amendment did not create a similar exemption for individuals who were already serving as selectmen and who wished to acquire a second job with their same municipality. To the contrary, chapter 107 specifically ruled out any such eligibility for appointment not only during selectmen's term of office but for six months thereafter. Your potential appointment to the Board of Health while you remain a selectman would fall squarely within the prohibition of chapter 107.[2]/

DATE AUTHORIZED: May 24, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-81

FACTS:

You are counsel in a law firm (Firm) which does business as a professional corporation. You are not a shareholder in the Firm nor is your name included in the Firm's title, and your compensation is not measured by the income of the Firm. Your compensation arrangement is analogous to that of an associate in the firm.

You were formerly Corporation Counsel for the City of (name omitted); you held this position (dates omitted), prior to which you were Chief General Counsel of a municipal agency, ABC (dates omitted), and Assistant Corporation Counsel for the city (dates omitted). While Corporation Counsel and Assistant Corporation Counsel, you from time to time worked on various proposals for a certain municipal construction project (the Project) and you advised the head of municipal agency DEF on matters relating to such proposals.

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[2]/In EC-COI-82-107 the Commission advised a selectman that §20 did not prohibit him from continuing to hold, on an annual reappointment basis, a municipal position which he had acquired prior to his election as selectman and has held continuously. In that opinion, the Commission stated that "the scope of the aforementioned limitation on appointment eligibility was intended to cover only new, post elective appointments to municipal positions and was not intended to prohibit municipal employees from eligibility for reappointment to positions held *immediately prior to their election as selectmen*" (emphasis added). In view of your year absence from the Board of Health position and resulting break in continuity of employment, you could not be considered as reappointed to a position held immediately prior to your recent election as selectman.

Because of your experience in this area, the head of DEF would like you to continue to advise him. To this end, the city would like to contract with the Firm. You will participate extensively in this project, and other resources of the Firm will also be utilized. The Firm will receive all of the compensation and your salary will not be affected. Persons who participate in the project would be designated special municipal employees.

QUESTIONS:

1. Are you considered to be a partner in the firm for purposes of G.L. c. 268A, §18(c)?

2. Would the contemplated arrangement between the Firm and the city violate G.L. c. 268A, §18(a) in that you would be compensated by someone other than the city (i.e., the Firm) in relation to a particular matter in which you previously participated as a city employee?

ANSWERS:

1. No.
2. No.

DISCUSSION:

As a former Corporation Counsel to the city, you are a former municipal employee,[1]/ and subject to G.L. c. 268A, §18. Moreover, if the Firm were to contract with the city to provide advice to the head of DEF, and the terms of that contract clearly called for your services either by name or particularized description, you would again be a municipal employee[2]/ (albeit a special municipal employee) and subject to other provisions of G.L. c. 268A.

1. Section 18 of G.L. c. 268A contains provisions which prohibit partners of municipal employees or former municipal employees from representing non-city parties in certain matters; whether or not *you* are considered a partner in the Firm determines whether other members of the Firm will be restricted thereby. The Commission finds that you are not at this time a partner, for the purposes of G.L. c. 268A.

The Commission bases this finding on the fact that your financial arrangement with the Firm is in substance analogous to that of an associate, i.e. you do not receive a share of the overall profits of the Firm, but a set salary. Previous Commission advisory opinions and those of the Attorney General have held that one's status as an associate does not result in the application of c. 268A to the partners in one's firm. See EC-COI-81-30, 79-57; Atty. Gen. Conf. Op. No. 845. In some cases, the Commission has also examined whether, regardless of substance, a person gives the public appearance of being a partner. Cf. EC-COI-82-19. However, reviewing the facts you have submitted, the Commission finds no basis for such an appearance, since your name is not included in the Firm's title, and you will not be listed with the partners, but as counsel to the Firm.[3]/

2. As former Corporation Counsel for the city, you are subject to §18 of G.L. c. 268A, and as a special municipal employee with respect to this project, you are subject to §§2, 3 and 17-23 of the statute.

> Section 18(a) states:
>
> A former municipal employee who knowingly acts as agent or attorney for or receives compensation, directly or indirectly from anyone other than the same city or town in connection with any particular matter in which the city or town is a party or has a direct and substantial interest and in which he participated as a municipal employee while so employed, [shall be punished by a fine or imprisonment or both].

If the Firm contracts with the city, you will not be acting as attorney for anyone other than the city in the matter, but you will be compensated by someone other than the city for it, i.e. by the Firm. Further, the decision to develop this project, and any subsequent contracts to construct it, are particular matters[4]/ in which you participated[5]/ while a municipal employee.

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[1]/G.L. c. 268A, §1(g).

[2]/See EC-COI-81-183; 80-84.

[3]/Of course, if your status in the Firm changes, the result here may differ and you should seek further advice from the Commission.

[4]/For the purposes of 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 and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property." G.L. c. 268A, §1(k) (emphasis added).

[5]/For the purposes of G.L. c. 268A, "participate" is defined as "participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee through approval, disapproval, decision, recommendation, *the rendering of advice*, investigation or otherwise." G.L. c. 268A, §1(j) (emphasis added).

Nevertheless, your compensation for this project will not violate §18(a) because it falls within an exemption contained in the last paragraph of §18, to wit:

> This section shall not prevent a present or former special municipal employee from aiding or assisting another person for compensation in the performance of work under a contract with or for the benefit of the city or town; provided that the head of the special municipal employee's department or agency has certified in writing that the interest of the city or town requires such aid or assistance and the certification has been filed with the clerk of the city or town. The certification shall be open to public inspection.

Since you will be a special municipal employee for purposes of this project and the Firm is a professional corporation[6]/ which you will be assisting in the performance of the contract with the city, you will not violate the statute, provided that the head of DEF files the required certification with the city clerk.

Section 17(a) which applies to current municipal employees, states

> No municipal 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 city or town or municipal agency in relation to any particular matter in which the same city or town is a party or has a direct and substantial interest.

However, §17 contains an exemption identical to that in §18 cited above. If you meet the terms of that exemption (i.e., if the proper certification is filed), you will not violate §17.

DATE AUTHORIZED: May 24, 1983

[6]/Under G.L. c. 4, §7, the word "person," when used in a statute, includes corporations, unless a contrary intention clearly appears.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-82

FACTS:

You are the head of a state regulatory agency (agency).

A private individual is planning to write and produce a film about the field regulated by the agency; he intends to sell and distribute the film, for profit, to schools and home video purchasers. The format will consist of a visual analysis of the laws administered by the agency, a view of the rationale of those laws and topical concerns such as (example).

This individual has asked you to appear in the film in your official capacity, to introduce the film's contents and to make a pitch for obeying the law. He has also asked agency officials to assist him by advising his film producers on the specifics of the law, and is interested in having agency enforcement personnel appear in the film to talk about their role in this area. The individual does not plan to compensate you or the other employees for your appearance or assistance.

QUESTIONS:

1. Does the conflict of interest law permit you to appear in the film in your official capacity, to introduce it?
2. May agency officials provide technical advice on the law to the film's producers?
3. May agency enforcement personnel appear in the film?

ANSWER:

Yes, if certain conditions are met.

DISCUSSION:

The conflict of interest law, G.L. c. 268A, §23, contains standards of conduct which govern the fact situation you present. Specifically, §23, paragraph 2, states:

(2) [No current officer or employee of a state, county or municipal agency shall] use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others;

(3) 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. . .

Although these provisions do not outright prohibit you or other members of the agency staff from taking part in the activities you describe, they do restrict the extent and tenor of these activities, as follows:

1. Although the contemplated film may well be viewed as a project which serves the public interest, it is nevertheless a private profit-making venture as well. As long as the profit will inure to the benefit of a private individual[s] and not to the commonwealth, your appearance must not in any way give the impression that the film is state-sponsored. You must also avoid any laudatory language which could be interpreted as an endorsement of the film. Whatever statement you make should be directed towards the topic of the law in general or the field it regulates, rather than the merits of the film.[1]/ To do otherwise would give the impression that you were using your official position to secure an unwarranted privilege for the filmmaker -- i.e., state endorsement of a private money-making project.

2. Agency officials may provide the filmmaker with information or advice which is routinely made available to the general public. Cf. EC-COI-82-17, 82-47. To do so is one of their duties as agency employees. However, they should not spend a disproportionate amount of state time on the project unless the filmmaker reimburses the commonwealth for their services. Otherwise the filmmaker would be receiving an unwarranted privilege, and agency employees would give a reasonable basis for the impression that the filmmaker could unduly enjoy their favor in the performance of their official duties.

3. Agency personnel may appear in the film, under certain conditions. Just as officials may only give the filmmaker advice which is available to the general public, agency personnel should only be allocated to the film project if you are willing to make them available to all such projects, on an equal basis. This is a matter of internal personnel policy, and you must determine whether, given that such requests might multiply, such assignments are an appropriate use of the agency's resources. While such work might not ordinarily be considered part of the duties of agency enforcement personnel, it is arguable that depictions of such personnel on film will be most accurate and dignified if agency employees themselves appear in the film; and that such appearances are appropriate. If you decide that they are, and the personnel perform the film work on state time, the filmmaker should reimburse the commonwealth (not the agency personnel) for that time.

DATE AUTHORIZED: May 24, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-86

FACTS:

You work full-time as a clinical social work supervisor for the Department of Mental Health (DMH) and are assigned to a Mental Health Clinic (ABC). Your primary responsibilities there are direct counseling of clients and supervision of the social work staff. You are responsible for the delivery of counseling and referral services to a Housing Authority, a municipal agency, G.L. c. 121B, §7, which has contracted with the ABC.

[1]/One course might be for you simply to be interviewed on film, since that role would put a discernible distance between you and the producers of the film.

You have been offered a part-time employment contract by the town of X. Under this contract your duties to the town would include 1) providing consultation to town agencies regarding strategies for dealing with organizational issues, 2) discussing with staff and supervisors work-related and personnel issues, and 3) providing of in-service seminars to coding inspectors and police officers regarding the handling of stress-related behavior and situations involving entrance into private living quarters including apartments, rooming houses, and hotels.

QUESTION:

May you work part-time for the town of X while you maintain your full-time DMH position?

ANSWER:

Yes, under certain conditions.

DISCUSSION:

As a clinical social work supervisor for DMH, you are a state employee as defined in G.L. c. 268A, §1(q) and therefore subject to the provisions of G.L. c. 268A, the conflict of interest law. The sections of the law that apply to you are §§4 and 6.

As a state employee you are permitted to hold an appointed position with a town under the "municipal exemption" of G.L. c. 268A, §4 provided that you do not act or vote as a town employee or any matter[1]/ within the purview of DMH or over which you have official responsibility[2]/ as a DMH employee. Since the passage of the "municipal exemption" in 1980, the Commission has examined whether a state employee's duties as a municipal employee come within the purview of his state agency and has prohibited proposed municipal employment on several occasions in light of the "purview" language. See, EC-COI-82-89; 82-39; 83-26. G.L. c. 19, §1 and G.L. c. 123, §3 confer on DMH general authority to "take cognizance of all matters affecting the mental health of the citizens of the commonwealth," and to "make investigations and inquiries relative to all causes and conditions that tend to jeopardize [that] health . . . and the effects of employments, conditions and circumstances on mental health." However, there is no specific authority conferred to oversee the organizational, personnel and stress-related consultation which you intend to provide, nor has DMH promulgated any regulations covering this area. Because DMH does not have responsibility for the subject matter of your consultation, the Commission concludes that your proposed responsibilities with the town would not fall within the purview of DMH.

Section 6 of G.L. c. 268A prohibits a state employee from participating,[3]/ in his capacity as a state employee, in a particular matter in which a business organization which employs him has a financial interest. The town of X would be a business organization for the purposes of G.L. c. 268A. EC-COI-81-47. Since the town has a financial interest in the Housing Authority contract with ABC, you must refrain from any participation in that contract in your ABC capacity unless the provisions outlined below are followed.

Section 6 further provides that any state employee whose duties would require him to participate in such a prohibited matter must disclose to his appointing official and the Ethics Commission the nature and circumstances of the matter and the financial interest involved. The appointing official may then (1) assign the matter to another employee, (2) assume responsibility for it himself, or (3) make a written determination, to be filed with the Ethics Commission, "that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Commonwealth may expect from the employee, in which case it shall not be a violation for the employee to participate in the particular matter." Accordingly, at the Clinic you could not participate in the Housing Authority contract unless you were to receive the written determination from your appointing official outlined above.

DATE AUTHORIZED: May 24, 1983

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[1]/Included are particular matters such 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." G.L. c. 268A, §1(k).

[2]/For the purposes of G.L. c. 268A, "official responsibility" is defined as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates to approve, disapprove or otherwise direct agency action." G.L. c. 268A, §1(i).

[3]/For the purposes of G.L. c. 268A, "participate" is defined as "participate in agency action in a particular matter personally and substantially as a state, . . . employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise." G.L. c. 268A, §1(j).

CONFLICT OF INTEREST OPINION NO. EC-COI-83-87

FACTS:

You are a member of the General Court and House Chairman of a Committee (Committee). You have been asked by an Association (Association) to speak at its annual convention which will be held out of state. The Association has offered to provide your "transportation, hotel, food and related expenses."

QUESTION:

May you attend the convention and accept the provision of transportation, hotel, food and related expenses by the Association?

ANSWER:

Yes, but you may only receive those expenses for transportation, lodging and meals directly related to your speech.

DISCUSSION:

As a member of the General Court, you are a state employee as defined in the conflict of interest law, G.L. c. 268A, §1 et seq, and as a result are covered by that law.

Whenever a public official or employee receives a benefit or gratuity from someone in the private sector who can be affected by the actions of that official or employee, issues under the conflict of interest law arise. In particular, the provisions of §3 and §23 come into play.

Section 3(b) of the conflict of interest law prohibits a state employee from accepting or receiving anything of substantial value for or because of any official act or act within his official responsibility performed or to be performed by him.[1]/ This section is much broader than the statute's bribery provisions[2]/ because it does not require a corrupt intent on the part of the public employee, and covers conduct which may not necessarily be viewed as corrupt.[3]/ The receipt of something of substantial value violates §3 even if given solely out of gratitude for a job well done or out of the desire to maintain a public employee's goodwill;[4]/ no **quid pro quo** is necessary, but only the acceptance of something of substantial value which is given for or because of official duties. In interpreting what is meant by the term "substantial value," a Massachusetts court has found that an item worth $50 may constitute substantial value under this statute.[5]/ "Official act" is defined in the statute as "any decision or action in a particular matter or in the enactment of legislation." G.L. c. 268A, §1(h). The law also defines "official responsibility" as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i).

The Standards of Conduct set out in §23 of G.L. c. 268A prohibit state employees from using their official position to secure unwarranted privileges for themselves or from engaging in conduct which gives reasonable basis for the impression that any person can improperly influence them or unduly enjoy their favor in the performance of their official duties or that they are unduly affected by the position or influence of any party or person. On this basis the Commission has held that a member of the Massachusetts Convention Center Authority could not accept travel to Washington, D.C. in connection with an appearance promoting tourism in Boston from a private group which was directly affected by the Authority's actions and was contemplating applying to the Authority for funding. EC-COI-83-19. The role of a legislator, in some ways, is distinguishable from that of the head of a regulatory or fund-awarding agency. Even legislation "reported favorably" by a committee must be approved by the legislature for final passage. In contrast, a state agency official may, in many cases, act directly and distinctly to the benefit of an individual or group totally within his own discretion and authority. While the conflict law seems to recognize the need for constituent access to legislators

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[1]/Similarly, Chapter 268A, §3(a) makes it an offense for a person or entity to offer or give such an item.

[2]/G.L. c. 268A, §2.

[3]/**Commonwealth v. Dutney**, 4 Mass. App. 363, 348 N.E.2d 812 (1976); **U.S. v. Kenner**, 354 F.2d 780, cert. denied 383 U.S. 958 (1965).

[4]/**In the Matter of the Collector-Treasurer's Office of the City of Boston**, Comm. Disposition Agreement, Feb. 27, 1981; see also **U.S. v. Standefer**, 452 F.Supp. 1178, 1183 (W.D. Pa. 1978); **U.S. v. Evans**, 572 F.2d 455, 479-82 (5th Cir. 1978); **U.S. v. Fenster**, 449 F. Supp. 435, 437-38 (1978) and cases cited therein re: 18 U.S.C.A., §201.

[5]/**Commonwealth v. Famigletti**, 4 Mass. App. 584, 354 N.E. 2d 890 (1976). Compare, EC-COI-82-160; 82-144, 81-144; 81-81.

by modifying the law's application in certain situations (see, for example, G.L. c. 268A, §4), §23 would still be applicable to a legislator who receives items of value from someone who has an interest in matters before the General Court.

As long as transportation, lodging and meals are in fact received by a legislator in connection with a legitimate speaking engagement, neither §3 nor §23 would be violated. With respect to §3, the items would be merely expenses attendant to the engagement and would not be for or because of any official act or acts performed or to be performed by the legislator. With respect to §23, the opportunity for constituent or interest group access to legislators is not unwarranted and should not result in any improper appearance. However, the legislator should receive only those items of transportation, lodging and meals which are directly related to a legitimate speaking engagement *and no more*. If a legislator were to receive more (for example, expenses related to an extended stay, any expenses for a guest, receptions in his honor, entertainment, or special services), or if the trip was not being made for a legitimate speaking engagement, §23 would be violated. In addition, §3 issues could be raised depending on the facts in any particular instance.

For a speaking engagement to be considered legitimate, it would have to be 1) formally scheduled on the agenda of the convention or conference, 2) scheduled in advance of the legislator's arrival at the convention or conference, 3) before an organization which would normally have outside speakers address them at such an event. Moreover, 4) the speaking engagement must not be perfunctory, but should significantly contribute to the event, taking into account such factors as the length of the speech or presentation, the expected size of the audience, and the extent to which the speaker is providing substantive or unique information or viewpoints. If these four factors are not satisfied, no items or expenses may be received. Assuming the speaking engagement is legitimate, the legislator may receive transportation to and from the site, lodging at the site made necessary by the speech and those meals immediately surrounding the speech. Thus, in your case, as we understand it, the convention will be held out of state over a four day period. If, for example, you were scheduled to speak in the morning of the second day, you could receive your transportation from Massachusetts to the location and back, lodgings for the night before your speech and those meals right before and right after your speech. If you wanted to stay the other nights or partake in other convention meals or events, you would have to do so at your own expense (or, if deemed appropriate, at the Commonwealth's expense).

Adherence to these guidelines will insure that the legislator's appropriate interest in being available to constituents and other interest groups and in educating himself in areas of legislative concern will be balanced with the state's interest in assuring the citizens of the Commonwealth that the acts of its legislature are not the product of the benefits which an interested individual or group may bestow upon legislators.

DATE AUTHORIZED: May 24, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-88

FACTS:

You are a member of the General Court elected from a district within a City and are Vice-Chairman of a House Committee (Committee). As such, you have had dealings in the past with Inc. (Inc.), a non-profit corporation made up for the purpose of promoting the greater City area. Inc. currently receives some of its funding from the state Department of Commerce and Development under a program which provides funds to certain qualifying promoting agencies. You have filed and supported legislation on behalf of Inc. and have arranged meetings between representatives and legislative leaders.

You were invited by Inc. to attend a promotional gathering out of state organized by Inc. for the purpose of generating increased interest in the City. Over a period of three days you had meetings with industry representatives who would be promoting the City. You updated them on the status of legislation affecting the City. You also attended a reception along with other Massachusetts public officials at which you met with corporate and association executives, and professionals from throughout the area.

Inc. has offered to pay your expenses incurred in connection with this trip.

QUESTION:

May you be reimbursed by Inc. for your expenses incurred in connection with this event?

ANSWER:

Yes, within the limitations set out below.

DISCUSSION:

As a member of the General Court, you are a state employee as defined in the conflict of interest law, G.L. c. 268A, §1 **et seq**, and as a result are covered by that law.

Section 3(b) of the conflict of interest law prohibits a state employee from accepting or receiving anything of substantial value for or because of any official act or act within hi fficial responsibility performed or to be performed by him.[1]/ This section is much broader than the statute's bribery provisions[2]/ because it does not require a corrupt intent on the part of the public employee, and covers conduct which may not necessarily be viewed as corrupt.[3]/ The receipt of something of substantial value violates §3 even if given solely out of gratitude for a job well done or out of a desire to maintain a public employee's goodwill;[4]/ no **quid pro quo** is necessary, but only the acceptance of something of substantial value which is given for or because of official duties.

In interpreting what is meant by the term "substantial value," a Massachusetts court has found that an item worth $50 constitutes substantial value under this statute.[5]/ The Commission has concurred with this determination.[6]/ Clearly, the value of the reimbursement here well exceeds that amount. "Official act," however, is defined in the statute as "any decision or action in a particular matter or in the enactment of legislation." G.L. c. 268A, §1(h). The law also defines "official responsibility" as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action." G.L. c. 268A, §1(i).

The item of substantial value which you will receive, i.e. reimbursement, does not appear to be for or because of any decision or action in a particular matter or in the enactment of legislation, nor is it for or because of any act within your official responsibility as a legislator. You state that you will be reimbursed for expenses incurred for your appearance and participation at a series of meetings sponsored by a private party intended to promote and benefit the City from which you are elected. Therefore, §3(b) will not prohibit you from being reimbursed by the Bureau.

The Commission has previously advised state employees to "exercise extreme caution when offered gifts or other things of value from organizations which do business with the state agency whose activities the employees participate in or for which they have official responsibility," EC-COI-81-9. This caution is based not only on the terms of §3 but also on G.L. c. 268A, §23 which prohibits state employees from using their official position to secure unwarranted privileges for themselves or from engaging in conduct which gives reasonable basis for the impression that any person can improperly influence them or unduly enjoy their favor in the performance of their official duties or that they are unduly affected by the position or influence of any party or person.

On this basis the Commission has held that a member of the Massachusetts Convention Center Authority could not accept travel to Washington, D.C. in connection with an appearance promoting tourism in Boston from a private group which was directly affected by the Authority's actions and was contemplating applying to the Authority for funding. EC-COI-83-19.

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[1]/Similarly, Chapter 268A, §3(a) makes it an offense for a person or entity to offer or give such an item.

[2]/G.L. c. 268A, §2.

[3]/**Commonwealth v. Dutney**, 4 Mass. App. 363, 348 N.E 2d 812 (1976); **U.S. v. Kenner**, 354 F.2d 780, cert. denied 383 U.S. 958 (1965).

[4]/**In the Matter of the Collector-Treasurer's Office of the City of Boston**, Comm. Disposition Agreement, Feb. 27, 1981; see also **U.S. v. Standefer**, 452 F.Supp. 1178, 1185 (1978); **U.S. v. Evans**, 572 F.2d 455, 479-82 (1978); **U.S. v. Fenster**, 449 F.Supp. 455, 437-38 (1978) and cases cited therein re: 18 U.S.C.A., §201.

[5]/**Commonwealth v. Famigletti**, 4 Mass. App. 584, 354 N.E. 2d 890 (1976).

[6]/See, EC-COI-82-160; 82-144; 81-184; 81-81.

Such an official may act distinctly and directly to the benefit of an individual or group totally within his own discretion and authority.

On the other hand, as a member of the General Court and Vice-Chairman of the Committee, you possess no extraordinary authority which you could exercise to the benefit of the Bureau. Cf. EC-COI-83-87. Inc. has no special interest in actions by the Committee. Your actions in filing legislation and otherwise aiding Inc. are legitimate examples of service by a legislator to a group whose actions may benefit his constituents. The Commission must balance the interest in encouraging constituent service of this type with that of assuring that legislators perform their duties unaffected by travel or other benefits which they may be offered by private parties.

As a result, the conflict of interest law does not prohibit your acceptance of reimbursement from Inc. for expenses incurred out of state. However, that reimbursement should be limited only to those expenses necessarily incurred in connection with your appearances on behalf of Inc., i.e. transportation to and from the location, necessary lodging and necessary meals. You may not be reimbursed for any expenses otherwise incurred, such as entertainment or extension of your stay beyond the required days.

This conclusion is based on the fact that your expenses out of state were incurred in connection with legitimate appearances which would reasonably be made by a legislator in connection with matters of interest to his constituents. The conditioned approval of your acceptance of this limited reimbursement does not preclude violation of §3 or §23 in this or any other case if these conditions are not complied with or if other facts beyond those contained herein so indicate.

DATE AUTHORIZED: May 24, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-89

FACTS:

State agency ABC (ABC) administers a grant program (the program), which awards grant monies to various entities. Under the program, grant recipients are required to have an independent audit performed at the end of the grant period. The audit is paid for out of grant monies and the audit results are submitted to ABC.

You represent a public accounting firm (firm) which is currently negotiating with ABC for a contract to prepare an audit guide for the program. The guide will be used by the grant recipients and by those firms which prepare independent audits of the grant recipients. The proposed contract does not specifically call for the services of any particular individual in the firm.

QUESTION:

If the firm prepared for ABC an audit guide for the program, does the conflict of interest law prohibit the firm from performing the subsequent audits for grant recipients?

ANSWER:

The conflict of interest law does not apply to the situation presented; however, state regulations for public accountants and the Professional Standards of the American Institute of Certified Public Accountants may be relevant to the activity you contemplate, and you should seek an opinion from the bodies empowered to interpret those requirements.

DISCUSSION:

The conflict of interest law, G.L. c. 268A, applies to all state, county and municipal employees in Massachusetts. The law defines a state employee as

> a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council. No construction contractor nor any of their personnel shall be deemed to be a state employee or special state employee under the provisions of paragraph (o) or this paragraph as a

result of participation in the engineering and environmental analysis for major construction projects whether as a consultant or part of a consultant group for the commonwealth. Such contractors or personnel may be awarded construction contracts by the commonwealth, during the period of such participation; provided, that no such contractor or personnel shall directly or indirectly bid on or be awarded a contract for any construction project if they have participated in the engineering or environmental analysis thereof. G.L. c. 268A, §1(q).

Prior opinions of the Ethics Commission and the Attorney General have ruled, under this definition, that the provision is primarily directed at the activities of individuals, rather than corporations, who are or were employed by state agencies.[1]/ For that reason, to date there has been no ruling that a corporation or partnership, as an entity, is a state employee covered by the restrictions of the conflict of interest law. However, in some situations the Commission or the Attorney General has examined a contract between the commonwealth and a corporation or partnership and found that the terms indicated the contract was for the services of a specific individual, rather than the corporation or partnership's services; in such situations the specified individual has been deemed a state employee for the duration of the contract, and thus covered by the conflict of interest law.[2]/

Because the contract which ABC and the Firm are negotiating does not call for services to be provided by any particular individual, but by the Firm as a whole, the Commission does not consider the Firm's employees to be state employees for the purposes of c. 268A.[3]/ Further, for the present the Commission will continue to follow previous opinions in declining to attribute state employee status to a corporation or partnership which holds a contract with a state agency.

Although the Commission here finds that the state conflict of interest law does not apply to your situation, the regulations of the Board of Registration of Public Accountancy (i.e. the Code of Ethics and Rules of Professional Conduct contained in 252 Code of Massachusetts Regulations 3.00 et seq., and in particular, 252 CMR 3.05(2) and (5)), and the Professional Standards of the American Institute of Certified Public Accountants, may address your situation. For that reason, the Commission urges you to consult the Board of Registration and the AICPA for further advice before entering into the ABC contract.

DATE AUTHORIZED: June 23, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-93

FACTS:

You are a member of the General Court. During the 1982 legislative session, you supported the passage of St. 1982, c. 556, which repealed to a substantial degree the so-called "Blue Laws" in the Commonwealth. You have been asked to speak out of state to legislators and business leaders from that state concerning Sunday closing laws. Corp. (Corp.), a corporation has offered to pay your expenses in connection with this engagement. You have had no prior dealings as a legislator with Corp.

QUESTION:

May you travel out of state at the expense of Corp. for a speaking engagement?

ANSWER:

Yes.

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[1]/See, e.g. EC-COI-81-183; Atty. Gen. Conf. Op. No. 852, 756.
[2]/See EC-COI-80-84; Atty. Gen. Conf. Op. No. 852.
[3]/Accord, EC-COI-82-133; 81-183; 81-120.

DISCUSSION:

As a member of the General Court, you are a state employee as defined in the conflict of interest law, G.L. c. 268A, §1 et seq., and, as a result, are covered by that law.

The Commission has recently issued two advisory opinions concerning the limitations placed by the conflict law on travel by legislators at the expense of private parties. In EC-COI-83-87, the Commission ruled that the Chairman of a legislative committee could have the expenses incurred in connection with a legitimate speaking engagement borne by a private professional organization interested in legislation before the committee as long as the expenses were limited to those items of transportation, lodging and meals directly related to and made necessary by the engagement. In EC-COI-83-88, the same limitations were imposed in a case involving a series of meetings where the sponsor was a private group which had extensive prior dealings with the legislator.

These two opinions were based on §§3 and 23 of the conflict of interest law. The former prohibits the acceptance or receipt by a state employee of anything of substantial value for or because of his official acts. The latter prohibits state employees from using their official position to secure unwarranted privileges for themselves or from engaging in conduct which gives reasonable basis for the impression that any person can improperly influence them or unduly enjoy their favor in the performance of their official duties, or that they are unduly affected by the position or influence of any party or person. These concerns arise when, as in these two opinions, the legislator's actions, which may benefit or harm interests of the sponsoring organization, might be affected by the offer and receipt of such travel expenses.

In your case, however, you have had no prior dealings as a legislator with Corp. or any representatives of that company. Your invitation to speak out of state resulted from a prior appearance which you made which was attended by company officials. Therefore, Corp. has no special interest in your actions as a member of the General Court, nor have you had prior dealings in your legislative role which could have resulted in this invitation. As a result, the conflict of interest law does not prohibit you from appearing out of state to speak at the expense of Corp.

DATE AUTHORIZED: June 23, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-94

FACTS:

You are the salaried Executive Director of ABC, Inc. (ABC), a private non-profit corporation. ABC is one of nearly 1,000 community action agencies organized in response to federal legislation to oversee the provision of certain social services from a localized point of view. Funding is primarily from federal sources. During the last fiscal year, ABC received approximately $30 million in federally originating funds, of which some $17.5 million passed through state agencies. ABC received less than $2 million in state-originated funds. The monies passing through and originating from the state are used to fund various ABC programs.

QUESTION:

Are you a "state employee" as defined in G.L. c. 268A, §1(q), as Executive Director of ABC?

ANSWER:

No.

DISCUSSION:

The conflict of interest law defines "state employee," in relevant part, 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." G.L. c. 268A, §1(q). The definition has not previously been extended to an employee of a corporation or a vendor which contracts with the state unless the Commonwealth intends to contract for the services of a specific individual. For example, in EC-COI-80-84, the Commission concluded the partners in a law firm were "state employees" because the contracting state agency specifically contemplated that each of the firm's partners would work on the project for the state. See also EC-COI-81-120; Attorney General Conflict Opinion Nos. 852, 756.

You are a salaried employee of ABC. Even though some portion of that salary may come from state-originated or state-handled funds, any services you perform are for ABC and not for any state agency. You do not hold a position or membership in any state agency, nor are you designated by any state contract to provide the services which that contract calls for. Therefore, you are not a "state employee" as defined in G.L. c. 268A, §1(q).

DATE AUTHORIZED: June 23, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-95

FACTS:

You were appointed on (date omitted) to a full-time position as a state employee with the state agency (ABC). Prior to your ABC appointment you were awarded a part-time consulting contract in (date omitted) by another state agency (DEF). DEF did not formally solicit proposals or publicly advertise the availability of the consulting opportunity. The process was based primarily on "word of mouth" between DEF and four other firms.

QUESTION:

Does G.L. c. 268A permit you to maintain your financial interest in the DEF consulting contract while you remain a full-time ABC employee?

ANSWER:

No.

DISCUSSION:

As one holding a full-time position with ABC, you are a state employee within the meaning of G.L. c. 268A, §1(q). Section 7 of G.L. c. 268A, generally prohibits a state employee from having a financial interest in a second contract made by a state agency, even where that contract predates the assumption of state employment. See, **In the Matter of David Fleming, Jr.,** Commission Adjudicatory Docket No. 156, Decision

and Order (November 18, 1982). Since your receipt of compensation under the consulting contract with DEF would constitute a financial interest in a contract made by a state agency, your continuation of the consulting contract would violate G.L. c. 268A, §7 unless you complied with one of the exemptions under §7.

The only relevant exemption which appears applicable to your situation is §7 ¶(b) which provides that §7 will not apply:

> to a state employee other than a member of the general court who is not employed by the contracting agency or an agency which regulates the activities of the contracting agency and who does not participate in or have official responsibility for any of the activities of the contracting agency, if the contract is made after public notice or where applicable, through competitive bidding, and if the state employee files with the state ethics commission a statement making full disclosure of his interest and the interests of his immediate family in the contract, and if in the case of a contract for personal services (1) the services will be provided outside the normal working hours of the state employee, (2) the services are not required as part of the state employee's regular duties, the employee is compensated for not more than five hundred hours during a calendar year, and (3) the head of the contracting agency makes and files with the state ethics commission a written certification that no employee of that agency is available to perform those services as a part of their regular duties.

On the basis of a review of the facts surrounding the award of the DEF consulting contract, the Commission advises you that your DEF contract does not satisfy the requirement that the contract be made after "public notice or, where applicable, through competitive bidding."[1/] On three recent occasions, the Commission has examined the "public notice" language to determine whether the process used in each case had sufficient vestiges of openness and provided equal access for the general public. See, EC-COI-83-35; 83-37; 83-56. To satisfy the minimum standards of "public notice," the process must be based upon either public advertisement in a newspaper of general circulation in the area serviced by the contracting agency (EC-COI-83-35) or on a good faith effort to notify all firms or individuals who would be qualified to perform the work called for under the state contract (EC-COI-83-56, n.5). A process based primarily on "word of mouth" between a state agency and four other firms does not possess sufficient vestiges of openness to satisfy the public notice requirements of §7(b).

Accordingly, you must divest your financial interest in the DEF consulting contract within thirty days. See, G.L. c. 268A, §7 ¶(a).

DATE AUTHORIZED: June 23, 1983

[1/] G.L. c. 268A, §1(b) defines competitive bidding as "all bidding where the same may be prescribed by applicable sections of the General Laws or otherwise, given and tendered to a state, county or municipal agency in response to an open solicitation of bids from the general public announcement or public advertising, where the contract is awarded to the lowest responsible bidder."

CONFLICT OF INTEREST OPINION NO. EC-COI-83-97

FACTS:

You are a full-time employee of the Department of Mental Health (DMH) at the ABC Health Center (ABC) in a town. Your duties are to provide children's outpatient services, but they do not include any work for the DEF state agency (DEF).

The (Description omitted) Service of DEF needs a consultant in the town area to perform psychological testing in foreign languages (Portuguese, Spanish and Cape Verdean Criullu) as well as English. The tests are necessary for (Description omitted); a substantial number of people in that area speak only those foreign languages, and the program demands that testing be done in the native language if possible. The DEF has advertised for such a consultant in various trade journals, and will use 03 contract funds to pay the consultant.

QUESTION:

Does the conflict of interest law, M.G.L. c. 268A, permit you, as a full-time DMH employee, to contract with DEF as an 03 consultant to perform psychological testing on your own time?

ANSWER:

Yes, provided that you comply with the conditions set forth below.

DISCUSSION:

As a full-time employee of DMH, you are a state employee as that term is used in the conflict of interest law. M.G.L. c. 268A §1(q). As such, you must comply with that law, in particular §7, which provides:

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, shall be punished [by a fine or imprisonment, or both].

If you enter into an 03 consultant contract with DEF,you will then have a direct financial interest in a contract made by a state agency. However, you may qualify for an exemption contained in §7 which states:

[This section shall not apply]

(b) to a state employee other than a member of the general court who is not employed by the contracting agency or an agency which regulates the activities of the contracting agency and who does not participate in or have official responsibility for any of the activities of the contracting agency, if the contract is made after public notice or where applicable, through competitive bidding, and if the state employee files with the state ethics commission a statement making full disclosure of his interest and the interests of his immediate family in the contract, and if in the case of a contract for personal services (1) the services will be provided outside the normal working hours of the state employee, (2) the services are not required as part of the state employee's regular duties, the employee is compensated for not more than five hundred hours during a calendar year, and (3) the head of the contracting agency makes and files with the state ethics commission a written certification that no employee of that agency is available to perform those services as a part of their regular duties.

In the situation you have presented, the "contracting agency" is DEF. As a DMH employee, you are not "employed by the contracting agency or an agency which regulates the activities of the contracting agency" nor do you "participate in or have official responsibility for any of the activities of the contracting agency." The requirement of public notice is designed to eliminate the public impression that state employees have an "inside track" to procure state jobs and contracts. EC-COI-83-35. In a prior opinion, the Commission has interpreted this clause as requiring advertisement of the availability of the position, at least two weeks prior to filling it, in a newspaper of general circulation in the area serviced by the contracting agency. **Id.** However, where the services of a qualified professional are required, the Commission has recognized methods which are designed specifically to reach members of the profession rather than the general public, see, e.g. EC-COI-83-56, and which satisfy the objective of openness in contract awards. Thus, in your case, it would be acceptable for the agency to advertise the position in a professional or trade journal, rather than a newspaper of general circulation, and the agency has done so. You must also file with the State Ethics Commission a statement making full disclosure of your interest in the contract.[1]/ Since

[1]/ A letter to the Commission, describing your two positions and the terms of your DEF contract, will suffice.

your consulting contract with DEF will be one for your personal services, you must also satisfy the requirements in clauses 1-3 in the quoted paragraph. In that regard, (1) you have already stated that you will perform the DEF work outside your normal DMH working hours; and (2) that the DEF work is not already a required part of your DMH duties. You may not be paid by DEF for more than 500 hours a year. (3) The head of the contracting agency has already notified the Commission that there is no one else available to perform these services.

In sum, as soon as you file a letter of disclosure, and provided that you do not work for DEF for compensation more than 500 hours a year, you will be in compliance with §7.

DATE AUTHORIZED: July 19, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-99

FACTS:

From (Date Omitted), you were a state employee in the ABC state agency (ABC). As such, certain DEF state agency projects were placed within your responsibility by the Secretary of ABC. The projects that were assigned to you were only those which were particularly controversial or especially technical. Your responsibility was to track and expedite the projects and advise the Secretary on their progress. Certain projects, like the (Description omitted), would predictably fit into this category. Others, however, could not be classified until the projects were underway.

The DEF is currently soliciting proposals from consulting firms in connection with a project to (Description omitted). Your consulting firm has been asked by a company intending to pursue the DEF consulting contract, to be a subcontractor in connection with this project. The plans for this project were in existence during the period you were employed by ABC, but you had no invovlement with it and, in fact, no substantive activity occurred on the project during this time. You state that it cannot be determined whether this project would have been assigned to you had it been undertaken while you were at ABC, but in any event you took no action on it.

QUESTION:

May you and your firm be employed by a company as a subcontractor on this project?

ANSWER:

Yes.

DISCUSSION:

Upon leaving state employment, you became a former state employee for purposes of the state conflict of interest law, G.L. c. 268A, §1 et seq.

Section 5(a) of the conflict law prohibits a former state employee from acting as agent for, or receiving compensation from, anyone other than the Commonwealth in connection with any particular matter[1]/ in which the state is a party or has a direct and substantial interest and in which he participated as a state employee. Decisions and determinations related to the project would be particular matters. Since you state that you took no action during your tenure at ABC in connection with this project, you did not participate in it, and §5(a) does not apply.

Section 5(b) of the conflict law prohibits you for one year from appearing personally before a state agency as agent for anyone other than the state in connection with any particular matter over which you had official responsibility during the last two years of your state employment.

The prohibition in §5(b) turns on the extent of your "official responsibility" while employed by ABC. For the purposes of G.L. c. 268A, official responsibility is defined as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action." G.L. c. 268A, §1(k). By its definition, it is the existence, and extent of the authority possessed, and not its exercise, which is significant to the application of the section.

Although the project at issue was in existence while you had authority over the DEF, you state that no "substantive activity" took place on it. But,

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[1]/For the purposes of 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 and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property." G.L. c. 268A, §1(k).

the essential question is whether, if the project were not dormant during this period, you would have had some authority over it. If so, the project was within your official responsibility regardless of its inactivity. If, on the other hand, the nature of your authority over DEF matters was such that you would have had no power over this particular project, the official responsibility requisite for application of §5(b) was absent.

The nature of your authority over DEF matters was such that it cannot be determined whether this project would have been assigned to you. Until it was, however, you would have had no authority over it. As a result, you did not have official responsibility over this project because at no time during your tenure at ABC did you have any actual authority over it. This conclusion may have been different had the project been one where its assignment to you was predictable by its nature, rather than potentially assignable to you.

You should also be aware that, pursuant to a recent legislative amendment, two provisions of the standards of conduct, G.L. c. 268A, §23, will apply to you as a former state employee. These provisions prohibit a former state employee from accepting employment or engaging in any business or professional activities which will require him to disclose confidential information which he has gained by reason of his official position or authority and from improperly disclosing such materials[2]/ or using such information to further his personal interests. See, St. 1982, c. 612, §16.

DATE AUTHORIZED: July 19, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-102

FACTS:

You are a member of the General Court. Your office and some community groups are organizing a voter registration drive and will hold a raffle as part of that drive. You would like to sign a letter which would be used to solicit local merchants for gifts to support the raffle.

QUESTION:

Would you violate G.L. c. 268A by signing the merchant solicitation letter?

ANSWER:

No.

DISCUSSION:

As a member of the General Court, you are a state employee under G.L. c. 268A §1(q) and may not "use or attempt to use your official position to secure unwarranted privileges or exemptions for [your]self or others." G.L. c. 268A §23 (para. 2) (2). In previous rulings, the Commission has applied this provision to prohibit members of the General Court from using state supplies or personnel in furtherance of their private interests, EC-COI-82-112; from receiving excessive travel reimbursements pursuant to speaking engagements before private organizations, EC-COI-83-87; or from interposing themselves in the decisionmaking process of a state administrative agency. **In the Matter of James J. Craven, Jr.**, Commission Adjudicatory Docket No. 110, Suffolk Superior Ct. Civil Action No. 43269 (July 29, 1981), further appeal pending. In each of these rulings, the legislator's conduct exceeded the customarily expected use of a legislative office and benefited a private, as distinct from public interest. In contrast, your proposed signing of an endorsement letter for a voter registration drive raffle is distinguishable from those situations and does not amount to an unwarranted privilege within the meaning of §23. The endorsement by a member of the General Court, whether it be for a piece of legislation or a gift solicitation, is within the range of activities customarily expected of legislators and, standing alone, does not rise to the level of misuse of public office to further a private or personal interest. While situations could arise where the solicitation may raise issues under §23, for example, where the solicitation is made to a merchant whose special legislation or other particular matter is about to be voted upon by the endorsing legislator, your situation does not raise these concerns.[1]/

DATE AUTHORIZED: July 19, 1983

[2]/These materials are defined as "materials or data within the exemptions to the definition of public records as defined by [G.L. c. 4, §7]."

[1]/Although the Commission has concluded that G.L. c. 268A does not preclude your proposed endorsement, you should be aware that other statutes may impose conditions on your activities. See, G.L. c. 55 §13; G.L. c. 271 §7A. You should contact the Office of Campaign and Political Finance and the Elections Division of the Secretary of State's Office, respectively, to ascertain the extent of these statutory provisions.

CONFLICT OF INTEREST OPINION
NO. EC-COI-83-103

FACTS:

You are a full-time consulting engineer, providing independent consulting services to the private sector as sole proprietor of your own consulting firm.

You are also a member and chairman of a State Appellate Board (Appeals Board), a body created by (Citation omitted) to provide for hearing appeals and granting variances in connection with the enforcement of any provision of law, code, rule or regulation relating to (Description omitted). (Citation omitted). The Appeals Board is statutorily required to have a consulting engineer as a member, and your service fulfills that requirement. Matters only come before the Appeals Board after they have been adjudicated in the first instance by the Board of ABC Regulations; the Appeals Board hears evidence, finds facts, and issues decisions and orders, including the granting of a variance in accordance with statutory standards. You serve on the Appeals Board less than sixty days per year.

QUESTION:

While a member of the Appeals Board, may you privately provide consulting services to clients, including entities such as DEF and XYZ, non state parties, and other similar bodies?

ANSWER:

Yes, subject to the restrictions outlined below.

DISCUSSION:

As a member of the Appeals Board, you are a state employee covered by the conflict of interest law, G.L. c. 268A. Because you serve only part-time in that position, you are a special state employee, as that term is used in the law. See G.L. c. 268A, §1(o).

Section 4 of G.L. c. 268A states:

(a) 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.

(b) No person shall knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly give, promise or offer such compensation.

(c) 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.

Whoever violates any provision of this section shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

. . .

A special state employee shall be subject to paragraphs (a) and (c) only in relation to a particular matter(a) in which he has at any time participated as a state employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the state agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special state employee who serves on no more than sixty days during any period of three hundred and sixty-five consecutive days.

. . .

This section shall not prevent a state employee from giving testimony under oath or making statements required to be made under penalty for perjury or contempt.

This section is directed towards your relationship with non-state clients. As applied to a special state employee (such as yourself), clauses (a) and (c) prohibit you from being paid by, or acting as agent for, anyone other than the commonwealth or a state agency in relation to a particular matter[1]/ in which you have participated[2]/ as a member of the Appeals

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[1]/For the purposes of 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 and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property." G.L. c. 268A, §1(k).

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

Board or which is a subject of your official responsibility[3/] (or has been within the past year). This does not prevent you from performing paid work on private projects in general, since such matters would not come under your official responsibility unless they had first gone before the Board of ABC Regulations. However, it **would** prevent you from accepting non-state money **in relation to a proceeding before the Appeals Board**, even if you abstained from the matter as a member of the Board. See EC-COI-79-80. You also could not act as the client's agent in the appeal, which would encompass negotiating on behalf of the client, or preparing its arguments or documentation for purposes of the appeal; if necessary, you could testify, but only for the statutory witness fee. The §4 prohibition would extend as well to your acting as the client's agent before any other state agency in connection with the appeal (such as the superior court) pursuant to any decision or recommendation of the Appeals Board.

Section 7 of G.L. c. 268A provides:

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, shall be punished by [a fine or imprisonment, or both].

Authorities such as the DEF or XYZ are state agencies for the purposes of the conflict of interest law.[4/] If you obtain a consulting contract with such an agency, you will have a direct financial interest in a "contract made by a state agency." However, you qualify for an exemption contained in §7 which provides:

[Section 7 does not apply]

(d) to a special state employee who does not participate in or have official responsibility for any of the activities of the contracting agency and who files with the State Ethics Commission a statement making full disclosure of his interest and the interest of his immediate family [5/] in the contract. . .

You participate in activities of the Appeals Board and thus also in the Department of GHI within which the Board operates. As long as you do not contract with those two agencies, and you file the disclosure of your financial interest in contracts with other state agencies,[6/] you may consult for other state agencies such as the DEF and XYZ.

Finally, §23 imposes certain other restrictions on your conduct. Section 23 para. 2 (2) prohibits a state employee from using or attempting to use his official position to secure unwarranted privileges or exemptions for himself or others, and §23 para. 2(3) prohibits a state employee from, 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, or that he is unduly affected by the kinship, rank, position or influence of any party or person. Under these standards, you should refrain from participating as an Appeals Baord member in any appeal which concerns work you have performed,[7/] since to do so would give basis for the impression that you would be unduly influenced by your own prior association with and work on the matter. If an appeal comes before you and concerns one of your clients, but not a project on which you have worked, you should exercise extreme caution to avoid the appearance of favoritism. The best course would be to abstain if your association with that client has been extensive or recent. Lastly, you should not advertise or mention your membership on the Appeals Board in your prospectus or solicitation of potential clients; to do so would constitute unwarranted use of your official position, and might also give the impression that your membership and influence on the Appeals Board could be improperly used to benefit the client.

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[3/] For the purposes of G.L. c. 268A, "official responsibility" is defined as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency actions." G.L. c. 268A, §1(i).

[4/] G.L. c. 268A, §1(p) ("state agency" includes independent state authorities and instrumentalities); G.L. c. 7 App. §1-2 (providing that the XYZ is a "public instrumentality"); G.L. c. 161A, §2; Atty. Gen. Co Op. No. 556.

[5/] For the purposes of G.L. c. 268A, "immediate family" is defined as "the employee and his spouse, and their parents, children, brothers and sisters." G.L. c. 268A, §1(e).

[6/] The Commission utilizes a form, a copy of which is enclosed, for this disclosure.

[7/] In some instances, such participation may also be prohibited by G.L. c. 268A, §6, but since your question is somewhat hypothetical, it is not possible to address that issue in this opinion, and unnecessary to do so in view of the §23 analysis.

CONFLICT OF INTEREST OPINION
NO. EC-COI-83-104

FACTS:

You are employed on a full-time basis as a pathologist at the ABC Medical Center (Center). You are interested in outside employment as an assistant medical examiner for DEF County. Your activities in that position would be within the supervisory and regulatory authority of the state commission on medicolegal investigation and the office of the chief medical examiner. See G.L. c. 38, §1B. As an associate medial examiner, you would be assigned to inquire into the cause and circumstances of certain categories of death. G.L. c. 38 §6. Upon determining that a further investigation is necessary in the public interest, you would notify the district attorney. **Id.** Thereafter, the district attorney and his law enforcement representative, the division of state police, would be responsible for directing the criminal investigation. The district attorney or attorney general would also be empowered to direct you to make an autopsy. **Id.**

QUESTION:

Does G.L. c. 268A permit you to serve as an assistant county medical examiner while you maintain your full-time employment at the center.

ANSWER:

No.

DISCUSSION:

In your capacity as a pathologist at the Center, you are a state employee within the meaning of G.L. c. 268A §1(q). As a state employee, you are prohibited by §4(a) from receiving compensation from a non-state party in connection with any "particular matter"[1/] in which the commonwealth or a state agency is a party or has a direct and substantial interest. All of your activities as an assistant medical examiner, including determinations and reports which you would make, would be subject to supervision and regulation by a state agency (the state commission on mediolegal investigation) and a state official (the chief medical examiner) and therefore would be of direct and substantial interest to the commonwealth. This conclusion is also confirmed by the accountability of the assistant medical examiner position to other state law enforcement officials. These reporting and regulatory requirements would also be matters of direct and substantial interest to the commonwealth. Accordingly, since your compensation as assistant medical examiner would be paid by the county, G.L. c. 38 §5 [a party other than the commonwealth], your receipt of compensation in connection with your assistant medical examiner duties would violate G.L. c. 268A, §4(a).[2/]

DATE AUTHORIZED: July 19, 1983

[1/]For the purposes of 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 . . ." G.L. c. 268A, §1(k).

[2/]The Commission's conclusion is based upon a construction of the statute as currently written, and there are no exemptions which would apply to your situation. In recent years, the General Court has carved out exceptions to general prohibitions of §4. See, St. 1982, c. 143 [state employees may be paid by non-state parties for filing state tax returns]; St. 1980, c. 10 [state employees may hold certain paid municipal positions]. If the recruitment of assistant medical examiners remains a difficulty, as you suggest, you may wish to consider filing with the General Court an amendment to §4 to permit state employees to hold such positions.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-105

FACTS:

Town Counsel of a town maintains a private law practice. An attorney who is a salaried member of that firm is being considered for appointment as Chairman of the Zoning Board of Appeals of the town (Board). As such, she could be a special municipal employee.[1]/

QUESTION:

If appointed, may she continue at the firm to assist Town counsel on town legal matters.[2]/

ANSWER:

Yes, subject to certain conditions.

DISCUSSION:

Under §17, paragraphs (a) and (c), a municipal employee is prohibited from receiving compensation from or acting as agent or attorney for anyone other than the city or town by which he is employed in connection with a particular matter[3]/ in which the same city or town is a party or has a direct and substantial interest. Those provisions are less restrictive with respect to a special municipal employee. A special municipal employee is subject to paragraphs (a) and (c) only in relation to a particular matter (1) in which he has participated[4]/ as a municipal employee, or (2) which is or within one year has been a subject of his official responsibility,[5]/ or (3) which is pending in the municipal agency in which he is serving if he works more than sixty days during any period of three hundred and sixty-five consecutive days.

As Chairman of the board, the attorney would be a special municipal employee subject to the restrictions regarding specials outlined above. Consequently, at the firm she could not work on any legal matters which pertain to the Board. Encompassed would be not only cases pending at the Board, but also appeals from Board determinations. This would be the case whether she is representing private parties or whenever she is assisting Town Counsel on behalf of the Town (since her compensation would be from someone other than the Town, i.e., the firm).

It should also be noted that under §19 of G.L. c. 268A, the attorney, as Chairman, will be prohibited from participating as a municipal employee in particular matters in which any business organization in which she is serving as an employee has a financial interest. If such a matter should come before her, in order to participate as member of the Board, she would first have to advise her appointing official of the nature and circumstances of the particular matter, disclose the financial interest involved and receive a written determination from her appointing official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from her.

The Town Counsel's private law firm is a business organization within the meaning of G.L. c. 268A. Therefore, whenever a particular matter in which the law firm has a financial interest comes before the Board, she would have to abstain or follow the procedure outlined above. Generally, a law firm does not have a financial interest in a client's case by merely representing the client because the firm's compensation is not usually dependent upon the outcome of the case. However, a financial interest in a matter will be attributed to the firm where a contingent fee situation exists where, for example, the firm receives its compensation only if the client prevails in the matter. In this instance the provisions of §19 would apply.

In those situations where the firm is representing a client before the Board she must also be cognizant of the provisions of §23. The second paragraph of §23 prohibits a municipal employee from using or attempting to use his official position to secure unwarranted privileges for himself or others and from, 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, or that he is unduly affected by the kinship, rank, position or influence of any party or person. Although she would not automatically run afoul of these provisions by participating in Board actions on

[1]/While the Commission does not ordinarily render advisory opinions to municipal employees, it does so here because of Town Counsel's personal role in this matter.

[2]/Town Counsel bills the town for his own services and those performed by attorneys at his firm. Payment from the Town goes to the firm.

[3]/For the purpose of 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. . . G.L. c. 268A, §1(k).

[4]/For the purposes of G.L. c. 268A, "participate" is defined as 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. G.L. c. 268A, §1(j).

[5]/For the purposes of G.L. c. 268A, "official responsibility" is defined as the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i).

matters the firm has before it, the safest course would be for her to refrain altogether from participating in them. Otherwise, it would have to be examined whether Board decisions involvng the firm were made on objective criteria applicable equally to all matters presented to the Board or whether her private relationship with the firm played any role. Cf. EC-COI-83-65.

DATE AUTHORIZED: July 19, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-106

FACTS:

You are an employee of the ABC Division of the Housing Court (Housing Court). That Court has jurisdiction, along with the district and superior courts, over certain statutory crimes and civil actions involving residential housing. See G.L. c. 185C, §3. As an employee you

(Description of duties omitted).

You recently passed the Massachusetts real estate licensing examination and expect to be licensed as a real estate salesman by the Massachusetts Real Estate Board. You are considering pursuing real estate sales on a part-time basis.

QUESTION:

Does the conflict of interest law, G.L. c. 268A, prohibit you from pursuing a private real estate business while simultaneously serving as an employee of the Housing Court?

ANSWER:

No, but the law does place certain limitations on your actions as a real estate salesman and as a Housing Court employee.[1]/

DISCUSSION:

As a Housing Court employee you are a state employee as defined in the conflict of interest law, G.L. c. 268A, §1 et seq., and, as a result, are covered by that law.

Section 23 of that statute contains standards of conduct which are applicable to all state employees. That section provides that you may not use your official position as a state employee to secure or attempt to secure unwarranted privileges or exemptions for yourself or others. It also proscribes conduct which gives reasonable basis for the impression that any person can improperly influence or unduly enjoy your favor in the performance of your official duties, or that you are unduly affected by the kinship, rank, position or influence of any party or person.

As a Housing Court employee you play a substantial role in the processing of cases in the Housing Court.

(Description Omitted)

Your authority, combined with the particularly strong interest in avoiding the appearance of impropriety in actions by the Judicial department, dictates that certain limitations be placed on your activities.

As a Housing Court employee, you should avoid taking any action on cases or matters before the Housing Court involving persons with whom you currently have or have had dealings in your private capacity as a real estate salesman. This would include both buyers and sellers of property, as well as landlords who may have sales or rental listings with you.

As a real estate salesman, you should not commence dealings with any party at a time when that party has a matter before the Housing Court. The law does not prohibit you outright from having private business dealings with persons or entities which have had matters in the Housing Court prior to commencement of those dealings. But, you should take great care not to exploit your official position to secure such business. See also, G.L. c. 268A, §§2 and 3.[2]/

DATE AUTHORIZED: July 19, 1983

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[1]/This advisory opinion only addresses issues posed in connection with the conflict of interest law, G.L. c. 268A. Other laws or restrictions may also be relevant to the question you ask.

[2]/Although not directly raised by your opinion request, you should also be aware that G.L. c. 268A also prohibits you from acting as an agent for anyone other than the state on a matter in which the state is a party or is interested (§4) and limits your ability to have a financial interest in any contract made by a state agency (§7). Thus you may not be a real estate agent on a sale in which the state is involved. See also G.L. c. 30, §44.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-108

FACTS:

You are employed as the chief of security for a state agency (ABC), and serve in the capacity between the hours of 7:00 A.M. to 2:30 P.M. on weekdays. When you originally assumed that position, the Facility was owned and administered by a City. You are also a member of the City Police Department and, since January 1, 1982, have been detailed to the Facility on weekdays during the period of 2:30 P.M. to 11:00 P.M. In effect you serve as Chief of Security for ABC from 7:00 A.M. to 11:00 P.M. on weekdays but are paid from two separate funding sources. Your responsibilities in both positions are identical. For example, you exercise your police powers to arrest individuals who violate criminal laws on the ABC premises and make reports to both the Police Department and the ABC irrespective of the shift. You are a plainclothed officer in both positions and work in the same location.

QUESTION:

Does G.L. c. 268A permit your continued assignment by the City Police Department to the ABC while you remain Chief of Security at the ABC.

ANSWER:

No.

DISCUSSION:

As a member of the City Police Department, you are a municipal employee within the meaning of G.L. c. 268A §1(g). As a municipal employee you are and have been subject to the restrictions of G.L. c. 268A §20 which, in effect, prohibit municipal employees from having a financial interest in a second contract made by the same municipality.

Prior to the change of Facility ownership, your employment with the Facility constituted a contract made by an agency of the City. In view of the statutory prohibition of §20 as it appeared at that time, your Facility employment contract constituted a financial interest in a second municipal contract apparently in violation of G.L. c. 268A §20. Inasmuch as you became a "state employee" under G.L. c. 268A §1(g) by virtue of the state assumption of the Facility, the propriety of your employment arrangement therefore turns on whether the General Court, either expressly or implicitly, intended to make lawful your dual employment arrangement at the Auditorium. The Commission concludes that it did not.

The enabling legislation creating ABC contains a "grandfather clause," which preserves whatever employment rights may have accrued prior to the transfer, but which expressly precluded conferring on employees "any rights not held prior to the transfer." In view of the operation of G.L. c. 268A §20, discussed previously, your employment arrangement was unlawful prior to the transfer and therefore could not be made lawful through construction of the "grandfather clause."

Additionally, your current arrangement violates G.L. c. 268A §4. As an employee of the ABC and a state employee for the purposes of G.L. c. 268A, you are prohibited from being paid by any non-state party in relation to any particular matter[1]/ in which the commonwealth or a state agency is a party or has a direct and substantial interest.

Your responsibilities as a police officer assigned to ABC include your making decisions and arrests in the enforcement of state criminal laws and preparing and filing arrest reports with the ABC. These activities are particular matters of direct and substantial interest to the commonwealth, and §4 prohibits your receipt of compensation from the City in relation to these matters. As a matter of sound policy, the application of §4 is appropriate because the decision by the ABC to deal with particular problems, such as crowd control, may be based upon different priorities than those of the City.

None of the exemptions within §4 are applicable to you. While your City compensation would be permissible if received "as provided by law for the property discharge of official duties," no law provides for your dual employment arrangement at the ABC, nor is membership in the City Police Department a condition for holding the position of Chief of Security. Further, your receipt of compensation from the City does not qualify for the "municipal exemption"[2]/ because all of your actions as a police officer assigned to the ABC would be on matters either within the purview of the ABC or within your official responsibility as Chief of Security.

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

[2]/The exemption under §4 provides as follows:

This section shall not prohibit a state employee from holding an elective or appointive office in a city, town or district, nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office. No such elected or appointed official may vote or act on any matter which is within the purview of the agency by which he is employed or over which such employee has official responsibility.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-109

FACTS:

You are an employee of a state agency (ABC). Your agency has recently received authorization for several new positions, and you have an immediate need for expansion and remodeling of existing office space at 100 Cambridge Street in Boston. You indicate that you have been informed by the State Division of Capital Planning and Operations (DCPO) that there are insufficient maintenance personnel within DCPO to complete the necessary construction of new offices within an acceptable time period during normal working hours. DCPO has advised you that a special group of DCPO maintenance employees could be made available to perform the construction after hours provided that ABC pay for the work out of its own budget. These employees would not normally be assigned to perform maintenance work at 100 Cambrige Street. In effect, under the proposed arrangement the maintenance employees would be paid separately by ABC for their after-hours construction services.

QUESTION:

Would your proposal arrangement by which you would pay DCPO maintenance employees to perform construction work after hours be permissible under G.L. c. 268A.[1]/

ANSWER:

No.

DISCUSSION:

The maintenance personnel employed by DCPO who you wish to perform the construction work are state employees for the purposes of G.L. c. 268A.[2]/ As state employees, they are subject to the restrictions of G.L. c. 268A §7 which, absent qualification for a statutory exemption, generally prohibits state employees from having a financial interest in a state contract. The purpose of the restrictions is "to prevent public employees from gaining private benefit from [second contractual] arrangements as a result of their public positions and to protect the state from improvident bargains which might result from the improper influence of an insider." BUSS, **The Massachusetts Conflict of Interest Statute: An Analysis,** 45 B.U.L. Rev. 299, 368 (1965). Admittedly broad in scope, the §7 prohibition is preventative and eliminates the potential for improper influence irrespective of whether the employee is actually in a position to exercise influence.

Prior to enactment of amendments to §7 in 1982 (St. 1982 c. 612., effective March 29, 1983), there were few permissible opportunities under which full-time state employees could have a financial interest in second contracts. Arrangements such as the one which you propose were consistently found to be in violation of §7. See, EC-COI-81-7; 80-116.

In response to the apparent overbreadth of the statutory prohibitions, the General Court adopted the recommendation of the Commission and amended §7 to, in effect, permit second contractual arrangements in those situations possessing sufficient safeguards against improper influence. The amendment provides that the §7 prohibition against having a financial interest in a second state contract will not apply

(b) to a state employee other than a member of the general court who is not employed by the contracting agency or an agency which regulates the activities of the contracting agency, and who does not participate in or have official responsibility for any of the activities of the contracting agency, if the contract is made after public notice or where applicable, through competitive bidding, and if the state employee files with the State Ethics Commission a statement making full disclosure of his interest and the interests of his immediate family in the contract, and if in the case of a contract for personal services . . .[1] the services will be provided outside the normal working hours of the state employee, . . . [2] the services are not required as part of the state employee's regular duties,. . . [3] the employee is compensated for not more than five hundred hours during a calendar year, and . . .[4] the head of the contracting agency makes and files with the State Ethics Commission a written certification that no employee of that agency is available to perform those services as part of their regular duties.

The conditions for exemption are conjunctive, and each element must be substantially satisfied. See, EC-COI-83-95 [failure to satisfy public notice requirement].

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[1]/Although the Commission would customarily render this advisory opinion to the individual employee seeking to contract with a state agency, it is not practicable to do so in this case.

[2]/This opinion assumes that these employees work for DCPO on a full-time, as opposed to a part-time, basis and are therefore not special state employees under G.L. c. 268A §1(o). The result of this opinion would be different in the case of special state employees.

Assuming that the appropriate notice and filing would take place and assuming that no individual employee would be paid by ABC for more than 500 hours, the arrangement you propose would satisfy all the conditions in §7(b) but one. The services to be performed by the DCPO maintenance employees are part of their regular duties.[3]/ The statute focuses on the nature of the employee's duties and not on considerations of place and time. Otherwise the purpose of the provision could be subverted by a mere shuffling of assignments.[4]/

DATE AUTHORIZED: July 19, 1983

COMMISSION ADVISORY 83-2

This Advisory explains how the conflict of interest law, General Laws Chapter 268A, applies to state representatives and senators when they receive expenses and/or fees for outside speaking engagements.

A. The Conflict of Interest Law

State representatives and senators are state employees as defined in the conflict of interest law, General Laws Chapter 268A. The receipt of expenses and fees by a legislator for speaking engagements can raise questions under two sections of Chapter 268A if the legislator is in a position to take official action on matters of interest to the giver of those expenses and fees.

First, §3(b) of G.L. c. 268A prohibits a state employee from soliciting or accepting anything of substantial value for or because of any official act performed or to be performed by him. The receipt of something of substantial value violates §3 even if given out of a desire to maintain a public employee's goodwill. "Official act" is defined in the statute to include "any decision or action. . . in the enactment of legislation." G.L. c. 268A, §1(h). Second, the Standards of Conduct set out in §23 of G.L. c. 268A prohibit state employees from using their official position to secure unwarranted privileges or from engaging in conduct which gives reasonable basis for the impression that any person can improperly influence them or unduly enjoy their favor in the performance of their duties.

The critical question when a legislator receives expenses or fees is whether these items were either for, or made necessary by, the speaking engagement, or whether the speaking engagement was merely a pretext for an improper benefit or gratuity.

B. Expenses

If expenses are necessary to a legitimate speaking engagement, neither §3 nor §23 would be violated. Section 3 concerns are avoided because the motive underlying the giving and the receipt of the expenses is a proper one: enabling the legislator to make the speech. In other words, there is nothing about such expenses suggesting they were given to create goodwill or otherwise influence a legislator in the performance of his official duties. Similarly, necessary expenses for making a speech would avoid §23 concerns. Expenses so limited do not give rise to the appearance of a private group unduly enjoying the favor of the legislator. To the contrary, constituent and interest group access to legislator's views is entirely appropriate.

Expenses, however, must be limited to those necessary to making the speech. Thus, the legislator should receive only those items of transportation, lodging and meals which are directly related to a legitimate speaking engagement **and no more**. If a legislator were to receive more (for example, expenses related to an extended stay, any expenses for a guest, reception in his honor, entertainment, or special services), or if the trip was not being made for a legitimate speaking engagement, §23 would be violated. In addition, §3 issues could be raised depending on the facts in any particular instance.

Several factors would indicate whether a speaking engagement is legitimate. It would have to be 1) formally scheduled on the agenda of the convention or conference, 2) scheduled in advance of the legislator's arrival at the convention or conference, and 3) before an organization which would normally have outside speakers address them at

[3]/The purpose of this particular condition is to prevent inefficiency during normal working hours that could be caused by a desire to create the opportunity for overtime work (often, if not always, at a higher rate of pay). If the funding for such overtime were to come from a source other than the budget of the employee's own agency, there would be little incentive on that agency to control such practices.

[4]/The Commission also notes that there would appear other answers to satisfy your goal without violating G.L. c. 268A, §7. For example, DCPO could pay their own employees directly for overtime worked or take employees from other locations to work at ABC during normal working hours. Such a course would keep DCPO employees under that agency's oversight when performing this work. As a result, the work normally within DCPO's jurisdiction and the employees doing that work can be more effectively monitored. Moreover, the actual cost to state agencies for having this work done by DCPO will be reflected in the budget of that agency. On the other hand, the conflict of interest law would not prevent ABC from contracting with state employees (other than their own), be they from DCPO or any other agency, as long as it is not their job to do this kind of work ordinarily and as long as the other conditions of §7(b) are met.

such an event. Moreover, 4) the speaking engagement must not be perfunctory, but should significantly contribute to the event, taking into account such factors as the length of the spech or presentation, the expected size of the audience, and the extent to which the speaker is providing substantive or unique information or viewpoints. If these four factors are not satisfied, no items or expenses may be received. Assuming the speaking engagement is legitimate, the legislator may receive transportation to and from the site, lodging at the site made necessary by the speech and those meals immediately surrounding the speech.

C. Honoraria

As noted above, legislators may not accept items of substantial value for or because of their actions in the enactment of legislation and may not by their conduct give reasonable basis for the impression that anyone can improperly influence them or unduly enjoy their favor. See G.L. c. 268A, §3 and §23. Several considerations could lead to the conclusion that money received ostensibly as a fee or honorarium was actually an improper gratuity and could understandably contribute to the impression described in §23. These considerations would include:

1. that the speaking engagement is not "legitimate," again taking into account the four factors set out in EC-COI-83-87 (described above);
2. that it was unusual for the organization or group to offer an honorarium;
3. that the honorarium was excessive;*
4. that the honorarium was not reported by the legislator on his Statement of Financial Interests [see G.L. c. 268B, §5(g) (7)]; and
5. that the organization or group has clearly demonstrated a substantial interest in legislation which is, or has recently been, pending and which the legislator receiving the honorarium is, or has been, in a unique position to affect either because he is a member of the leadership or is on the committee considering it.

Generally, no single consideration alone will be determinative of whether an honorarium is proper. The totality of the circumstances must be examined using basic common sense. A legislator should obviously be concerned when he is offered what the Speaker of the U. S. House of Representatives would be expected to receive or when he is asked to speak to a group just when an important piece of legislation of interest to that group is about to be considered by the committee on which he sits. To the extent that a legislator has any doubts as to the propriety of an honorarium offered, he may seek an advisory opinion pursuant to G.L. c. 268B, §3(g).

D. Conclusion

Three final points should be made. First, §23 also prohibits a public official or employee from "us[ing] or attempt[ing] to use his official position to secure unwarranted privileges. . . for himself or others." Accordingly, in no event should a legislator use state supplies or facilities (not available to the general public) in the preparation or delivery of a speech or presentation for which he will receive an honorarium.

Second, this advisory discusses the application of c. 268A only. Chapter 268B (the Financial Disclosure Law) requires that a public official disclose on his annual Statement of Financial Interests reimbursements and honoraria received from a person having an interest in legislative or other governmental matters. The special filing requirements are fully described in the instructions for filing published by the Commission. Those items received which do not satisfy those guidelines should be reported as gifts.

Finally, it is the Commission's goal that the setting out of these guidelines will lead to future compliance with the law by public officials. The Commission feels that these guidelines strike the appropriate balance between a legislator's interest in being available to outside groups and in educating himself and the state's desire to avoid undue influence by special interest groups.

DATE AUTHORIZED: August 16, 1983.

*Whether an honorium is excessive will not depend solely on the dollar amount. That figure should also be compared to what the organization or group customarily pays its speakers, what other participants in the event are getting, and what people of comparable position and stature usually receive. Compare Rule 16A.11 of the Rules of the House of Representatives.

No member, officer, or employee shall accept or solicit an honorarium for a speech, writing for publication or other activity from any person, organization or enterprise having a direct interest in legislation or matters before any agency, authority, board, or commission of the Commonwealth which is in excess of the usual or customary value of such services.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-110

FACTS:

You are a state representative and chairman of the Joint Legislative Committee on Education (Committee). DEF Corporation (DEF), a computer manufacturer, has lent the Committee certain electronic equipment (computers, printers, word processors, and software) for office use, Committee research, and day-to-day Committee operations; the equipment remains the property of DEF. The Committee does not consider any legislation or proposed legislation which would directly affect DEF.

QUESTION:

Does the conflict of interest law, G.L. c. 268A, permit the Committee to accept the loaned equipment from DEF?

ANSWER:

Yes.

DISCUSSION:

Section 3 of the conflict law prohibits a state employee from soliciting or accepting 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. G.L. c. 268A, §3(b). However, this section is not applicable to the facts you have presented, because the equipment is not for your personal use, but rather for the use of a legislative Committee, in the performance of its official duties. Moreover, the equipment loan does not appear to be motivated by official acts performed by you or the Committee, since neither has any particular authority over legislation which directly affects DEF.

Section 23 of G.L. c. 268A provides:

[No current officer or employee of a state, county or municipal agency shall:]

. . .(2) use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others;

. . .(3) 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.

As mentioned above, the equipment is not on loan for personal use by you or other Committee members; for that reason, the Commission does not find that acceptance of the equipment constitutes use of official position to secure an unwarranted privilege. Finally, because the Committee does not consider any legislation which would directly affect DEF, acceptance of the equipment does not give reasonable basis for the impression that you or the Committee will be improperly influenced by the loan or will unduly favor DEF. See EC-COI-83-87, page 3.

DATE AUTHORIZED: August 16, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-111

FACTS:

You are an employee in the state Department of Environmental Management (DEM). Until two months ago, you and your wife jointly owned for eighteen years a 100-acre parcel of woodland located in the Town of ABC. At that time, in order to protect that land from being subject to any liability you might incur in the performance of your state duties, you transferred your ownership interest in the land to your wife for no consideration. Your wife is currently the sole record owner of the land, and she would like to sell the parcel to DEM.

QUESTION:

May your wife sell her land to DEM while you are employed by that agency?

ANSWER:

No.

DISCUSSION:

As a DEM employee, you are a state employee as defined in the conflict of interest law, G.L. c. 268A, §1 et seq., and, as a result, are subject to that law.

Section 7 of Chapter 268A prohibits a state employee from having a direct or indirect financial interest in a contract made by a state agency. The sale of this property would be a contract within the meaning of §7. EC-COI-81-27; 79-99.

When the spouse of a state employee contracts with a state agency, the financial interest which may accrue to the spouse is not automatically attributed to the state employee solely as a result of the marriage relationship. For example, in EC-COI-79-77, §7 did not prohibit the wife of a state employee from being employed by a state agency. However, there are cases wherein the nature of the interest and the circumstances involved will necessarily result in attribution of financial interest to the spouse. In EC-COI-83-37, the husband was a general and limited partner in a partnership which had a contract with a state agency. Upon learning of his impending employment by the state, he assigned all his rights in the partnership to his spouse for no consideration. Prior to that assignment, his spouse was not involved in any way with the partnership. In view of the circumstance surrounding the assignment, the Commission concluded that the husband could be said to still have a financial interest in the partnership for §7 purposes.

The Commission reaches a similar conclusion in your case. Until two months ago, you had a significant and identifiable interest in the land in question and the proceeds of any sale of that land. Your transfer to your wife was not in return for any consideration, nor is there any indication that your purpose was to benefit your spouse by giving her sole right and title to that land and all benefits which might come from it. Thus, although the land is no longer held jointly, the purpose behind the transfer was not to sever completely your interest in it, but to insulate it from any liability you might incur. Absent evidence that you will not derive any financial benefit, direct or indirect, from the sale of the land, the Commission concludes that you will have a financial interest in the sale of the property by your wife to DEM in violation of §7.[1]/

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[1]/Although a recent amendment has eased somewhat the restrictions of §7 as they apply to full-time state employees, the newly created exemption under §7(b) will not apply to you because you are employed by the same state agency which would be contracting with your wife.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-113

FACTS:

You are a member of the Massachusetts Housing Finance Agency (MHFA). MHFA is an independent public body whose primary function is to provide mortgage financing for the introduction of housing throughout the state. To accomplish this goal, MHFA raises funds by issuing tax-exempt bonds through underwriters. G.L. c. 23A App. §§1-8. As a member of MHFA, you vote approval of all bond issues including the price of the bond and the accompanying interest rate. **Id.**

MHFA recently completed a bond issue for one of its housing programs. You voted as a member to approve this bond issue. MHFA entered into a contract with underwriters for the issuance of these bonds.

QUESTION:

May you purchase MHFA bonds for your personal portfolio without violating G.L. c. 268A, the conflict of interest law?

ANSWER:

No, unless you receive an exemption from the governor under §7(e).

DISCUSSION:

MHFA is a state agency as defined by G.L. c. 268A, §1(p)[1]/, and as a member of the MHFA, you are a state employee. Because you receive no compensation for your membership (G.L. c. 23A App. §§1-3, you are a special state employee and certain provisions of G.L. c. 268A apply less restrictively to you. G.L. c. 268A, §1(o).

Under §7, a state employee is prohibited from having a financial interest in a contract made by a state agency. A bond is a contract. **Day v. Walton,** 199 Tenn. 10 (1955); **Guaranty Tr. Co. of N.Y. v. W. Va. Turn. Com'n,** 144 W. Va. 266 (1959). When it is issued by the state, it creates a contractual obligation between the state and the holders of the

[1]/"State agency," any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department and any independent state authority, district, commission, instrumentality or agency but not an agency of a county, city or town. G.L. c. 268A, §1(f). (Emphasis added.)

bond. **Arizona St. Highway Com'n v. Nelson,** 105 Ariz. 76 (1969); **New Jersey Sports & Exposition Auth. v. McCrane,** 61 N.J. 1 (1972). Therefore, when a bond is issued by a state agency, the contract runs between the agency and the bondholder and is within the purview of §7.[2]/ If you purchase MHFA bonds, you would have a financial interest in a contract made by a state agency.[3]/ However, §7 does not apply

> to a special state employee who does not participate in or have official responsibility for any of the activities of the contracting agency and who files with the state ethics commission a statement making full disclosure of his interest and the interest of his immediate family in the contract. . .§7(d) or
>
> to a special state employee who files with the state ethics commission a statement making full disclosure of his interest and the interests of his immediate family in the contract, if the governor with the advice and consent of the executive council exempts him. §7(e)

In view of the facts presented, you do not qualify for the §7(d) exemption. In your position as a board member of MHFA, you participate in the activities of MHFA, the contracting agency. Therefore, the only exemption under §7 for which you can qualify is paragraph (e). Pursuant to §7(e), in order to purchase MHFA bonds, you must receive an exemption from the governor and file a statement disclosing your bond purchase(s) with the Commission.

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[2]/Although the MHFA's enabling legislation allows state employees to participate in MHFA residential mortgage programs notwithstanding the provisons of G.L. c. 268A, see, G.L. c. 23A App. §1-5A, the scope of this limited exemption does not cover the MHFA bond issue upon which your inquiry is based.

[3]/The purchase of government bonds will not always create a contractual relationship prohibited by §7. For example, treasury bonds issued by the Commonwealth through the Treasurer's office rather than by a specific agency do not trigger the application of §7 since there is no "contracting agency" involved.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-114

FACTS:

You are the Mayor of the City of ABC (City) and are on an unpaid leave of absence from DEF, Inc., a road-building company located in ABC. DEF has been awarded certain contracts by the City Department of Public Works for the current fiscal year, and the contracts are about to be submitted to your office for your signature, which is required under G.L. c. 43 §29.[1]/

QUESTIONS:

1. Does G.L. c. 268A allow you to sign the DEF contracts on behalf of the City?

2. If not, what alternative steps should be taken to effectuate the DEF contracts?

ANSWERS:

1. No.

2. See discussion below.

DISCUSSION:

1. In your capacity as Mayor of the City, you are a municipal employee for the purposes of G.L. c. 268A. EC-COI-82-144. As a municipal employee you are subject to the restrictions of G.L. c. 268A §19 which, in relevant part, prohibits you from participating[2]/ in any particular matter[3]/ which affects the financial interest of a business organization with which you have an arrangement concerning future employment. DEF, a private company, is a business organization for the

[1]/In relevant part, G.L. c. 43 §29 provides that

> All contracts made by any department, board or commission where the amount involved is two thousand dollars or more shall be in writing, and no such contract shall be deemed to have been made or executed until the approval of the mayor under Plan A, B, C or F, or of the city manager under Plan D or E, and also of the officer or the head of the department or of the chairman of the board, as the case may be, making the contract is affixed thereto.

[2]/For the purposes of G.L. c. 268A, "participate" is defined as participate in agency action or in a particular matter personally and substantially as a state, . . . employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

[3]/For the purposes of 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. . ." G.L. c. 268A, §1(k).

purposes of §19. Further, by virtue of your leave of absence status from DEF, you have an arrangement concerning future employment with DEF. By signing the DEF contracts on behalf of the City, you would be participating personally and substantially in a particular matter. Cf. **Urban Transport, Inc. v. Mayor of Boston,** 373 Mass. 693, 697-98 (1977) (the Mayor's approval of a validly awarded contract is not a ministerial act); accord, **Eastern Mass. St. Ry Co. v. Mayor of Fall River,** 308 Mass. 232, 235 (1941) (interpreting G.L. c. 4 §29). Your signature would therefore violate §19 because it would affect the financial interest of a business organization with which you have an arrangement for future employment. Nor does it appear that any exemptions in §19 apply to you.[4]/

2. The Commission is obliged to give G.L. c. 268A a workable meaning, **Graham v. McGrail** 370 Mass. 133, 140 (1976), and to construe G.L. c. 268A with related provisions of other statutes "so as to constitute a harmonious whole." **Town of Dedham v. Labor Relations Commission,** 365 Mass. 392, 402 (1974); EC-COI-83-1; 81-75. Inasmuch as you are prohibited by G.L. c. 268A from engaging in an act which is a condition for the effectuation of municipal contracts under G.L. c. 43 §29, there is a compelling need to construe the General Laws so as to permit the City to carry on its municipal business while observing the safeguards of G.L. c. 268A. This result can be best effectuated by having the DEF contracts submitted directly to the City Clerk for approval. Not only would the City Clerk be the customary recipient of all contracts normally signed by the Mayor, G.L. c. 41 §17, but also other statutory provisions would appear to contemplate such a substitute arrangement. In particular, G.L. c. 43 §27[5]/ establishes a procedure under which mayors may give notice of their conflict to the city council, discontinue any official relationship with the contract, and have the city clerk sign the contract. Adoption of such a procedure with respect to the DEF contracts would be consistent with both the language of G.L. c. 268A §19 and the purposes of G.L. c. 43 §27.

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[4]/Under the second paragraph of §19, certain municipal employees may seek out and receive from their appointing official written permission to participate in an otherwise prohibited matter. As an elected official, this avenue is not available to you. **District Attorney for the Hampden District v. Grucci,,** 1981 Mass. Adv. Sh. 2125, 2129, n. 3. Nor, as discussed, **infra,** would this appear to be an appropriate case to apply a "rule of necessity." Compare EC-COI-82-10 (rule applicable to achieve quorum); 80-100 (rule applicable only where there is a critical need and no other person employed by the commonwealth possesses the power to participate in the matter).

[5]/Under G.L. c. 43 §27,

[N]o mayor or member of the city council or school committee and no officer or employee of the city shall directly or indirectly make a contract with the city, or receive any commission, discount, bonus, gift, contribution, or reward from or any share in the profits of any person making or performing such contract, unless the mayor, such member, officer or employee, immediately upon learning of the existence of such contract, or that such contract is proposed, shall notify in writing the mayor, city council or school committee of the nature of his interest in such contract, and shall abstain from doing any official act on behalf of the city in reference thereto. In case of such interest on the part of an officer whose duty it is to sign such contract on behalf of the city, the contract may be signed by any other officer of the city duly authorized thereto by the mayor, or if the mayor has such interest, by the city clerk. . . (emphasis added)

CONFLICT OF INTEREST OPINION NO. EC-COI-83-116

FACTS:

You are a District Court Judge. A non-profit Corporation ("the Corporation") has been awarded a contract by the Division of Alcoholism at the Department of Mental Health to conduct for that Court driver alcohol education programs and treatment programs. See G.L. c. 90, §24(d). The contract was competitively bid. The Corporation has similar contracts to provide these services to other District Courts. An individual placed in such a program by a District Court pays a fee in the amount of $280 directly to the program. The amount of the fee has been set by the Division of Alocholism.

Your wife's son from her first marriage is employed by the Corporation as an "After Care Manager". In that capacity he "funnel[s] appropriate subjects to approved after-care vendors and . . . monitors their progress while under treatment." You state that "[a]t no time did [you] discuss the possibility of his being selected [for that position] with anybody at [the Corporation] either before or after his selection." You further state that except in emergency situations you do not make referrals to the program conducted by the Corporation and that they are made by another judge.

QUESTION:

Does the conflict of interest law (General Laws Chapter 268A) impose any restrictions on you with respect to the programs conducted by the Corporation by virtue of the fact that your wife's son is employed by the Corporation?

ANSWER:

Generally not, except as described below.

DISCUSSION:

As a District Court Judge you are a state employee as defined in the conflict of interest law. See G.L. c. 268A, §1(g). The provisions of that law relevant to your question are §6 and §23.

1. **Section 6**

Pursuant to §6, you may not participate [1/] in a "particular matter"[2/] in which, among others, a member of your immediate family has a financial interest. "Immediate family" is defined in §1(e) as "the [state] employee and his spouse and their parents, children, brothers and sisters." Your wife's son from a previous marriage would be considered a member of your immediate family. We do not interpret the use of the word "their" in the definition of immediate family to imply that only those children born to the employee and his spouse together are included. "Their" also modifies "parents . . . brothers and sisters." Obviously, the parents, brothers and sisters of either the employee or his spouse are meant to be included. See Buss; **The Massachusetts Conflict of Interest Statute: An Analysis,** 45 B.U. L. Rev. 299, 356 (1965).

Accordingly, you may not participate in a particular matter in which your step-son has a financial interest. If such a matter were to come before you, you would not only have to abstain but would also have to advise the official responsible for your appointment and the State Ethics Commission of the nature and circumstances of the particular matter and make full disclsoure of such financial interest. Under §6, the appointing official may then either 1) assign the particular matter to another employee, 2) assume responsibility for the particular matter, or 3) make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Commonwealth may expect from the employee, in which case it shall not be a violation for the employee to participate in the particular matter. Your appointing official is the Governor. In view of the constitutional provisions concerning separation of functions (see Constitution of Massachusetts, Part 1, Article 30), the legislature could not have contemplated that the Governor would be called upon to exercise a judicial function. Accordingly, in order to give the statute a "workable meaning", **Graham v. McGrail,** 370 Mass. 133, 140 (1976) which will avoid constitutional doubts, see, **Commonwealth v. Crosscup,** 369 Mass. 228, 234 (1975), we imply a delegation of the obligations imposed by §6 on the "appointing official" to the Chief Justice of the Supreme Judicial Court. See G.L. c. 211, §3.

Your wife's son would be deemed to have a financial interest in the court's decision to refer defendants to "after-care programs" if his continued employment by the Corporation turned on their being such referrals. Compare EC-COI-81-108, EC-COI-82-105. We need not address that issue since such referrals are usually made not by you but by another judge of the Westborough District Court. Even if his continued employment, in fact, did turn on their being such referrals, it would appear highly unlikely that it would turn on those rare referrals made by you in "emergency situations." Therefore, he would not, in any event, be deemed to have a financial interest in such sporadic referrals.

2. **Section 23**

Section 23 (para. 2) (3) prohibits a state employee from giving reasonable basis, by his conduct, 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. Recently, the Commission concluded that a District Court Judge violated this provision by assigning defendants to attend alcohol education programs given by a corporation employing his daughter. See **In the Matter of Robert N. Scola,** Commission Adjuciatory Docket No. 212.

It would appear that the circumstances in your case are sufficiently different from those in **Scola** that a similar conclusion would **not** be warranted. First, unlike the judge in that case, you generally do not make referrals. Second, in **Scola** the judge, himself, made the initial decision to use the corporation's services. In your case, that decision was made by the Department of Mental Health after a public bidding process. Finally, the family member in **Scola** was the only paid employee of that corporation.

If the circumstances you have described should change and, in particular, if you should be called upon to make referrals on a more regular basis, you should either seek a further advisory opinion or comply with the provisions of §6 outlined above.

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[1/] For purposes of c. 268A, "participate" is defined as to "participate in agency action or in a particular matter personally and substantially as a state . . . employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise." See §1(j).

[2/] For purposes of c. 268A, "particular matter" is defined to include "any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding. . ." See §1(k).

CONFLICT OF INTEREST OPINION NO. EC-COI-83-117

FACTS:

You are a full-time maintenance employee of the ABC Housing Authority (Authority) and are interested in receiving a housing subsidy from the Authority through the Section 8 program. Under the Section 8 program, the Authority enters into a "Housing Assistance Payments Contract" (Contract— with a landlord while the landlord enters into a lease with an eligible tenant. The tenant then owes a share of the rent under the lease to the landlord, with the balance of the total rent paid by the Authority under the Contract. See, 42 U.S.C. §1437(f).

QUESTION:

Does G.L. c. 268A permit you to receive a housing subsidy from the Authority while you remain a full-time Authority employee.

ANSWER:

No.[1]/

DISCUSSION:

As a maintenance employee of the Authority, you are a municipal employee for the purposes of G.L. c. 268A. See, G.L. c. 121B §7.[2]/ As a municipal employee, you are prohibited by G.L. c. 268A §20 from having a financial interest in a second contract made by the City of ABC (City) or an agency of the City, including the Authority. Since, under the terms of the Contract, a portion of your rental obligations to your landlord would be assumed by the Authority, you would have a financial interest in a second municipal contract in violation of §20. See, EC-COI-83-63; 81-189; 81-167.

None of the exemptions of §20 apply to your situation. Under G.L. c. 268A §20(b), full-time municipal employees may now qualify for second municipal contracts upon satisfying several conditions.[3]/ While your financial interest in the Contract would appear to satisfy the "public notice" requirements, your employment with the Authority, the contracting agency, precludes your eligibility for this exemption.

Section 20(e) also exempts the financial interest of municipal employees in municipal contracts in connection with the improvement or rehabilitation of their residences. However, you would not qualify for this exemption because your contractual financial interest is in relation to a rental subsidy, as opposed to residential improvement or rehabilitation.

The fact that the conditions imposed by the federal government under the Section 8 program are not as strict as those imposed by G.L. c. 268A §20 does not diminish the Commission's statutory obligation to enforce the provisions of G.L. c. 268A. While G.L. c. 268A was modeled after its federal counterpart, 18 U. S. C. 201 **et seq,** there are significant differences in the statutes' treatment of multiple contractual financial interests by government employees. Moreover, it does not appear that Congress intended to pre-empt the application of state law in implementing the Section 8 program. Compare, EC-COI-83-30.[4]/

DATE AUTHORIZED: August 16, 1983

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[1]/Although the Commission does not customarily render advisory opinions over municipal conflict of interest inquiries, the question which you pose is of statewide application and therefore appropriate for an opinion. This formal opinion will also provide a consistent interpretation to an area of law which has become the subject of uncertainty. See, e.g., Regulations Prescribing Standards of Conduct for Public Officials and Employees of Housing and Redevelopment Authorities issued by the Department of Community Affairs in August, 1977.

[2]/As a full-time employee, you do not qualify as a special municipal employee under G.L. c. 268A §1(n) and thereby become eligible for certain exemptions under the law; nor has the City Council expressly classified your position as a special municipal employee.

[3]/The §20 prohibition does not apply (b) to a municipal employee who is not employed by the contracting agency or an agency which regulates the activities of the contracting agency and who does not participate in or have official responsibility for any of the activities of the contracting agency, if the contract is made after public notice or where applicable, through competitive bidding, and if the municipal employee files with the clerk of the city or town a statement making full disclosure of his interest and the interest of his immediate family; and if in the case of a contract for personal services (1) the services will be provided outside the normal working hours of the municipal employee, (2) the services are not required as part of the municipal employee's regular duties, the employee is compensated for not more than five hundred hours during a calendar year, (3) the head of the contracting agency makes and files with the clerk of the city or town a written certification that no employee of that agency is available to perform those services as part of their regular duties, and (4) the city council, board of selectmen or board of aldermen approve the exemption of his interest from this section.

[4]/The principles expressed in this opinion would be applicable to other Authority employees as well. To avoid undue hardship, particularly with respect to those employees who may have relied upon previous regulations permitting their rent subsidy arrangement, the Commission will apply the provisions of §20 on a prospective basis only to those employees who are not currently receiving rent subsidies from the Authority under the Section 8 program.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-119

FACTS:

You are the Superintendent of Schools in the Town of ABC (Town). Just prior to your selection as superintendent, in July, 1982, the ABC School Committee (School Committee) awarded a five-year computer contract to DEF, a Rhode Island-based corporation which employs 80 field representatives and other employees. In September, 1982, DEF hired your wife as a sales representative/regional manager for a service area outside of the ABC area, and she does not have any direct dealings with the ABC School Department. Your wife's salary is based entirely on sales commissions, and she has no ownership interest in DEF.

QUESTION:

What restrictions does the conflict of interest law, G.L. c. 268A place on your activities with respect to present or future DEF contracts with the School Committee.

ANSWER:

You will be subject to the restrictions set forth below.[1]/

DISCUSSION:

As school superintendent for the ABC School Committee, you are a municipal employee for the purposes of G.L. c. 268A, §1(g). Three sections of G.L. c. 268A are relevant to your situation.

1. **Section 19**

This section prohibits you from participating[2]/ in any particular matter[3]/ in which a member of your immediate family, such as your wife, has a financial interest. The DEF contract is a particular matter, and your activities in signing, evaluating, recommending the contract or in preparing specifications for the contract could constitute paticipation in that particular matter. However, the limitations on your participation will arise under §19 only if your wife has a financial interest in the contract. Since your wife has no ownership interest in DEF, and her compensation from DEF is based solely on contracts with entities other than the School Committee, she does not have a financial interest in the contract between DEF and the School Committee; you may therefore participate in the DEF contract on behalf of the School Committee while your wife retains her present financial arrangement with DEF.[4]/

2. **Section 20**

This section prohibits you from having a financial interest in a second contract made by the Town of ABC or an agency of the Town.

However, your wife's employment with a company which has a contract with the School Committee does not place you in violation of §20. This conclusion is based on the fact that your wife has no financial interest in a contract with the Town or agency of the Town, and also because, in any event, her financial interest would not be imputed to you. Compare: EC-COI-80-105; 80-60; 83-37.

3. **Section 23**

As a municipal employee, you are also subject to the standards of conduct set forth in G.L. c. 268A, §23; three provisions contained within these standards would be applicable to your situation.

(a) Under §23 para. 3 (2), you are prohibited from improperly disclosing confidential information[5]/ acquired by you in the course of your official duties or using such information to further your personal interests. Your situation poses obvious potential problems under this paragraph because, on the one hand, you are married to an individual who is employed by DEF, and who presumably has a loyalty to DEF; on the other hand, you have access as school superintendent to internal information which would be of interest to DEF, for example, reviews of DEF's performance under the contract or evaluations of the merits of competitor proposals for future contracts. You should therefore carefully observe the mandate of this paragraph and refrain from disclosing to your wife any confidential information related to the DEF contract with the School Committee.

(b) Under §23 para. 2 (2), you may not use or attempt to use your official position to secure unwarranted privileges or exemptions for yourself or others. Although the prospective fact situation which you present does not pose inherent problems under this provision, you should bear it in mind in

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[1]/The advice rendered in this opinion is intended to guide your prospective conduct. This opinion does not constitute a review or determination of the propriety under G.L. c. 268A of acts which have already occurred.

[2]/For the purposes of G.L. c. 268A, "participate" means participate in agency action or in a particular matter personally and substantially as a state . . . employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

[3]/For the purposes of G.L. c. 268A, "particular matter" is defined as any judicial or other proceeding, application, submission, request for a ruling or other determination, contact, claim, controversy, charge, accusation, arrest, decision, determination, finding but excluding enactment of general legislation by the general court . . .G.L. c. 268A, §1(k).

[4]/You also ask whether the result would be affected if your wife were promoted to a salaried position with DEF. Given the hypothetical nature of the question, it would be premature to formulate a response at this time. However, the result would depend upon whether her salary were attributable to the DEF contract with the School Committee.

the course of your dealings with DEF as School Superintendent. In particular, you should refrain from discussing with DEF the subject of advancing your wife's employment status at DEF.

(c) Under §23 para 2 (3), you are prohibited from giving reasonable basis for the impression that any person can improperly influence or unduly enjoy your favor in the performance of your official duties, or that you are unduly influenced by the kinship, rank, position or influence of any party or person. This provision would be applicable to you whenever you are discussing the DEF contract with other emplyees of the School Department, particularly those employees who monitor or implement the contract. Inasmuch as you are responsible for the management of the School Department and presumably are in a position to affect personnel decisions such as contract renewal, promotions, and discipline, you should take steps to avoid giving the impression to these employees that your personnel decisions affecting them would be related to their specific evaluations or recommendations under the DEF contract.

DATE AUTHORIZED: August 16, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-120

FACTS:

You currently serve as an employee in the office of the Secretary of State and are also an elected, paid member of a City Council. Pending before the City Council is a local initiative petition proposing a measure ("Act"). Prior to any City Council vote on whether to place the measure on the 1983 city election ballot, the State Ballot Law Commission (SBLC) considered and dismissed objections to the measure which were based on the city's procedure in certifying the referendum signatures. Following the SBLC action, the City Council voted on a motion to place the measure on the ballot pursuant to G.L. c. 43, §40. You disqualified yourself from participating in the matter, and the motion failed 4-4. Following the vote, one of the petitioners filed a suit in the Supreme Judicial Court seeking an order that the City Council place the matter on the ballot. The only parties to the suit are City residents and officials. Among the parties who have filed amicus curiae briefs with the court is the Secretary of State's office. The Secretary of State does not possess any statutory or regulatory authority over the procedures for adopting local initiative petitions.

QUESTION:

Does G.L. c. 268A permit you to vote as a City Councillor on whether the Act should be placed on the ballot?

ANSWER:

Yes.

DISCUSSION:

As an employee of the Secretary of State, you are a state employee for the purposes of G.L.c. 268A. Under G.L. c. 268A, §4, you are prohibited from receiving compensation from any party other than the commonwealth in relation to any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest. Whether you would be prohibited from voting as a City Councillor on the placement of the Act on the 1983 ballot depends on whether the vote would be a matter in which the commonwealth or a state agency is a party or has a direct and substantial interest. On the basis of the information which you have provided, your vote would not fall within the §4 proscription.

The procedure by which municipalities adopt initiative petitions is governed by statute, G.L. c. 43, §§38-41, and is not subject to regulation by the Secretary of State's office. Therefore, local initiative matters are not customarily of direct and substantial interest to the commonwealth. While the prior SBLC proceedings were clearly matters in which a state agency was a party, the proceedings involved a procedural issue distinct from the particular matter on which you seek guidance. Further, the SBLC involvement in reviewing the City certification procedure for the petition signatures does not rise to the level of a direct and substantial interest by a state agency in your vote on whether to place the Act on the city election ballot.

Nor does the commonwealth appear to have a direct and substantial interest in the lawsuit pending before the Supreme Judicial Court. The lawsuit involves local residents and officials of the City and does not name as a party any state officials or state agencies. The fact that the Secretary of State's office, along with other private parties, has filed an **amicus curiae** brief does not, without more, give the Secretary of State's office a direct and substantial interest in your vote as City Councillor. See, EC-COI-83-67. Inasmuch as your vote would not violate §4, it is unnecessary to consider whether you qualify or are subject to any of the exemption under §4.

DATE AUTHORIZED: September 13, 1983

CONFLICT OF INTEREST OPINION EC-COI-83-122

FACTS:

You were recently elected as a member of the board of assessors in a Town of (Town). In that capacity you are responsible for determining the assessment of real and personal property in the Town. A cinema corporation (Cinema) leases commercial property in two locations within the Town for the purpose of exhibiting movies. During the past year the Cinema paid a personal property tax on property to the Town. Additionally the assessed value of the commercial property which Cinema leases is currently unresolved and is pending before the board.

Shortly after your election as assessor, you received from the Town Clerk a Cinema theater pass entitling you and a guest to attend movies at any Cinema theater free of charge. The pass is customarily given by Cinema to all elected Town officials through the Town Clerk who will have the names of newly elected officials typed on to the blank passes which the Clerk receives from Cinema. You have chosen not to use the pass pending the receipt of this opinion.

QUESTION:

Does G.L. c. 268A permit you to accept or use the free passes from Cinema?

ANSWER:[1]/

No.

DISCUSSION:

As a member of the Town board of assessors, you are a municipal employee for the purposes of G.L. c. 268A, and are subject to the standards of conduct contained in §23 of that statute. In particular you are prohibited under §23 para. 2 (3) from by your conduct, giving reasonable basis for the impression that any person can improperly influence or unduly enjoy your favor in the performance of your official duties, or that you are unduly affected by the kinship, rank, position or influence of any party or person. For the prohibition to apply, there need be no showing of actual favoritism or undue influence, but merely a reasonable impression.

On prior occasions, the Commission has closely questioned gifts distributed according to public position because the gift is often preceived by the public as improper and therefore diminishes public confidence in the credibility and impartiality of the government official's decisions. See EC-COI-83-4 [municipal officials violated §23(e) by accepting ticket reservation privileges accorded only to elected and certain appointed officials]; EC-COI-81-134 [state regulatory official may not accept a free trip to China sponsored by persons subject to his official authority]. On the basis of the information which you have presented, the Commission concludes that your acceptance and use of the Cinema passes would create a reasonable basis for the impression that Cinema would unduly enjoy your favor in the performance of your assessor duties. This conclusion is based on the fact that your received the pass solely because of your status as an elected official, and also that you received the pass from a large commercial taxpayer whose valuation is unresolved and may reasonably be expected to be decided by the board of assessors. You should therefore return the pass to Cinema.[2]/

DATE AUTHORIZED: September 13, 1983

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[1]/ Under G.L. c. 268A, §22 the Commission will customarily decline to render advisory opinions over municipal conflict of interest provisions and will refer the municipal employee to the Town Counsel or City Solicitor. However, the facts of your request raise issues of state-wide application and therefore this opinion will provide uniform guidance to all public employees similarly situated.

[2]/ In view of the Commission's legal conclusions under §23, it is unnecessary to determine whether the receipt of the passes would also violate G.L. c. 268A, §3(b) which prohibits the receipt of anything of substantial value for or because of an official act. Further, this opinion does not reach the issue of the propriety under G.L. c. 268A of the acceptance and use of Cinema theater passes by officials who would not reasonably expect to have official dealings with Cinema.

CONFLICT OF INTEREST OPINION NO. EC-83-123

FACTS:

You are presently employed by the commonwealth on a full-time basis in the executive office of administration and finance. You also own all of the outstanding stock of Associates, Inc. (Inc.), a corporation established in 1979; your spouse serves as president and you serve as treasurer and sales director. Since 1979, both you and your spouse have performed consulting services through the corporation. Commencing in November, 1982, and continuing to the present, your spouse has provided consulting services in an area in which she has worked for eight years and has acquired an expertise distinct from yours.

The Department of Public Welfare (DPW) is in the process of negotiating a consultant contract with a private company (ABC) for the provision of certain work. ABC has received funding under similar contracts with DPW since January, 1982. ABC would like to engage the services of your spouse in designing a work program, developing a funding proposal, and developing a work site with a major employer in the Boston area.

Your spouse would prefer to contract with ABC through Inc., rather than as an independent contractor. If she were to proceed in this manner, prior to the conclusion of any formal agreement with ABC, you would transfer all of your stock in the corporation to your spouse and resign from all positions with the corporation so that you would have no ownership interest in or legal rights or responsibilities with respect to the management of the corporation. This transfer of stock would be irrevocable and without contingencies or reversionary rights and would be made for consideration approximating the net book value of the corporation.

QUESTION:

Assuming that your spouse contracted with ABC through Inc. and you divested your interest in the corporation pursuant to your proposed arrangement, would you have a financial interest in your spouse's contract with a state agency in violation of G.L. c. 268A §7?

ANSWER:

No, subject to certain conditions set forth below.

DISCUSSION:

In your capacity as an employee of administration and finance, you are a state employee for the purposes of G.L. c. 268A and are therefore subject to the prohibitions of G.L. c. 268A §7 relating to your financial interest in contracts made by state agencies. Specifically, you would be prohibited from having a financial interest in the contract between DPW and ABC.[1/]

On the basis of the information which you have provided, the Commission concludes that your spouse's financial interest in the DPW contract with ABC will not be imputed to you for the purposes of §7. The fact that the assignment of your control and interests in Inc. would be made for consideration to an individual who has independent expert experience and background in the subject matter covered by the contract distinguishes your situation from EC-COI-83-37 and 83-111. In those opinions the Commission advised state employees that their circumstances of their assignment to their spouse did not constitute an "arms length transaction" and that they therefore effectively maintained a financial interest in their spouses' contracts with state agencies. Under the arrangement which you have proposed, the Commission will not attribute to you your spouse's financial interest in the ABC contract solely as a result of your marriage relationship. EC-COI-79-77. However, to assure that your assignment is an "arms length transaction," the funds which your spouse will use as consideration for the assignment should not be derived from bank accounts or other financial holdings which are at present jointly controlled by you and your spouse.

DATE AUTHORIZED: September 13, 1983

[1/]None of the exemptions in §7 would appear to apply to you. In particular, you would not qualify for an exemption under §7(b) because you are employed by a state agency which regulates the activities of DPW, the contracting agency. The provisions of the so-called "welfare exemption" under §7 para. 4 would also not apply because the services under the ABC contract would not be based on rates set by the Rate Setting Commission or DPW and would not be furnished directly to recipients of public assistance.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-125

FACTS:

You are employed on a full-time basis at a state college (ABC). In April, 1982, you started, with your family, a small business (DEF). The business is located in the garage of your residence. Your spouse is the president of DEF, and you and your son are employees of the company. In 1982, you loaned DEF $7,000 in start-up money, and you have received periodic loan repayments in lieu of salary in 1983. As an employee of the company, you assist your spouse in determining how much to pay for certain items. You indicate that the company had no income in 1982 and has had sales of approximately $5,000 in 1983.

ABC has recently solicited bids for a contract, and DEF would like to submit a bid for that contract.

QUESTION:

If DEF were awarded the contract, would you have a permissible financial interest in that contract?

ANSWER:

No.

DISCUSSION:

As an employee of ABC, you are a state employee for the purposes of G.L. c. 268A and are therefore subject to the restrictions of that statute. Under G.L. c. 268A, §7, you are prohibited from having a financial interest in a contract made by a state agency (other than your employment contract). For example, you could not personally contract with ABC.[1]/

If DEF were to contract with ABC, you would have a financial interest in that contract as well. This conclusion is based on the close connection which you have with the company. In effect, DEF is your company. You initiated the company, capitalized it, chose the location at your residence, and regularly participate in financial decisions for the company as an employee. Under these facts, the financial interest of DEF in any contract would be indistinguishable from yours. Buss, **The Massachusetts Conflict of Interest Law: An Analysis**, 45, B.U. Law Rev. 299, 375 (1965). Compare, EC-COI-83-37 where the Commission concluded that a state employee who had assigned his interest in a corporation to his wife retained a financial interest in his spouse's contract with the state where the assignment was not an arm's length transaction and where the wife had no previous expertise in the subject area covered by the contract.

Therefore, as long as your substantial involvement with DEF continues, DEF will be unable to contract with ABC. However, G.L. c. 268A, §7 would not prohibit DEF from having contracts through competitive bidding with state agencies other than ABC, provided that you file a statement with the Commission making full disclosure of the interest of you and your immediate family in the contract.

DATE AUTHORIZED: September 13, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-128

FACTS:

You are an Assistant Clerk-Magistrate with the Division of the District Court Department of the Trail Court. You are assigned to the "jury of six" session. Defendants who have waived a trial before a single district court justice or who are appealing the guilty finding of such a justice appear in the jury of six session. You assign work to other employees, empanel juries and monitor the session calendar. You generally do not act as a bail commissioner, appear at arraignments or issue arrest warrants. Occasionally you may be called upon to issue a warrant during evening hours when other clerks are unavailable.

You would like to be a stockholder and director of ABC, a private, for-profit corporation. ABC will offer a service providing blood alcohol content testing to drunk driving suspects. Individuals will be able to telephone the company and a registered nurse or emergency medical technician will be sent to take a blood sample. The sample will be delivered to a medical laboratory and an analysis mailed back for potential use at the trial on the drunk driving charge.

You and two other individuals wish to set up the corporation. You will not be involved with the provision of services or in the day-to-day operation.

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[1]/Although recent amendments to §7 have eased somewhat the broad prohibition against contracts with other state agencies, the statute retains the prohibition against an employee contracting with his own state agency.

You will serve as a director and stockholder, focusing your efforts on marketing the service. If successful at the outset, you intend to expand into other states, possible through franchising. You will receive dividends as a stockholder. You will not be compensated as a director, but may receive certain fringe benefits.

QUESTION:

May you be a stockholder and director of ABC and share in the profits of that firm while holding your position as assistant clerk-magistrate?

ANSWER:

You may receive dividends as a stockholder, but you are prohibited from receiving anything of value in return for serving as a director.

DISCUSSION:

As an assistant clerk-magistrate, you are a state employee as defined in the conflict of interest law, G.L. c. 268A, §1 et seq., and, as a result, are subject to that law.

Section 4 of the conflict law prohibits you from being compensated by anyone other than the Commonwealth in connection with any particular matter[1]/ in which the state is a party or has a direct and substantial interest. "Arrest" and "judicial proceeding" are particular matters and the state is a party to and has a direct and substantial interest in criminal proceedings. EC-COI-79-72. "Compensation" is defined as "any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another." G.L. c. 268A, §1(a).

Clearly, if you were to be paid to perform the [testing] services, you would be receiving compensation in connection with particular (i.e., arrests, criminal judicial proceedings) matters in which the state is a party in violation of §4. But, even though you will not be involved with the day-to-day operation of the firm, as a director you will have a role in the policies and direction of the company. Since, at least at the outset, all of the corporation's business will result from criminal actions brought by the Commonwealth, anything of value you receive in return for serving as a director will be compensation in connection with particular matters in which the state is a party and has a direct and substantial interest. Therefore, your receipt of any financial benefit as a result of your directorship from the coporation is prohibited by §4 as long as the company is primarily involved with drunk driving arrests in Massachusetts.

On the other hand, your receipt of dividends based on your stock ownership would not be prohibited by §4. These dividends are based on your ownership interest in the company rather than any services rendered by you. Therefore, the receipt of stock dividends would not be prohibited by §4.

Section 4 also prohibits your appearance as agent or attorney on behalf of [the testing service] in connection with matters in which the state is interested. You may not represent the company in any dealings it may have with state agencies.

Section 23 of the conflict law provides standards of conduct applicable to all state employees. That section prohibits the use or attempted use of your official position to secure unwarranted privileges for yourself or others. You must also avoid a course of conduct which gives reasonable basis for the impression that anyone may improperly influence or unduly enjoy your favor in the performance of your duties, or that you are unduly affected by the kinship, rank, position or influence of any party or person.

As a clerk-magistrate, you are constantly in contact with attorneys who may at some point have clients with a need for the [testing service]. You should not in any way exploit your access to these attorneys to generate interest in and business for [the testing service]. The fact that you are a clerk-magistrate should not be included in any promotional information circulated by [the testing service]. If a drunk driving case should reach the jury of six session and the defendant has utilized the [testing service], you should refrain from taking any action on it as a clerk-magistrate. You should not treat attorneys who use the [testing service] any differently than those who do not.

Under this section a state employee is also prohibited from accepting or engaging in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority, from improperly disclosing such information acquired by him in the course of his official duties and from using it to further his personal interests. You should not use any confidential information acquired in your position as clerk-magistrate to benefit yourself or [the testing service].

DATE AUTHORIZED: September 13, 1983

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[1]/For the purposes of 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 and petitions of cities, towns, counties and districts for special laws related to their governmental organization, powers, duties, finances and property." G.L. c. 268A, §1(k) (emphasis added).

CONFLICT OF INTEREST OPINION NO. EC-COI-83-129

FACTS:

You are an employee of ABC, Inc. (ABC) and you own more than 1% of that company's stock. You are performing services full-time for state agency DEF pursuant to a contract between ABC and DEF concerned with certain data for state agency GHI. At the time this contract was awarded, this particular work was handled by DEF, rather than within the GHI. You are the "Project Leader" on this contract and its terms require that DEF grant prior written consent to any replacement of you as Project Leader. DEF may cancel the contract if ABC does not seek and receive this consent.

Following a response to a Request for Proposals (RFP), ABC has been awarded a contract with the GHI.

QUESTION:

1. Are you a "state employee" for purposes of the state conflict of interest law, G.L. c. 268A?

2. If so, may you own stock in ABC while it has a contract with the GHI?

ANSWER:

1. Yes.

2. No.

DISCUSSION:

1. **Status as a State Employee**

The conflict of interest law defines "state employee," in relevant part, 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." G.L. c. 268A, §1(q).

This definition is generally not interpreted to include an emplyee of a corporation or vendor which contracts with the state. See, e.g., EC-COI-83-94. However, both the Commission and the Attorney General have held that such an employee is covered by the definition if the terms of the contract indicate that a specific individual's services are being contracted for. In Attorney General Conflict Opinion No. 854, a 50% stockholder in a corporation was specifically named in a contract between that corporation and a state agency. The state agency could cancel the contract if he failed to perform the duties designated. The Attorney General concluded that under these circumstances the individual was a state employee for the purposes of G.L. c. 268A. In Commission advisory opinion EC-COI-80-84, the Commission concluded that the partners in a law firm were "state employees" because the contracting state agency specifically contemplated that each of the firm's partners would work on the project for the state.

In your case, DEF specifically contemplates that you will be Project Leader for this contract. The terms of the contract require that ABC obtain written approval from DEF before replacing you. In fact, before accepting you as Project Leader, DEF required that you come in and demonstrate your abilities. All factors considered, you must be considered a "state employee" for the purposes of the conflict law.

2. **Stock Interest in ABC**

Section 7 of G.L. c. 268A prohibits a full-time state employee from having a financial interest in any contract made by a state agency. Your stock ownership in ABC creates a financial interest for you in the firm's contact with the GHI. Unless you qualify for one of the exemptions in §7, this financial interest is prohibited.

A recent amendment to the conflict law states that §7 will not apply:

> to a state employee other than a member of the general court who is not employed by the contracting agency or an agency which regulates the activities of the contracting agency and who does not participate in or have official responsibility for any of the activities of the contracting agency, if the contract is made after public notice or where applicable, through competitive bidding, and if the state employee files with the state ethics commission a statement making full disclosure of his interest and the interests of his immediate family in the contract, and if in the case of a contract for personal services (1) the services will be provided outside the normal working hours of the state employee, (2) the services are not required as part of the state employee's regular duties, the employee is compensated for not more than five hundred hours during a calendar year, and (3) the head of the contracting agency makes and files with the state ethics commission a written certification that no employee of that agency is available to perform those services as a part of their regular duties.

Although you would satisfy most of the requirements of this exemption, your work for the DEF involves computer processing of GHI data. GHI is the "contracting agency" on the contract in which you have a financial interest. As a result, you "participate in or have official responsibility for [some] of the activities of the contracting agency." Therefore, you do not qualify for this exemption, and unless you either divest yourself of your stock interest or eliminate your state employee status, you will be in violation of §7.[1]/

DATE AUTHORIZED: September 13, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-133

FACTS:

You are an appointed member of state agency ABC. Prior to that appointment, you were employed as an attorney in the City of DEF (City) Law Department. While in that position, you represented a city agency in matters before ABC involving the City. You also represented the city agency in negotiating a contract with a private firm selected by that agency. You negotiated the terms of that contract and oversaw payments made under it during implementation, but neither participated in carrying out the contract, nor could challenge any determination made. That contract contained certain ABC-required criteria relative to the determinations themselves and mandated use of certain generally accepted procedures. Appeals of determinations made pursuant to this contract may come before ABC during your tenure as a member.

You were also associated with a law firm of which your father and brother are currently members. You terminated that association upon your appointment to ABC. Your brother, as a member of the firm, currently has a case pending before ABC. You intend to abstain from participating in that case.

QUESTION:

1. May you participate as a member of the ABC in cases involving determinations made pursuant to the contract you negotiated for the City?

2. Will abstention from participation as an ABC member in the case in which your brother is counsel be sufficient for compliance with the conflict of interest law?

ANSWER:

1. Yes, as long as those cases concern only the determination and not any terms of the contract which you may have had discretion to negotiate.

2. Abstention and certain other steps outlined below will satisfy the requirements of the conflict of interest law.

DISCUSSION:

Upon terminating your employement with the City, you became a former municipal employee and, as a result, are subject to §§18 and 23 of G.L. c. 268A, the conflict of interest law.

Section 18(a) prohibits you from ever being compensated by or acting as agent or attorney for anyone other than the City in connection with any particular matter[1]/ in which the City is a party or has a direct and substantial interest and in which you participated as a municipal employee. The determinations made by the firm, as well as the ABC cases based on them, are particular matters in which the City is a party and has a direct and substantial interest. Should you participate as an ABC member in those cases, you will be receiving compensation from someone other than the City (i.e. the Commonwealth) in connection with those matters. But, your role as a City employee in connection with these particular matters was solely in the negotiation of the contract with the firm, and not in any way related to the performance of the individual determinations which will be at issue in the ABC cases. Even though those neogitations included mandating the formulas which had to be

[1]/Other exemptions within §7 would appear to be inapplicable. Inasmuch as the size of your stock interest exceeds 1% of ABC's stock, your financial interest would not qualify for an exemption which is limited to ownership interests of less than 1% of the stock of a corporation. See, G.L. c. 268A, §7 para. 2. Further, even if you were regarded as a special state employee under §1(o), you would not be eligible for a §7(d) exemption because your financial interest would be with a state agency (GHI) which also employs you. But see, G.L. c. 268A, §7(e).

[1]/For the purposes of 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 and petitions of cities, towns, counties and districts for special laws related to their governmental organization, powers, duties, finances and property." G.L. c. 268A, §1(k).

satisfied in the individual determinations, you did not participate "personally and substantially", as required in §18(a), in those determinations. Therefore, that section will not prohibit you from participating in ABC cases involving determinations made pursuant to the contract you negotiated.[2]/ Of course, §18(a) prohibits you from participating as an ABC member in any valuation case in which you were involved as a City employee.

Section 23 of the conflict law contains standards of conduct applicable to present and former state, county and municipal employees. Under this section a former municipal employee is prohibited from accepting or engaging in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority, from improperly disclosing such information acquired by him in the course of his official duties and from using it to further his personal interests. You are subject to the provisions of this section regardless of whether your private sector activities are restricted by the provisions of §18.

Upon appointment to the ABC, you became a state employee for conflict of interest law purposes. Section 6 of G.L. c. 268A prohibits you from participating in any particular matter in which you or a member of your "immediate family"[3]/ has a financial interest. The section further provides that should such a matter come before you, you must disclose to your appointing official and the Commission the nature of the particular matter and the financial interest in it.

Ordinarly, the appointing official has three options open to him or her. He may "(1) assign the particular matter to another employee; or (2) assume responsibility for the particular matter; or (3) make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the commonwealth may expect from the employee, in which case it shall not be a violation for the employee to participate in the particular matter." These provisions take the matter out of the hands of the individual employee and place it in the hands of the head of an agency or the head of a department who can then make a judgment about what should happen. Presumably, he is in a position to balance the administrative needs of the agency, the alternatives available, the character of the employee, and the significance of the financial interest involved. That the statute sets out three options does not mean that they will be available in any given situation. For instance, in the case of elected officials who do not have an appointing official, none of the options are available.

The members of ABC constitute a collegial body, of which the affirmative vote of a majority is necessary for any action. In these circumstances, §6 requires that you make the appropriate disclosure to your appointing official (the Governor) and the State Ethics Commission and that you then do not participate in the matter. Your appointing official has no further role to play. Compare, EC-COI-80-29. The particular matter in quesiton must then be resolved by the remaining members of ABC without your participation or the participation of anyone in your place.

In addition to §6, §23 prohibits the pursuit of a course of conduct which gives reasonable basis for the impression that anyone may improperly influence or unduly enjoy your favor in the performance of your official duties, or that you are unduly affected by the kinship, rank, position or influence of any party or person.

Your stated intention to refrain from participating in the ABC case being brought by your brother addresses the concerns raised by §§6 and 23. However, you should disclose the existence of this matter as provided in §6. Similarly, because of your relatively recent connection with determinations in the City, §23 issues arise in connection with City cases before ABC. Although the wisest course in the cases would seem to be abstention, the statute does not require that you take that step. You should be aware, however, that your actions on these cases may subsequently be examined for compliance with the terms of §23.

DATE AUTHORIZED: September 13, 1983

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[2]/Section 18(b) prohibits you, for one year after ending your City employment, from appearing personally before any agency of the City on behalf of anyone other than the city in connection with any particular matter in which the City is a party or has a direct and substantial interest, and over which you had official responibility (see, G.L. c. 268A, §1[j]) during that last two years of your City employment. Since your participation as an ABC member will not involve appearances before the City agencies as agent or attorney, this section does not apply.

[3]/For the purposes of G.L. c. 268A, "immediate family" is defined as the state employee, his spouse and their parents, brothers, sisters and children. G.L. c. 268A, §1(e).

CONFLICT OF INTEREST OPINION NO. EC-COI-83-136

FACTS:

You are an employee of the Executive Office of Communities and Development (EOCD). EOCD receives data from local entities (local housing authorities, municipalities, community action agencies) which are grantees for various funding programs administered by EOCD. The data relates to EOCD reporting requirements rather than day-to-day operations of these local entities. Your only contact with these entities is in connection with clarifying portions of data submitted. You have no decision-making authority over the local entities.

You would like to start a private business which would market a package of computer hardware and software to local housing authorities and other organizations involved in the management of assisted housing. You would have an agreement with a computer manufacturer which would supply the hardware and the software would automate various functions connected with management of assisted housing; e.g. accounting, tenant services, maintenance, personnel. You would also provide training in the use of the product and maintenance.

You expect that this business will take at least a year of development, which you would like to begin while still employed by the state. This development will involve assembling a team to work on the project, incorporating the business, writing computer programs and devising a marketing strategy. You intend to end your state employment when you begin publicly marketing the service.

EOCD, although aware that some local entities have begun to computerize, has not taken any position on this type of computerization and has not made any effort to promote or regulate the use of computers by these entities.

QUESTIONS:

1. May you pursue the development phase of the business while a state employee, provided you do not seek to sell your service to local agencies in Massachusetts?

2. May you offer your service outside the Commonwealth while still a state employee?

3. May you begin to sell your service within the state once you end your state employment?

ANSWERS:

1. Yes.

2. Yes.

3. Yes, provided you comply with the conditions set out below.

DISCUSSION:

As an employee of EOCD, you are a state employee as defined in the conflict of interest law, G.L. c. 268A, §1 et seq., and, as a result, are covered by the provisions of that law.

Section 4 of the conflict law prohibits you while a state employee from being compensated by, or acting as agent or attorney for, anyone other than the state in connection with any particular matter[1]/ in which the state is a party or has a direct and substantial interest. Grants made by EOCD to local entities are particular matters to which the state is a party. EC-COI-80-14. In addition, the extensive authority which EOCD has over local housing authorities, see EC-COI-83-25; also **Commissioner of the Department of Community Affairs v. Medford Housing Authority**, 363 Mass. 826, 830 (1973), gives the state a direct and substantial interest in most, if not all, of the actions of a local housing authoirity. However, as long as you do not intend to offer or implement your service to agencies you describe while you remain a state employee, you will not violate §4. Should you decide to offer the service to EOCD grantees or any other entities connected with or regulated by a state agency, you should seek another opinion.

Section 7 of G.L. c. 268A prohibits you from having a financial interest in a contract made by a state agency. If a client used state funds to purchase your service while you remain a state employee, it is possible that you would violate this section. This possibility is eliminated if you do not sell the service to any local agency in the Commonwealth.

Once you leave state service, you will be a former state employee. As such, you are prohibited

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[1]/For the purposes of 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 and petitions of cities, towns, counties and districts for special laws related to their governmental organization, powers, duties, finances and property." G.L. c. 268A, §1(k).

by §5(a) of G.L. c. 268A from being compensated by, or acting as agent or attorney for, anyone other than the Commonwealth in connection with any particular matter in which the state is a party or has a direct and substantial interest and in which you participated as a state employee. Currently, EOCD plays no active role in promoting or regulating the kind of computerization which you intend to offer. However, if EOCD does decide to play such a role, for example, in the form of a program promoting computerization, and you take part in the formulation of the policies, procedures and/or requirements on which EOCD's efforts are based, you would be prohibited by §5(a) from marketing your system to local entities in connection with that EOCD program. The program would be a particular matter in which you participated and you would be receiving compensation from someone other than the Commonwealth in connection with it. But, as long as you take no action as a state employee on the formulation or implementation of such a program, §5(a) will not prevent you from marketing your system to local entities dealing with EOCD, even if EOCD does pursue such a program because you will not have participated in it.

Section 23 of the conflict law sets out standards of conduct which cover all state employees. The section provides that, while you remain a state employee, you may not "use or attempt to use your official position to secure unwarranted prvileges or exemptions for yourself or others." In other words, you may not exploit your employment by EOCD in order to secure clients for your new business.

Two provisions of the standards of conduct will apply to you as a former state employee. These provisions prohibit a former state employee from accepting employment or engaging in any business or professional activity which will require her to disclose confidential information which she has gained by reason of her official position or authority and from, in fact, improperly disclosing such materials[2]/ or using such information to further her personal interest. You may not use confidential information which you have obtained during your EOCD employment in developing and promoting your private business.

DATE AUTHORIZED: October 3, 1983

[2]/These materials are defined as "materials or data within the exemptions to the definition of public records as defined by [G.L. c. 4, §7]."

CONFLICT OF INTEREST OPINION NO. EC-COI-83-137

FACTS:

You are an attorney and are currently employed by the General Court as legal counsel for a legislative committee. The scope of your responsibilities includes advising the committee on all legal matters, conducting research, drafting legislation and proposing amendments to bills. You recently filed a complaint in the case of [identifying information deleted]. The complaint was filed on behalf of the committee chairman and other members and employees of the committee in their capacity as residents of the commonwealth.

QUESTION:

Does G.L. c. 268A allow you to act as attorney for the plaintiffs while you remain employed by the General Court?

ANSWER:

No.

DISCUSSION:

As an employee of the General Court, you are a state employee within the meaning of G.L. c. 268A, Section 1(q), as are members of the General Court. Under G.L. c. 268A, Section 4(c), a state employee may not, otherwise than in the proper discharge of his official duties, act as attorney for anyone (other than the commonweath) in connection with a particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest. The lawsuit which you filed on would constitute a particular matter in which a state agency is both a party and has a direct and substantial interest.

In reviewing the exemptions to Section 4 it is clear that members of the General Court could permissibly act as attorney on behalf of the plaintiffs in the lawsuit because the appearance would be "before the court of the commonwealth." See, G.L. c. 268A, paragraph 5; EC-COI-82-137. It does not follow, however, that employees of the General Court would share the exemption to Section 4 which is currently limited to members of the General Court.

The plain language of Section 4 distinguishes legislators from non-legislators. This distinction reflects a view that legislators are customarily elected to represent the interests of their private constituency and therefore cannot be expected to

maintain the same degree of loyalty to the interests of the commonwealth which is expected of non-legislators. See, EC-COI-83-87, 83-102; Commission Advisory 83-2. The particular exemption at issue, while enacted as an amendment to G.L. c. 268A, is consistent with the intent of the special Commisison which drafted G.L. c. 268A to avoid "mak(ing)" membership in the Legislature so onerous as to make it financially impossible for qualified people to serve, and yet to draw definite lines marking the limits of acceptable practice." See, Report of the Special Commission on the Code of Ethics, 1962 House Doc. No. 3650, p. 12. The terms of the less restrictive application of Section 4 are limited to legislators and do not extend to their employees. To hold otherwise would be inconsistent with both the plain language of Section 4 and the policy behind the exemptions.

Further, your representation of the plaintiffs would not appear to qualify for the Section 4(c) exemption as "in the proper discharge of (your) official duties." The statute provides some latitude to an employee's appointing official to determine what would constitute the proper discharge of official duties, and the Commission will customarily defer to the appointing official's discretion. See, EC-COI-80-96, 81-89, 83-20; cf. 81-33. However, an appointing official's discretion under Section 4 is not unlimited. For example, in Commission Compliance Letter 81-21, the Commission indicated that the authorization given by Department of Mental Health officials to DMH employees with supplementary salary arrangements would not excuse or otherwise serve as a defense to a Section 4 violation. Whether any particular determination by an appointing official would so far exceed the customary job requirements for an employee as to frustrate the purposes of the statute is a judgement which ultimately rests with the Commission as the primary civil enforcement agency under G.L. c. 268A. See G.L. c. 268B, Section 3(1).

As a legislative employee, your responsibilities include research and drafting services for the committee. Those responsibilities exercised in the proper discharge of your official duties could reasonably extend to representing individuals in their capacity as legislators or members of the committee in a court suit, for example challenging a particular law or regulation as it affects the legislator or leadership in the official capacity. In contrast, the lawsuit which you filed was filed on behalf of the plaintiffs in their private capacity as residents of the commonwealth, and not as members of the committee. In view of the absence of a distinct institutional interest of the committee which would be served by your filing and pursuing the lawsuit, the Commission advises you that the proper discharge of your official duties would not reasonably extend to representing the plaintiffs in the lawsuit.

DATE AUTHORIZED: October 3, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-140

FACTS:

The CTFP consists of attorneys and staff under contract with DMH involved with the establishment of irrevocable trusts for residents of state schools for the mentally retarded. These trusts are established by conservators and guardians of retarded citizens who have been given authority to do so by the Probate and Family Court. The attorneys and staff of the CTFP handle the procedure of filing a petition in court asking that the conservator or guardian be given the authority to execute and fund the trust. The superintendent of the facility wherein the retarded individual resides, who, you state, is a fiduciary of that individual, is a party to this petition.

Once the authority to create the trust has been granted some or all of the retarded resident's assets are transferred to the court-appointed trustee, to be administered in accordance with a standard trust agreement prepared by DMH. That agreement provides that the trustee must annually file an account of the trust with DMH and that DMH must be notified of the intended resignation of a trustee. In addition, the superintendent of a facility in which a retarded individual resides, as a result of his fiduciary role, has the right and responsibility to intervene if the trust is not being administered in the best interest of the retarded resident.

After formation, these trusts may require the services of an attorney. Attorneys who have participated on DMH's behalf in the formation of these trusts would like to perform these services.

QUESTION:

Can a former CTFP attorney, who participated in the establishment of CTFP trust, be employed as an attorney by that trust?

ANSWER:

No.

DISCUSSION:

Certain provisions of the state conflict of interest law, G.L. c. 268A, apply to former state employees. Section 5(a) of that chapter prohibits a former state employee from ever being compensated by or acting as agent or attorney for anyone other than the Commonwealth in connection with any particular matter[1]/ in which the state is a party or has a direct and substantial interest and in which he participated as a state employee.

Section 5(b) prohibits a former state employee for one year from appearing personally before any state agency as agent or attorney for anyone other than the Commonwealth in connection with any particular matter in which the state is a party or has a direct and substantial interest and over which he had official responsibility[2]/ during the last two years of his state employment.

The trust is a particular matter. The ongoing monitoring by DMH of certain trust matters, combined with the state school superintendent's rights and responsibilities as a fiduciary to the retarded resident give the state a continuing direct and substantial interest in the trust. A former CTFP attorney who participated in the establishment of the trust would be prohibited by section 5(a) from being compensated by, or acting as agent or attorney for, anyone other than the Commonwealth in connection with that trust. Therefore, such an attorney could not provide legal services, whether on a paid or unpaid basis, to a trust if he or she participated in its creation.[3]/

DATE AUTHORIZED: October 25, 1983

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[1]/For the purposes of 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 and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property." G.L. c. 268A, section 1(k).

[2]/For the purposes of G.L. c. 268A, "official responsibility" is defined as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action." G.L. c. 268A, section 1(i).

[3]/The prohibition in section 5(b) would also apply for one year after an attorney left the employ of CTFP, but the prohibition of section 5(a) renders the application of section 5(b) moot.

CONFLICT OF INTEREST OPINION
NO. EC-COI-83-141

FACTS:

You are involved in Group Day Care Licensing for the Office for Children (OFC).

The OFC has, among its criteria for licensing of day care centers, certain minimum staffing requirements. Employees in the centers can be classified as "aide," "teacher" or "head teacher" depending upon the amount of early childhood education completed. Although many colleges in your Region, both public and private, offer early childhood courses, the OFC has not adopted any standards upon which an individual course can be evaluated. As a result, you have begun to identify the courses being offered, examine their content, and assign them a value for satisfying the educational requirements for group day care center staffing.

Some of the colleges in your Region operate group day care centers on campus which must be licensed by your office. Others lease space to organizations which operate the on-campus centers.

You wish to pursue part-time employment at a college as an instructor of an early childhood course. Although you have not chosen the exact subject matter of this course, you have stated that an administration - oriented course, which would be of interest primarily to "head teachers" who have already satisfied the most stringent educational requirements and hold management or administrative positions in group day care centers, may be a possibility.

QUESTION:

May you pursue part-time employment at the college level as a teacher of early childhood education courses while employed by the OFC in your present capacity?

ANSWER:

Only in certain limited situations described below.

DISCUSSION:

As an employee of the OFC, you are a state employee as defined in the conflict of interest law, G.L. c. 268A, section 1 **et seq.**, and, as a result, are subject to the provisions of that law.

Section 4 of the conflict law prohibits a state employee from being compensated by, or acting as agent for, anyone other than the state in connection with a "particular matter"[1]/ in which the state is a party or has a direct and substantial interest. The certification of the educational background of group day care facility staff for facility licensing purposes is a particular matter in which the state is a party. If you were to be paid by a **private** college for teaching a course offered principally to satisfy the OFC's requirements, you would be receiving compensation from someone other than the state in connection with that particular matter. Therefore, you would be prohibited from teaching at any private college an early childhood course which was designed parimarily for meeting the OFC's educational requirements for group day care center staff members. A course in early childhood education not eligible for such use, such as an administration-oriented course, would not be prohibited by section 4. Section 4 also would not apply to a course taught at a state college because your compensation would not be from someone other than the state.

Section 6 of the conflict law prohibits you from participating as a state employee in a particular matter in which you, or a business organization in which you are an employee, have a financial interest. If such a matter comes before you, the statute provides that you shall advise your appointing official and the Ethics Commission of the nature and circumstances of the particular matter and the financial interest in it. Your appointing official shall then either 1) assign the matter to another employee; 2) assume responsibility for the matter; or 3) make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Commonwealth may expect from you. Copies of that determination must be sent to you and to the Ethics Commission.

The evaluation of a course by you for OFC licensing purposes is a particular matter, as is the licensing of an individual group day care center. You would have a financial interest in the

[1]/For the purposes of 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 and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property." G.L. c. 268A, section 1(k).

evaluation of the course you would teach. Therefore, you would have to comply with the disclosure provisions of section 6. This would also be true of your evaluation of other early childhood courses at the private college where you teach because that college would be a business organization in which you are an employee with a financial interest in the evaluation. This would also be true of the licensing of any group day care center operated by or located at a private college.

Section 7 prohibits a state employee from having a financial interest in a contract made by any state agency. Your employment relationship with a state college would be a contract with a state agency in which you would have a financial interest. However, an exemption in the section states that it shall not prohibit a state employee from teaching on a part-time basis in an educational institution of the Commonwealth, provided the employee does not participate in or have official responsibility for the financial management of that institution. Therefore, the section will not prohibit your part-time employment as a teacher at a state college.

You will also be subject to the section 23 standards of conduct which are applicable to all state employees. Section 23 prohibits you from using your official position to secure unwarranted privileges or exemptions for yourself or others. For example, you may not improperly exploit your access to OFC officials and information or your authority over OFC group day care licensees, in order to benefit your part-time employment. The section also prohibits pursuit of a course of conduct which gives reasonable basis for the impression that any person can improperly influence or unduly enjoy your favor in the performance of your official duties, or that you are unduly affected by the kinship, rank, position, or influence of any party or person. You should take care to abide by this provision, especially in your dealings with group day care center staff members who are or have been enrolled in your course.

DATE AUTHORIZED: October 25, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-143

FACTS:

You are employed by a state agency (ABC). Your duties involve responsibilities for the ABC's Financial Division. You also work part-time as a Bail Commissioner pursuant to an appointment received from the Superior Court. G.L. c. 276, section 57. As such, you take bail from persons (defendants) who have been arrested for committing criminal misdemeanors or felonies. You perform this service during the hours when the court is not in session, primarily evenings and weekends. Pursuant to court rules, you receive a fee from each defendant. See "Rules Governing Persons Authorized To Take Bail" of the Superior Court.

QUESTION:

Does the conflict of interest law, G.L. c. 268A, permit you to serve as a Bail Commissioner while working for the ABC?

ANSWER:

No.

DISCUSSION:

You are a state employee by virtue of your employment with the ABC, a state agency. Section 4(a) of G.L. c. 268A prohibits a state employee, otherwise than as provided by law for the proper discharge of official duties, from receiving or requesting compensation[1]/ from anyone other than the Commonwealth or a state agency in relation to any particular matter[2]/ in which the Commonwealth or

[1]/ For the purposes of G.L. c. 268A, "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 for another. G.L. c. 268A, section 1(a).

[2]/ For the purposes of 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. . . G.L. c. 268A, section 1(k).

a state agency is a party or has a direct and substantial interest. In your position as a Bail Commissioner, the fee which you receive constitutes compensation. It is received from the defendant, who is someone other than the Commonwealth or a state agency. That fee is not provided for by law for the proper discharge of your official duties since it not received in connection with your duties as an ABC employee. The fee is in relation to a particular matter, an arrest, judicial proceeding or determination. The Commonwealth is a party and has a direct and substantial interest in the matter because it involves an arrest pursuant to a violation of the state's criminal laws and, any ensuing judicial proceedings will be brought by the Commonwealth against the defendant. On the basis of these facts, the Commission concludes that your employment as a Bail Commissioner violates section 4(a) of the law and you must refrain from any further compensated activity in this position.

DATE AUTHORIZED: October 25, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-145

FACTS:

The Walter E. Fernald State School (Fernald) is a facility within the Department of Mental Health (DMH). Fernald operates the Templeton Colony (Colony) in Baldwinville, MA which houses 182 mentally retarded men. In addition to the support services Templeton Colony receives from DMH, the Ferncol Friends Inc., a private, non-profit corporation (Corporation), was established to provide further assistance to the Colony. The primary goal of the Corporation is to provide activities and other benefits for the Colony's residents. To this end, the Corporation raises significant funds which it makes available to the Colony to support the client programs. The Corporation does not have a contract with DMH to provide services to the Colony.

The Corporation also has an unpaid Advisory Board (Board) which consists of "citizens interested in the problems of retardation and human handicap." See By-Laws of Ferncol Friends, Inc. The Board members are not members or officers of the Corporation. The role of the Board is to assist the Corporation in providing support to the Colony by developing or identifying programs which require the Corporation's financial support. The Board also keeps the Corporation aware of the needs of mentally retarded citizens within and outside the Colony. The Board consists primarily of present state employees who are staff members of the Colony.

QUESTION:

Does the conflict of interest law, G.L. c. 268A, permit the employees of the Colony to serve as members of the Board?

ANSWER:

Yes, subject to the limitations discussed below.[1]/

DISCUSSION:

As state employees working at the Colony, the provisions of section 4(c) apply to the individuals in question. Section 4(c) prohibits a state employee from acting as agent or attorney, otherwise than in the proper discharge of his official duties, for anyone other than the state in connection with any particular matter[2]/ in which the state is a party or has a direct and substantial interest. This provision is designed to prevent state employees from assisting non-state parties such as the Corporation in their dealings with the state. Decisions and determinations concerning programs and activities involving the residents of the Colony are particular matters in which the state, through DMH, has a direct and substantial interest. As long as the state employees on the Board do not act as

[1]/You should disseminate the contents of this advisory opinion to the DMH employees who serve on the Board.

[2]/For the purposes of 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 . . . G.L. c. 268A, section 1(k).

the Corporation's representative or spokesperson before DMH or other state agencies in relation to these matters, they will not violate section 4(c). By merely serving on the Board, a state employee will not violate the law. For example, it is permissible for state employees to participate in internal Board discussions or recommendations related to the Colony. See, EC-COI-82-45, 81-158. On the other hand, by appearing before any state officials or agencies on behalf of the Board, by signing, in their Board capacity, documents or correspondence directed to state officials or agencies, or by acting as spokespersons for the Board in their dealings with the state, state employees would be acting as the agent of the Corporation in violation of section 4(c). See, **United States v. Sweig,** 316 F. Supp. 1148 (S.D.N.Y. 1970).[3]/

Section 23 of the law also applies to those state employees who also serve on the Board. This section provides that no state employee shall "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 of any other party or person."

This provision addresses the activities of Board members as state employees should matters involving the Corporation come before them in that capacity. They must avoid giving the impression that they are favoring the Corporation in pursuing their state duties. This provision would apply where Board members are involved in their state capacity in determining how the revenue from the Colony's Cordwood and Logging Program is divided between the Commonwealth and the Corporation.

This section further prohibits a state employee from improperly disclosing confidential information or using such information to further his personal interest. In this regard, the state employees on the Board are prohibited from divulging to the Corporation confidential information they acquire as staff members of the Colony or using that information as the basis of their recommendations to the Corporation.

DATE AUTHORIZED: October 25, 1983

[3]/The activities described above are merely examples and do not constitute the entire range of conduct which would rise to the level of "agency" within the meaning of section 4(c). Should questions arise over the application of this statute, state employees serving on the Board may request further guidance from the Commission.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-147

FACTS:

You are currently employed by a state agency (ABC) on a full-time basis. In that capacity you have no job-related responsibilities which pertain to the manner in which the ABC issues, redeems or administers any bonds that it has sold for the purposes of obtaining money to finance its programs. Prior to your employment with ABC, you and your husband jointly purchased three units of a Trust sponsored by DEF, a private brokerage and investment firm. The trust series from which you have purchased three units (valued at approximately $1,000 each) has sold a total of 12,000 units for investment purposes and has within its portfolio $12,200,000 in tax-exempt securities. As of December 1, 1982 the trust series had invested $2,665,000 (approximately 22% of the value of the portfolio) in various bonds issued by ABC.

QUESTION:

Does G.L. c. 268A permit you to retain the three units of the Trust while you serve as a full-time ABC employee?

ANSWER:

Yes.

DISCUSSION:

As a full-time employee of ABC, you are a state employee for the purposes of G.L. c. 268A. Consequently, you are subject to the restrictions of G.L. c. 268A as they apply to state employees.

Section 7 of G.L. c. 268A prohibits state employees 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 a party, of which interest he has knowledge or has reason to know." This broad prohibition has been tempered by the second paragraph which exempts from section 7 financial interests consisting of the ownership of less than one percent of the stock of a corporation. The basis of this exemption was the determination by the

Special Commission which drafted G.L. c. 268A "that such a holding should not be considered detrimental conflict of interest." Final Report of the Special Commission on Code of Ethics, 1962 House Doc. No. 3650, p. 14. In this regard, the Special Commission observed that "an employee who owns some shares of telephone stock should not be punished because the state contracts for telephone service" **Id.**

In EC-COI-83-113, the Commission concluded that a bond issued by ABC for one of its programs was a contract made by a state agency within the meaning of G.L. c. 268A, section 7. However, in that opinion the Commission did not reach the issue of whether the purchase of a small fraction of the units of a trust which includes ABC bonds and which is sponsored by a brokerage firm would qualify for the "ownership interest" exemption under section 7 para. 2. On the basis of the facts which you have presented, the Commission concludes that your financial interest would qualify for the aforementioned exemption. In effect, you have an ownership interest in .025 percent of the principal and net income of the Trust. In view of the analogy of your Trust ownership interest to the ownership interest in a corporation, as well as the stated purposes of the exemption under section 7 para. 2, your trust ownership interest qualifies under this exemption. See, Buss, **The Massachusetts Conflict of Interest Statute: An Analysis**, 45 B.U. Law Rev. 299, 376 n. 399 (1965). Compare, G.L. c. 268A, section 7 para. (c) which conditions exemption for members of the General Court on the lack of a ten percent proprietary interest "in the corporation or other commercial entity with which the contract is made. . ."[1]/

DATE AUTHORIZED: November 15, 1983

[1]/Inasmuch as your ABC position does not involve the issuance, redemption or administration of ABC bonds, your ownership of three units which include ABC bonds would not constitute the use of your official position to secure an unwarranted privilege for yourself or the improper disclosure of confidential information in violation of G.L. c. 268A, section 23. Nevertheless, you should be aware of these principles and guide your conduct accordingly.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-148

FACTS:

You are currently working full-time as an engineer at a state school. You would like to accept a part-time position as an engineer at a Massachusetts correctional institution (MCI). You would work approximately 20 hours per week (four hours per day) in this position at a rate of compensation of $10.62 per hour. Your duties at MCI will involve servicing its power plant and you will not have any direct contact with the inmates.

QUESTION:

Does the conflict of interest law, G.L. c. 268A, permit you to accept the position at MCI and maintain your position at the state school?

ANSWER:

Yes, subject to certain conditions discussed below.

DISCUSSION:

As a full-time employee working at the state school, you are a state employee for the purpose of the conflict of interest law. See G.L. c. 268A, section 1(q). Section 7 of the law generally prohibits full-time state employees from having a financial interest in a contract made by a state agency beyond their original contract of employment. Until recently, your prospective employment with MCI would have been prohibited. However, during the 1982 legislative session, the General Court eased the restrictions of section 7 by enacting the following exemption:

> This section shall not prohibit a state employee from being employed on a part-time basis by a facility operated or designed for mental health care, public health, correctional facility or any other facility principally funded by the state which provides similar services which operates on an uninterrupted and continuous basis; provided that such employee does not participate in, or have official responsibility for, the financial management of such facility, that he is compensated for such part-time employment for not more

than four hours in any day in which he is otherwise compensated by the commonwealth, and at a rate which does not exceed that of a state employee classified in step one of job group XX of the general salary schedule contained in section forty-six of chapter thirty, and that the head of the facility makes and files with the state ethics commission a written certification that there is a critical need for the services of the employee.

At the time that this legislation was pending, the General Court was considering several proposals which would have allowed various facilities, as those described above, to hire present state employees to fill positions in social service programs run on a twenty-four-hour-per-day basis which were customarily difficult to staff. See, e.g., 1982 House Doc. No. 124. In light of this background, the primary issue in your case is whether your work involving the MCI power plant is the type of activity contemplated by this exemption. For the reasons below, the Commission concludes that your prospective employment with MCI qualifies for the section 7 exemption.

Although the primary emphasis of this exemption focuses on human service programs which envision direct client contact, the plain language of the exemption broadens its scope. According to principles of statutory interpretation, the meaning of a statute must be construed from the wording of the statute, **Commonwealth v. Gove,** 366 Mass. 351 (1974). It is proper to go to outside sources to construe the statutory intent only where the plain language is ambiguous or the language leads to an absurd result. **Attorney General v. School Committee of Essex,** 387 Mass. 326 (1982); **New England Medical Center Hospital, Inc. v. Commissioner of Revenue,** 381 Mass. 748 (1980). The Commission finds that the language of the exemption is clear on its face and unambiguous. Further, the result which follows in your situation as a consequence of this finding is reasonable and does not warrant the imposition of conditions which do not appear on the face of the statute. Therefore, under the facts you have provided, your prospective employment with MCI is covered by the section 7 exemption. Your conditions of employment comply with the requirements of the exemption and the head of the facility has filed a written certification with the Commission that there is a critical need for your services.

DATE AUTHORIZED: November 15, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-153

FACTS:

You are Building Commissioner in a Town (Town). You and your wife jointly own various vacant lots in the Town and contemplate construction of buildings on these lots for subsequent sale. In order to secure the various permits and approvals required by the Town for this construction, you may have to appear before agencies of the Town.

In August, you received an advisory opinion from the Town Counsel regarding the propriety of proceeding as detailed above while holding the position of Building Commissioner. The Town Counsel ruled that both Section 107.5 of the State Building Code and Section 17 and 23 of G.L. c. 268A, the state conflict of interest law prohibited you from pursuing the planned construction. You have asked the Commission to review that opinion.[1]/

QUESTION:

Does your proposed construction and sale of buildings on lots jointly owned by you and your wife in the Town, while you are Building Commissioner in the Town, violate G.L. c. 268A, the conflict of interest law?

ANSWER:

No, as long as you comply with the restrictions outlined below.

DISCUSSION:

As Building Commissioner in the Town you are a municipal employee as defined in the conflict of interest law, G.L. c. 268A, Sections 1 et seq., and, as a result, are subject to the provisions of that law.

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[1]/Section 22 of the conflict law authorizes Town Counsels to issue advisory opinions regarding the application of G.L. c. 268A to municipal employees. The Commission does not ordinarily review opinions issued by Town Counsels pursuant to that authority. However, to the extent that the Town Counsel in your case purports to rely on Commission interpretations in his ruling, the Commission will clarify those interpretations. The Commission takes no position on the Town Counsel's interpretation of and reliance on the State Building Code because the Commission's interpretative authority extends only to G.L. c. 268A.

Section 17 of the conflict law prohibits a municipal employee from being compensated by (Section 17(a)) or acting as agent or attorney for (Section 17(b)) anyone other than the Town in connection with any particular matter[2]/ in which the Town is a party or has a direct and substantial interest. "Compensation" is defined in the statute as "any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another." G.L. c. 268A, Section 1(a). Section 17 also contains an exemption which states that the section shall not prevent a municipal employee from acting with or without compensation, as agent or attorney for or otherwise aiding or assisting members of his immediate family except in those matters in which he has participated or which are the subject of his official responsibility; provided, that the official responsible for appointment to his position approves. The definition of "immediate family" includes your spouse. G.L. c. 268A, Section 1(e).

The Town permits and approvals required for construction of these buildings are particular matters in which the Town is a party. Since the proceeds from a sale of real property do not constitute compensation as defined in the conflict law (see EC-COI-82-85), you would not violate Section 17(a). Section 17(b), however, can be violated even where no compensation is involved. Since the property is jointly owned, any appearances you make before Town agencies will be on behalf of not only yourself but also your wife.* If such appearances involve particular matters outside the authority of the Building Commissioner, you will not violate Section 17(c) as long as your appointing official gives his or her approval. However, you will not be able to appear on matters within the authority of the Building Commissioner so long as you own the property jointly.

Section 19 of G.L. c. 268A prohibits a municipal employee from participating as such in any particular matter in which he or any member of his immediate family has a financial interest. The statute further provides that it shall not be a violation of Section 19 if the municipal employee first advises the official responsible for his appointment of the nature and circumstances of the particular matter, makes full disclosure of the financial interest, and receives in advance of participation a written determination made by the appointing official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee. This section prohibits you from taking any action as Building Commissioner in connection with your property, unless you receive a written exemption from your appointing official.

Section 23 of the law provides certain standards of conduct applicable to all municipal employees. The section prohibits the use or attempted use of your official position to secure unwarranted privileges or exemptions for yourself or others, the pursuit of a course of conduct which gives reasonable basis for the impression that any person can improperly influence or unduly enjoy your favor in the performance of your official duties or that you are unduly affected by the kinship, rank, position or influence of any party or person.

As Building Commissioner in the Town, you have regular access to Town officials and have authority over various construction matters in the Town. You would violate the provisions of section 23 if you improperly exploit your access to Town officials to aid your construction plans, thereby using your official position to secure unwarranted privileges. You also may violate section 23 if you give any special consideration or treatment in your capacity as Building Commissioner to any contractors with matters before you whom you may have employed to work on your property, because you would give reasonable basis for the impression that you are improperly influenced in the performance of your official duties by your private relationship with these contractors. Although these provisions do not prevent you from pursuing your planned construction, you should take great care to abide by their terms.

DATE AUTHORIZED: November 15, 1983

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[2]/For the purposes of 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 and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, finances and property." G.L. c. 268A, Section 1(k).

*Appearing on just your own behalf does not constitute appearing as an "agent." See EC-COI-83-12.

CONFLICT OF INTEREST OPINION
NO. EC-COI-83-156

FACTS:

You are an employee of the Department of Public Welfare (DPW). In your private capacity, you are a real estate broker. As a DPW employee, you filed a non-support complaint in the District Court on behalf of a recipient of public assistance (Recipient) against her ex-husband. Prior to filing the complaint, you discovered that the Recipient was selling her home through a multiple listing book with a real estate company with whom you were not affiliated. You obtained this information when checking the multiple listing book pursuant to your private real estate business. However, you never discussed this matter with the Recipient prior to the Show Cause Hearing held on the non-support complaint.

At the Show Cause Hearing the defense attorney mentioned that the Recipient's house was for sale to support the position that the proceeds from the sale of the house should serve as the Recipient's sole source of support rather than money from her ex-husband. The Clerk of the Court (Clerk) then indicated that he was interested in buying a home in the same area as the Recipient's and the house was described to him. At the conclusion of the hearing, the Court issued the non-support complaint against the ex-husband because the parties were unable to reach a voluntary agreement.

During the weekend following the Hearing, the Clerk called you at home and arranged to have you show him the Recipient's house and eight other houses of comparable value. The Recipient's house was selling for $135,900. The Clerk decided to buy it and offered $122,000. You and the listing broker took the Clerk's offer to the Recipient's home. The Recipient rejected it and you asked her what she would accept for the house. The Recipient made a counter-offer of $128,000. You then called the Clerk from the Recipient's home and informed him of the counter-offer, which he then accepted. The listing broker did the paperwork for the Recipient and you did the paperwork on behalf of the Clerk.

At a Pre-Trial Conference, after the Purchase and Sale Agreement was signed by the parties, but before the closing, the Recipient and her ex-husband agreed upon a dollar amount for support. The proceeds from the sale of the Recipient's house were not considered in reaching the support agreement.

As one of the brokers in the real estate transaction, you are entitled to a commission from the sale of the house. The arrangement is such that the listing broker and your real estate company will split the 6% commission in half. You will receive $1,700 of your company's portion.

QUESTION:

May you accept the broker's commission without violating the conflict of interest law, G.L. c. 268A?

ANSWER:

No.

DISCUSSION:

As an employee of DPW, you are a state employee subject to the provisions of section 23. The applicable provision of this section prohibits a state employee from using or attempting to use his official position to secure unwarranted privileges or exemptions for himself or others. By accepting the broker's commission from the sale of the Recipient's house you would violate this section.

The Commission has applied section 23 to prohibit commercial arrangements involving inherent exploitation by a state employee of an individual with whom the employee has acquired a relationship which turns on trust or reliance in carrying out his state responsibilities. In EC-COI-81-66, the Commission prohibited a state employee from conducting his private business, involving catalog sales, with state employees whom he supervised and with the client population which his agency served. This same provision also prohibited a state employee from soliciting sales for his private business from the clients he served in his official capacity and from state consultants under his supervision. See EC-COI-82-64. In each instance, the Commission determined that business generated by the state employee in these situations from their supervisees or clients could be attributed to pressure the supervisees or clients felt to maintain a positive relationship with the state employee. Similarly, the Commission finds that by acting as the broker in a private transaction involving a client with whom you are working in your official capacity, you were in a position to exert pressure on the client to take action to your financial benefit. The Recipient may have felt compelled to make a counter-offer to the clerk when you asked what she would accept for the house based on the fact that you were handling her non-support suit. In light of these facts, your acceptance of the broker's commission would violate section 23.

DATE AUTHORIZED: November 15, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-157

FACTS:

You are an employee of the Suffolk County Mosquito Control Project (Project), a government agency established by special legislation in 1973. See, St. 1973, c. 606. The Project is administered by a five member commission appointed by the State Board of Reclamation (SRB), a state agency within the Department of Food and Agriculture (DFA). See, G.L. c. 252, §§1-24. The Project is one of eight entities in the commonwealth established through special legislation to investigate, construct and maintain mosquito control works within specified geographic areas. All Project work is under the direction and supervision of SRB. St. 1973, c. 606, §3. Your salary is paid out of the state treasurer from the SRB consultant account and is derived from an annual appropriation by the General Court to the SRB. See, St. 1983, c. 289, Item Account No. 2520-0900. To meet the expenses of the Project, the State Treasurer may assess member communities of the Project a proportionate share of the costs. St. 1973, c. 606, §2. All expenditures of the Project are reviewed and approved by the Executive Office of Environmental Affairs (EOEA), and DFA performs accounting functions for the Project. As a Project employee, you are specifically defined as a person in the services of the commonwealth for the purposes of eligibility for group life, health and accident insurance. See, G.L. c. 32A, §2(b). For the purposes of retirement benefits, you are a member of the Suffolk County Retirement System. See, G.L. c. 32, §28(4).

You are interested in performing consultant services after hours to public and private entities concerning mosquito control.

QUESTIONS:

1. In your capacity as a Project employee, are you subject to G.L. c. 268A?

2. Assuming that you are, what limitations does G.L. c. 268A place on your proposed consulting activities?

ANSWER:

1. You are a state employee for the purposes of G.L. c. 268A.

2. Your consulting activities will be subject to the limitations set forth below.

DISCUSSION:

1. **Jurisdiction**

The prohibitions of the conflict of interest law, G.L. c. 268A, apply to all individuals, whether paid or unpaid, who provide services for a state, county or municipal agency within Massachusetts. Whether an individual covered by G.L. c. 268A will be characterized as either a state employee, a county employee or a municipal employee in most cases automatically flows from the name of the government agency. However, this is not invariably the case. See, Buss, **The Massachusetts Conflict of Interest Statute: An Analysis,** 45 B.U. Law Rev. 299, 310 (1965) "[M]erely looking at the name or geographic scope of an agency's function will not remove all uncertainty from the characterization problem"].

Where an agency possesses characteristics of more than one level of government, the Commission will review the interrelation of the agency with those levels to determine the agency's status under c. 268A. For example, in EC-COI-82-52, the Commission concluded that the Greenfield-Montague Transportation Area was a state agency for the purposes of G.L. c. 268A in view of the control and funding from the State Department of Transportation. Similarly, in EC-COI-81-100, the Commission found the Hanscomb Field Advisory Commission to be a state, rather than municipal entity, because of its advisory function to a state agency. Compare, EC-COI-83-63 [regional school district is an independent municipal agency under G.L. 268A]; EC-COI-83-63 [regional housing authority is a county agency for the purposes of G.L. c. 268A in view of control exercised by county commissioners]. On the basis of its review of the structure and operation of the Project, the Commission concludes that the Project is an instrumentality of a state agency, in view of the interrelation between the Project and the commonwealth. **In the Matter of Louis L. Logan,** 1981 Ethics Commission 40, 45-56. This conclusion is based primarily upon the control and oversight of Project activities exercised by state agencies, and the funding of the Project through annual appropriations of the General Court. While it would have been desirable for the General Court to have removed any uncertainty over the Project's characterization under G.L. c. 268A, as it has done

for housing authorities pursuant to G.L. c. 121B, §7, the characterization of the Project as a state agency appropriately takes into account the commonwealth's control of the Project.

As a state employee, you are subject to the restrictions which G.L. c. 268A places on your outside consulting activities. In particular, two sections of G.L. c. 268A are relevant to your situation:

[The remainder of the opinion reviews the provisions of §4 and §7 of G.L. c. 268A].

DATE AUTHORIZED: December 13, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-158

FACTS:

You are employed on a full-time basis as a pathologist at the University of Massachusetts Medical Center (Center). You are interested in working nights and weekends as an assistant medical examiner for ABC County. Your activities in that position would be within the supervisory authority of the chief medical examiner, whose office, together with the commission on medicolegal investigation (Commission), is located at the medical school of the University of Massachusetts (Medical School). G.L. c. 38, §1B. The chief medical examiner, by statute, maintains a faculty affiliation with the Medical School. Id. The dean of the Medical School is one of the fifteen Commissioners on medicolegal investigation. The Office of Chief Medical Examiner (Office), in conjunction with the Medical School, conducts certain educational, research and training programs. G.L. c. 38, §1B. All fees and expenses of the medical examiners and associate medical examiners are now paid by the Commonwealth, as are all costs and expenses of the Office and the Commission. Id.

QUESTION:

Assuming that assistant medical examiner duties are funded by the Commonwealth, would you qualify for a §7 exemption permitting you to serve in such a capacity while maintaining your full-time employment at the Center?

ANSWER:

Yes.[1]/

DISCUSSION:

In your capacity as a pathologist at the Center, you are a state employee within the meaning of G.L. c. 268A, §1(q). As a state employee, you are prohibited by §7 from having a financial interest in another contract made by a state agency. Inasmuch as your duties as an assistant medical examiner would be funded by the Commonwealth, your financial interest in that position would fall within the broad §7 prohibition. Your situation would, however, qualify for the major exemption under that section, which is set out in §7(b). That exemption provides that a state employee may have a financial interest in contracts made by a state agency if he:

> is not employed by the contracting agency or an agency which regulates the activities of the contracting agency and does not participate in or have official responsibility for any of the activities of the contracting agency, if the contract is made after public notice...and if the state employee files with the state ethics commission a statement making full disclosure of his interest and the interests of his immediate family in the contract, and if in the case of a contract for personal services (1) services will be provided outside the normal working hours of the state employee, (2) the services are not required as part of the state employee's regular duties, the employee is compensated for not more than five hundred hours during a calendar year, and (3) the head of the contracting agency makes and files with the state ethics commission a written certification that no employee of that agency is available to perform those services as a part of their regular duties. G.L. c. 268A, §7(b).

As an assistant medical examiner, you would provide services, not otherwise required as part of your duties, on nights and weekends. The chief medical examiner has stated that you would work approximately 12 to 15 hours a month, and

[1]/A prior State Ethics Commission decision, issued to you on July 19, 1983, was based on the assumption that medical examiners' duties were funded at the County level thereby raising problems under §4 of G.L. c. 268A. See EC-COI-83-104. That decision remains valid where county funds are in fact used. However, due to a recent change of procedures whereby such duties are now state-funded, the State Ethics Commission has re-analyzed your situation under §7 of the conflict of interest law.

therefore would not be compensated for more than 500 hours in a calendar year. As a pathologist for the Center, you are employed by neither the Office of Chief Medical Examiner nor the Commission. While there is some interrelation between the Office, the Commission and the Medical School in terms of personnel, location and certain educational programs, it does not rise to the level of the M('ical School "regulating" the former two entities. "'Regulate' means to govern or direct according to rule or to bring under the control of constituted authority, to limit and prohibit, to arrange in proper order, and to control that which already exists." Black's Law Dictionary (5th ed. West, 1979) citing **Farmington River Co. v. Town Plan and Zoning Commission of Town of Farmington**, 25 Conn. Sup. 125, 197 A.2d 653, 660 (1963). The Medical School has neither jurisdiction over nor responsibility for either the Office or the Commission. The State Ethics Commission therefore concludes that your receipt of compensation for assistant medical examiner duties would not violate the conflict of interest law provided that:

1. you file with the State Ethics Commission a disclosure of your financial interest in the contract with the Office of Chief Medical Examiner and the Commission, and
2. the Chief Medical Examiner files a written certification with the State Ethics Commission that no employee is available to perform those services as a part of his or her regular duties.

DATE AUTHORIZED: December 13, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-161

FACTS:

You presently work full-time for the Cape Cod Planning and Economic Development Commission (CCPEDC) of Barnstable County. You would like to pursue personal employment outside of Barnstable County as a consultant, offering your services to private firms and cities and towns. The work for your clients would involve reviewing problems and engineering plans. It might also include assisting towns with grant applications where you also paticipated in Barnstable County's application for the same funding.

QUESTION:

Will the conflict of interest law, G.L. c. 268A, allow you to pursue this type of personal employment?

ANSWER:

Yes, subject to the restrictions discussed below.

DISCUSSION:

You are a county employee as that term is defined in §1(d)[1]/ by virtue of your employment with CCPEDC. See, EC-COI-81-119. As such, you may not receive compensation from, nor act as agent for anyone other than Barnstable County in relation to any particular matter[2]/ in which Barnstable County is a party or has a direct and substantial interest. G.L. c. 268A, §11. Generally, this section of the law will not prevent you from accepting personal employment with other public[3]/ or private entities outside of the Barnstable County area as long as the matters on which you work are not of direct and substantial interest to Barnstable County. However, there is one area where you must exercise caution. Section 23 of the law prohibits a county employee from accepting other employment which will impair his independence of judgment in the exercise of his official duties. See §23 para. 2(1). This section would prohibit you from working in your consultant position on the grant application of a client if you also worked on Barnstable County's application for the same funds. This prohibition would apply notwithstanding the fact that your client would not be located in Barnstable County because of the competing interests of the two entities for whom you work. See EC-COI-80-94.

DATE AUTHORIZED: December 13, 1983

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[1]/"County Employee," a person performing services for or holding an office, position, employment or membership in a county agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis. G.L. c. 268A, §1(d).

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

[3]/Should you become a consultant to the state or a municipality, you would be subject to additional provisions of the law which are not addressed here. If this situation develops, you should request another opinion based on the specific facts of the case.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-164

FACTS:

You are a teacher in the ABC school system and have been recently elected as Mayor of ABC. Pursuant to the ABC City Charter, in your capacity as Mayor you will also be the chairman of the seven member ABC School Committee. Upon assuming the office of Mayor, you intend to take an unpaid leave of absence from your teaching position for the duration of your service as Mayor.

QUESTION:

What limitations does G.L. c. 268A place on your School Committee activities in view of your right to return to your teaching position?

ANSWER:

You are subject to the limitations set forth below.[1/]

DISCUSSION:

Upon assuming the office of Mayor, you will be a municipal employee within the meaning of G.L. c. 268A, §1 (g). Under G.L. c. 268A, §19 you are prohibited from participating,[2/] in relevant part, in any particular matter[3/] in which you have a financial interest. Inasmuch as you will return to your teaching position at the conclusion of your mayoral service, you have a financial interest in that position. The compensation for your teaching position would not involve a determination of general policy where your interest would be shared with a substantial segment of the population of the municipality. See, **Graham v. McGrail**, 370 Mass. 133, 139. G.L. c. 268A, §19 (b) (3). The scope of your financial interest would include not only the compensation for the position and the inclusion of funding to increase the compensation for the position, **Graham v. McGrail, id.,** but also determinations related to the retention of the position. For example, if the School Committee were to consider a reduction in the level of teaching services which might lead to an elimination of your teaching position, you would have a financial interest in that matter. The prohibition of §19 requires you to refrain from participating whenever such matters come before you. To participate in a matter encompasses more than the act of voting, **id.** at 138, and includes discussing the merits of these determinations with other members of the School Committee. The safest course would be for you to leave the room whenever a matter affecting the compensation for your teaching position comes before you. This is not to say that you would have a financial interest in every matter related to teacher compensation. For example, you could participate in reviewing a grievance filed by a particular teacher as long as the outcome of the grievance did not affect your financial interest. Similarly, you could participate in deciding the level of funding for collective bargaining units other than the teachers' unit as long as that decision does not affect the compensation for your teaching position.

As a municipal employee, you are also subject to the standards of conduct contained in G.L. c. 268A, §23. In relevant part, you are prohibited by this section from

1. using or attempting to use your official position to secure unwarranted privileges or exemptions for yourself or others and

2. by your conduct, giving reasonable basis for the impression that any person can improperly influence or unduly enjoy your favor in the performance of your official duties, or that you are unduly affected by the kinship, rank, position or influence of any party or person. G.L. c. 268A, §23 para. 3 (2) (3).

You should keep these standards in mind whenever matters affecting teachers come before you on the School Committee.

DATE AUTHORIZED: December 13, 1983

[1/] You have requested this opinion from the Commission rather than from the incumbent City Solicitor whom you intend to replace. The City Solicitor has acceded to your pursuing this question with the Commission.

[2/] For the purposes of G.L. c. 268A, "participate" means participate in agency action or in a particular matter personally and substantially as a state . . . employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

[3/] For the purposes of 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. . . G.L. c. 268A, §1 (k).

[4/] As an elected official, you have no appointing official who can grant you permission to participate where "the interest is not so substantial as to be deemed likely to affect the integrity of [your] services." Compare, G.L. c. 268A, §19 para. 2. **District Attorney for the Hampden District v. Grucci**, 1981 Mass. Adv. Sh. 2125, 2128 n. 3.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-165

FACTS:

You are the Commissioner of the Metropolitan District Commission (MDC). Since 1972, the MDC has been involved in the planning and implementation of an extensive zoo development project in Franklin Park, Boston. The MDC is currently considering hiring Jerry Johnson (Johnson), president of Jerry M. Johnson, Inc. (JMJI), to serve as an exhibit design producer to perform certain design and fabrication work. Your advisory opinion request relates to whether your hiring Johnson would render him in violation of any jurisdictional limitations contained in G.L. c. 268A.

The background of the project is as follows:

In 1972 the MDC and the Boston Zoological Society (BZS) embarked upon a program to develop a "state-of-the-art" enclosed zoo facility at Franklin Park. The development project was to include four circular pavilions, a variety of outdoor animal exhibits, and renovations to existing zoo buildings. Johnson was designated by the BZS as the individual designer to perform animal exhibit design and supervision under a four-year agreement with BZS. During several years of planning and design development studies, increases in construction cost estimates forced cutbacks in the original project's scope. Finally, in 1977, the MDC eliminated three of the four pavilions and divided the remaining project into phases. The first phase centered on the Tropical Forest pavilion, a circular structure which would enclose approximately an acre of floor space. The pavilion was to be filled with plants, rockwork, and animals and educational exhibits appropriate to an African rain forest.

In March, 1978, the MDC selected Weidlinger Associates, Inc. as its prime design consultatnt. JMJI was specifically named under the contract as a subconsultant exhibit designer; the contract also identified JMJI's compensation and personnel schedule for the design work.

In March, 1980, following problems with the construction of exterior exhibits, the MDC decided to centralize the control of the project under one contract with Weidlinger responsible for the design and Johnson as the subcontractor for both interior and exterior exhibits. Accordingly, in September, 1980, the MDC entered into a "minimum package" contract with Weidlinger to design all interior exhibits, site work, and utilities necessary to make the Tropical Forest pavilion operational. As part of the minimum package, JMJI, which had been working on preliminary planning and design of the zoo exhibits for nearly eight years, was chosen to design all natural and educational exhibits, acting as Weidlinger's subcontractor. The engineering aspects of the contract were the responsibility of other parties. Additionally, Johnson was specifically designated to direct and participate in team meetings concerning the preparation of construction documents.

By the end of 1981, drawings and other documents produced under MDC's minimum package contract were substantially complete. The MDC thereafter sought to hire an exhibit design producer to complete the design of the pavilion's exhibits and fabricate the exhibits. The MDC proposed that the exhibit design producer would subcontract with a general contractor, who would be selected through competitive bidding, and whose responsibilities would include construction of supports and surfaces needed to install the exhibit design producer's exhibits.

Following discussions of this proposal, an agreement was reached between the State Department of Capital Planning and Operations, MDC, and the Designer Selection Board (DSB), the state agency responsible for identifying qualified designers for State agency buildings. Under this agreement, 1) MDC was to remain responsible for administering the minimum package construction project, 2) the DSB was to solicit applications for the contract, review applicants, and submit names of qualified finalist firms to MDC, and 3) MDC was to select the producer and to negotiate contract terms. In October 1982, DSB reviewed applicants for the work and selected Johnson as the first-ranked finalist.

QUESTION:

Would the MDC's hiring of Johnson as an exhibit design producer place Johnson in violation of G.L. c. 268A, §1 (q)?

ANSWER:

No.

DISCUSSION:

Although the Commission does not customarily render formal advisory opinions to agency heads concerning the conduct of third parties, your question is appropriate for a formal

opinion inasmuch as it raises a jurisdictional question under G.L. c. 268A, it presents an issue of first impression, and would provide guidance to your agency with respect to any potential liability for recision of the contract under G.L. c. 268A, §9.

1. Status as a State Employee

During the period of Johnson's performing services with Weidlinger under contracts with the MDC [since March, 1978], Johnson has been a "state employee" for the purpose of G.L. c. 268A.[1]/ This definition is generally not interpreted to include an employee of a corporation or vendor which contracts with the state. See, e.g., EC-COI-83-94. However, both the Commission and the Attorney General have held that such an employee is covered by the definition if the terms of the contract indicate that a specific individual's services are being contracted for. For example, in Attorney General Conflict Opinion No. 854, a 50% stockholder in a corporation was specifically named in a contract between that corporation and a state agency. The state agency could cancel the contract if he failed to perform the duties designated. The Attorney General concluded that under these circumstances the individual was a state employee for the purposes of G.L. c. 268A. In Commission advisory opinion EC-COI-80-84, the Commission concluded that the partners in a law firm were "state employees" because the contracting state agency specifically contemplated that each of the firm's partners would work on the project for the state. More recently, in EC-COI-83-129, the Commission reached this same conclusion with respect to an individual whose services were specifically contemplated, reviewed and approved by the state.

Based upon a review of the zoo development-related documents between the MDC, Weidlinger and JMJI since March, 1978, the Commission concludes that Johnson's services were specifically called for by the MDC. The MDC wished to utilize Johnson because he had already acquired an expertise in the zoo exhibit design through his BZS work; accordingly, he and his company were identified as the subcontractor under the MDC contract with Wiedlinger. Johnson's role included directing and participating in team meetings concerning the preparation of construction documents. Given the specialized role which the MDC wished Johnson to fulfill under the Weidlinger contract, Johnson was a "state employee" for the purposes of G.L. c. 268A.

2. Application of Jurisdictional Limitations in §1 (q)

Within the definition of "state employee" in §1 (q) are the following conditions:

No construction contractor nor any of their personnel shall be deemed to be a state employee or special state employee under the provisions of paragraph (o) or this paragraph as a result of participation in the engineering and environmental analysis for major construction projects either as a consultant or part of a consultant group for the commonwealth. Such contractors or personnel may be awarded construction contracts by the commonwealth and may continue with outstanding construction contracts with the commonwealth during the period of such participation; provided, that no such contractor or personnel shall directly or indirectly bid on or be awarded a contract for any construction project if they have participated in the engineering or environmental analysis thereof. This language, which was the result of a 1977 amendment to §1 (q) [see St. 1977, c. 245], does not apply to Johnson.

The plain language of the amendment exempts from the definition of "state employee" or "special state employee" only construction contractors and their personnel who have participated in the engineering and environmental analysis for major construction projects in the commonwealth. The role which Johnson and JMJI played under the Weidlinger contracts were primarily exhibit design; the engineering and analyses were the responsibility of other parties. Nor was Johnson, strictly speaking, a construction contractor for the project. In view of the limited scope of the 1977 amendment, a broad application of the amendment would be inconsistent with the stated legislative purpose. See, **Commonwealth v. Gove,** 366 Mass. 351, 354 (1974). If a more flexible coverage is now deemed desirable, the General Court is the appropriate forum to effectuate that goal.

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[1]/The conflict of interest law defines "state employee," in relevant part, as " 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. . ." G.L. c. 268A, § (q).

Even if the exempting language of the amendment could be regarded as ambiguous, a review of the legislative history surrounding the enactment of St. 1977 c. 245 confirms that the General Court did not intent to include individuals such as Johnson within the scope of the amendment. The original bill, 1977 House Doc. No. 2843 was intended to "expedite the employment of construction tradesmen on major construction projects." The stated purpose of the drafters was to relax the restrictions on construction contractors who have participated in the engineering and environmental analysis without impairing the legislative purpose behind G.L. c. 268A. During the course of consideration of the bill, certain perfecting amendments were made, such as a change in the title to "authorize certain construction contractors to participate in state projects." There is no suggestion, however, that a broader coverage was proposed or considered by the General Court. To the contrary, both the original and final versions of the bill which became St. 1977, c. 245 were limited to construction contractors and applied only where such contractors were involved in the engineering and environmental analysis for major construction projects.

3. Conclusion

In view of this jurisdictional conclusion, the Commission advises that you Johnson is neither exempt from the definition of "state employee" nor subject to the conditions of the 1977 amendment to §1 (q) which might, in effect, prohibit his selection as exhibit designer on a project for which he previously worked as a contractor.[2/]

DATE AUTHORIZED: December 28, 1983

[2/]The advice contained in this opinion is limited to the jurisdictional application of G.L. c. 268A to Johnson. It is not intended to constitute a review of Johnson's prior activities to determine whether other provisions of G.L. c. 268A may have been violated. Nor does this opinion pass on the propriety of appointing Johnson under other statutes.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-171

FACTS:

You are in the Division of Standards (DOS) within the Executive Office of Consumer Affairs. DOS has responsibility for carrying out the weights and measures obligations of the state. G.L. c. 98, §29. To this end, the director of DOS or his inspectors examine various commodites and devices throughout the state to ensure the accuracy of weights and measures. See G.L. c. 98, §32 et seq. DOS has direct responsibility for ensuring this accuracy in towns with a population of 5,000 or less. G.L. c. 98, §33A. In cities or towns with a population over 5,000, the mayor or selectmen must appoint local sealers of weights and measures, who have concurrent jurisdiction with DOS. See G.L. c. 98, §34-35 and §32 respectively. Towns may combine to have one local sealer for the whole territory. G.L. c. 98, §36.

Since 1973, you have also held the part-time position of Sealer of Weights and Measures in ABC, a town with a population in excess of 20,000. Because the job of local sealer is part-time, pays little, and requires some training and skill, cities and towns have apparently had difficulty in finding qualified persons to serve in those positions. You further state that it is the consistent practice of DOS to assign an inspector who is a part-time local sealer to a territory different from the one for which he works as a local sealer.

QUESTION:

Whether G.L. c. 268A permits the practice of DOS employees, and, in particular, yourself, holding part-time positions as local sealers.

ANSWER:

No.[1/]

[1/]Although this advisory opinion is directed to you as the individual who has requested the opinion, the conclusion would apply to other DOS employees who also perform local sealer of weights and measures duties.

DISCUSSION:

As a full-time employee of DOS, you are a state employee as defined in G.L. c. 268A, §1 (q) and are therefore subject to provisions of G.L. c. 268A, the conflict of interest law. Section 4(a) of G.L. c. 268A provides:

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[2]/ in which the commonwealth or a state agency is a party or has a direct and substantial interest.

The determinations made by local sealers in the testing and sealing of weighing or measuring devices are particular matters. These deteminations are of direct and substantial interest to DOS because they are made by the local sealers in conformity with the standards promulgated by DOS. Specifically, pursuant to G.L. c. 98, §29, DOS adopted the "National Bureau of Standards Handbook 44, Specifications, Tolerances and Other Technical Requirements for Weighing and Measuring Devices, 1982 Edition" as the rules and regulations in relation to weighing and measuring devices and the use thereof. See 202 CMR 2.09, 4.00. "The regulations are applicable to state and municipal weights and measures officials in their official inspection and tests of weighing and measuring devices as prescribed by statute." Mass. Admin. Reg. 309 at 1 (1982). Because of DOS' interest in local sealer determinations, you are prohibited under §4(a) from receiving compensation for such duties while you are simultaneously the Assistant Director of DOS.

In 1980, however, an exemption was added to §4 providing that a state employee may hold elective or appointive office in a municipality and receive compensation for his municipal duties as long as he does not vote or act on any matter[3]/ which is within the purview of the state agency by which he is employed or over which he has official responsibility.[4]/ See G.L. c. 268A, §4 as amended by St. 1980, c. 10. See also EC-COI-83-86. Since the passage of the "municipal exemption" in 1980, the Commission has examined whether a state employee's duties as a municipal employee come within the purview of his state agency and has prohibited proposed municipal employment on several occasions in light of the "purview" language. See EC-COI-83-26; EC-COI-82-89; EC-COI-82-39.

You were appointed as a local sealer for the Town of ABC by the Board of Selectmen in 1973. Under G.L. c. 98, §32, both the lcoal sealers and DOS have concurrent powers to inspect any weighing or measuring devices in a town, and if a violation of law is discovered, to make and prosecute a complaint. The Commission has previously held that a state employee will not qualify for the §4 municipal exemption where his municipal duties are within the concurrent jurisdiction of the agency by which he employed. See, EC-COI-82-120. Alternatively, the §4 municipal exemption is not available to you because your local sealer duties would involve matters within the purview of your state agency. See, e.g., EC-COI-82-89. Your local role as tester and sealer of commercial devices constitutes the local enforcement of state weighing and measuring standards, as promulgated by DOS. See G.L. c. 98, §29, 202 CMR 2.09, 4.00. Accordingly, you may not continue performing local sealer duties for compensation while you remain employed by DOS.[5]/

DATE AUTHORIZED: December 28, 1983

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[2]/"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, detemination, finding, but excluding enactment of general legislation by the general court and petitions of cities and towns, counties and districts for special law related to their governmental organizations, powers, duties, finances and property." G.L. c. 268A, §1 (k).

[3]/Included are the particular matters defined in footnote 1.

[4]/For the purposes of G.L. c. 268A, "official responsibility" is defined as the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1 (i).

[5]/To the extent that Attorney General Conflict Opinion No. 236 is inconsistent with G.L. c. 268A, §4 and opinions of the Commission interpreting §4 the Commission declines to follow it.

CONFLICT OF INTEREST OPINION NO. EC-COI-83-174

FACTS:

You are a member of the Boston School Committee (School Committee). Pursuant to the enabling statute, each member of the School Committee may appoint a confidential administrative assistant who is exempt from the civil service law. In practice, each School Committee member is allotted a certain sum for administrative assistant salaries, and each member exercises sole discretion as to how many assistants should be hired, whom they will be, and their salaries. You indicate that, in view of the confidential relationship between School Committee members and their administrative assistants, the full School Committee does not formally review or approve the appointment of administrative assistants.

QUESTION:

Does G.L. c. 268A permit you to select a member of your immediate family to serve as your administrative assistant on the School Committee?

ANSWER:[1]/

No.

DISCUSSION:

In your capacity as a member of the School Committee, you are "municipal employee" within the meaning of G.L. c. 268A, §1 (g). **Graham v. McGrail**, 370 Mass. 133, 134 (1976). As a municipal employee you are subject to the restrictions of G.L. c. 268A, §19 which disqualifies you from taking certain actions in your municipal employee capacity. Specifically §19 prohibits you from participating[2]/ in any particular matter[3]/ in which, in relevant part, a member of your immediate family [4]/ has a financial interest. Although §19 provides an exemption procedure under which municipal employees may be allowed to participate where the financial interest "is not so substantial as to be deemed likely to affect the integrity of the [employee's] services, . . ." This exemption is not available to you as an elected municipal employee. **District Attorney for the Hampden District v. Grucci**, 1981 Mass. Adv. Sh. 2125, 2128 n. 3.[5]/

The decision to select an administrative assistant is a particular matter under §1 (k). Should a member of your immediate family have a financial interest in this decision, §19 would prohibit your participation in the decision. The plain language of §19, therefore, would disqualify you from selecting a member of your immediate family to serve as your administrative assistant on the School Committee. This result is consistent with previous Commission rulings interpreting §19. See, **In the Matter of John A. Pellicelli,** 1982 Ethics Commission 100; EC-COI-81-102; 82-10; 82-180.

Following the enactment of G.L. c. 268A in 1962, there was some ambiguity over whether "nepotism" was intended to be covered by §19. Notwithstanding the plain language which seemingly prohibited employees from appointing their family members to public positions the Special Commission which drafted G.L. c. 268A indicated that the subject matter of nepotism should be treated under the standards of conduct [§23] rather than under the criminal sections [such as §19]. See, **Final Report of the Special Commission on Code of Ethics,** 1962 House Doc. No. 3650, p. 9. However, the view of the Special Commission was later criticized as inconsistent with the language of §19, see, Braucher, **Conflict of Interest in Massachusetts,** in Perspectives of Law, Essays for Austin Wakeman Scott, 25 (1964) and apparently not followed in the subsequent enforcement of §19. Nonetheless, until 1983, no appellate court decision had addressed the inconsistency between the plain language of §19 and the Special Commission's report.

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[1]/Although this answer is directed to you as the public employee who has requested the opinion, the advice contained in the opinion would apply to other members of the School Committee as well.

[2]/G.L. c. 268A, §1 (j) defines "participate," as 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.

[3]/G.L. c. 268A, §1 (k) defines "particular matter," 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 and petitions of cities, towns, counties and districts for special laws related to their governmental organization, powers, duties, finances and property.

[4]/G.L. c. 268A, §1 (e) defines "immediate family," as the employee and his spouse, and their parents, children, brothers and sisters.

[5]/In 1982, the General Court considered comprehensive legislation filed by the Commission which, in part, would have provided an exempting avenue for elected municipal employees under §19. See, 1982 House Doc. No. 1235, §16. This particular proposal was not approved.

In August, 1983, the Supreme Judicial Court removed whatever doubt remained over the proper construction of §19. In **Sciuto v. City of Lawrence,** 389 Mass. 939 (1983), the Court ruled that a municipal director of public safety violated §19 by promoting his brother to the ranks of lieutenant and captain in the municipal police force. In response to the contention that nepotism was not covered by §19, the Court stated that the Special Commission's statement was difficult to reconcile with the express language of §19, **id,** 148, and adopted the position expressed by Justice Braucher in **Conflict of Interest in Massachusetts, supra.** Therfore, in view of the Court's recent definitive statement, there is no longer any room for doubt that §19 prohibits municipal employees from appointing family members to municipal positions.

You should be aware that the scope of the §19 prohibition covers more than the appointment of a family member; it disqualifies you from participating in **any** particular matter affecting the financial interest of your family member. For example, you would also be prohibited from:

1. recommending the appointment of a family member as an administrative assistant;
2. participating in the determination of the salary of a family member;
3. determining the terms and conditions of employment of a family member, and
4. evaluating the job performance of a family member.

Should such matters come before you while present at meetings of the School Committee, you must refrain from participating in these matters and should leave the room. See, **Graham v. McGrail, supra,** at 138.

There are no exemptions under §19 which would apply to you, nor does the Commission possess the authority to create an administrative exemption for appointment to confidential positions. The provisions of St. 1964, c. 465 cannot be reasonably construed to supercede §19. Chapter 465 merely allows School Committee members to select a confidential administrative assistant without regard to the provisions of the civil service law. Nothing in c. 465 authorizes the selection of a family member. If you feel that the prohibitions of §19 are unduly strict as applied to the selection of family members to administrative assistant positions, the forum for seeking changes to ease those restrictions is the General Court.

DATE AUTHORIZED: December 28, 1983

CONFLICT OF INTEREST OPINION NO. EC-COI-83-176

FACTS:

You were recently elected Mayor of the City of ABC (City) and will begin your term of office in January, 1984. As Mayor, you will be the chief executive officer of all municipal agencies, including the police department. In that capacity, you will determine the police department budget, will serve as the appointing authority for all appointments and promotions, will be involved in collective bargaining negotiations on behalf of the employer, and will serve as the third step in the grievance procedure under the police department collective bargaining agreement. You are also a private attorney and have three clients who were arrested in ABC for driving-related incidents in 1983. Two clients were arrested by ABC police for alcohol-related offenses; the third client was arrested by the state police. All three cases are scheduled for trial in either January or February, 1984.

QUESTION:

Does G.L. c. 268A permit you to represent the three defendants while you also serve as the Mayor of ABC?

ANSWER:

You may represent the defendant in the case prosecuted by the state police, but your representation of the two defendants arrested by the ABC police while you serve as Mayor is prohibited.

DISCUSSION:

1. **State Police Case**

In your capacity as Mayor of the City, you will be a municipal employee for the purposes of G.L. c. 268A. EC-COI-82-144. As a municipal employee you are prohibited by G.L. c. 268A, §17 from either receiving compensation or acting as attorney for a private party in any judicial proceeding or other particular matter[1]/ in which the City or an agency

[1]/G.L. c. 268A, §1 (k) defines "particular matter," 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 and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

of the City is either a party or has a direct and substantial interest. Your representation of a defendant in a judicial proceeding prosecuted by the state police would not fall within the §17 prohibition. A case prosecuted by the state police for a violation of a state law is not a matter of direct and substantial interest to the City. Although the arrest might have taken place within the City, whatever interest the City has in the prosecution of the defendant for a violation of state law is not separate and distinct from that of the citizenry of the commonwealth as a whole. **Commonwealth v. Mello,** 1980 Mass. App. Ct. Adv. Sh. 2223, 2226. Moreover, because the scope of your official authority as Mayor does not extend to the activities of the state police, your representation of a defendant in a case prosecuted by the state police would not pose any problems under the standards of conduct contained in G.L. c. 268A, §23. As will be seen below, the degree of official authority over the prosecuting officers is a key factor in the application of §23.

2. ABC Police Cases

As a municipal employee you are subject to the standards of conduct contained in §23. Two relevant provisions prohibit you from

using or attempting to use your official position to secure unwarranted privileges or exemptions for yourself or others [§23 para. 2 (2)], and

by your conduct giving reasonable basis for the impression that any person can improperly influence or unduly enjoy your favor in the performance of your official duties, or that you are unduly affected by the kinship, rank, position or influence of any party or person. [§23 para. 2 (3)].

The facts which you present are similar to those addressed by the Commission in a 1981 advisory opinion, EC-COI-81-73. In that opinion, the Commission advised a part-time City Solicitor that she could not also represent clients in criminal proceedings brought by the city police department. The basis for the ruling was that, as City Solicitor, her ability to render independent advice to city police officials would be impaired by her representation of defendants prosecuted by those same officials. The opinion also referred to the inherent difficulty posed by being in a position of having to choose whether to divulge confidential information to defend a client.

The relationship between the office of the Mayor and City Police Department, while not confidential in nature, raises analogous concerns. As Mayor, you will be in an inherent position to use your authority as the employer to further the interest of your clients during the trials. Additionally, your representation during the same period in which you will be deciding whether to execute a new police collective bargaining agreement, reviewing the police budget and making personnel decisions creates a reasonable impression that your decisions as mayor might be unduly affected by the actions of the prosecuting police officers during the trials. The fact that the arrests may have occurred prior to your becoming Mayor does not remove the impression created by your exercise of authority over the same police officers who will be participating in the criminal proceedings following your assumption of the office of mayor.[2/]

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[2/]The prohibitions contained in this opinion are addressed to your prospective activities as a defense attorney once you become Mayor. However, you may accept compensation for any work which you performed for the two defendants during the period prior to your assuming office. Following your referral of the two cases to another atttorney, you may accept a customary referral fee.

SUMMARIES OF ADVISORY OPINIONS

(Where an asterisk appears, the text of the advisory opinion has been included among the foregoing opinions.)

*EC-COI-83-1 — Under §20, last paragraph (added by St. 1982, c. 107), a selectman cannot be appointed to serve as executive secretary to the board of selectmen until six months after leaving his post of selectman. For selectmen the §20 waiting period of six months applies, rather than the 30-day waiting period required by §21A.

EC-COI-83-2 — Under §4(a), a state employee, whose official duties include reviewing service providers to determine whether they should get certain payments from the state, may also work part-time as a record keeper for one of the providers, because the provider is not compensating him in relation to a particular matter of direct and substantial interest to the state. However, §6 will preclude him, unless he receives the appropriate exemption from his appointing official, from participating as a state employee in any particular matter in which that provider has a financial interest.

EC-COI-83-3 — Members of a task force established by a cabinet secretary are not state employees for purposes of c. 268A, §1(q), because that task force is temporary, informally constituted, without formal reporting responsibilities, and its recommendations are not binding on the secretary. Rather, it is intended to serve as a forum for public comments by the various interest groups and businesses represented on it.

*EC-COI-83-4 — Section 23 prohibits members of the Worcester Civic Center Commission from giving, and state and municipal employees (themselves included) from receiving, ticket reservation privileges not accorded to the general public.

EC-COI-83-5 — A state employee who owns and operates a vehicle and equipment leasing company on the side may not contract directly or indirectly with any state agency before March 29, 1983. After that date, §7(b) will permit him to have such contracts if his own agency is not involved and if he meets the other requirements set forth in that subsection (See EC-COI-83-35.) However, §4(c) will prohibit him from acting as agent for the leasing company in regard to particular matters, such as leases, which involve the Commonwealth or state agencies.

EC-COI-83-6 — Under §4, a state employee who, as part of his state job, developed and implemented a certain data processing system may act as a paid consultant to other states to explain the system to them, since the consultation is not of direct and substantial interest to Massachusetts. However, §23 prohibits the employee from divulging confidential information in the course of consultation; he also may not use either state supplies or facilities not available to the public, or state time to prepare or deliver the outside services.

EC-COI-83-7 — Under §7, a Department of Social Services area board member, who also is the sole owner of rental property, may not lease that property to DSS unless he fully discloses his financial interest in the lease and is exempted by the Governor with the approval of the executive council.

EC-COI-83-8 — A state employee whose official duties include enforcement of certain regulations may teach a course at a state college, even though the course is required by such regulations, because he qualifies for the §7 teaching exemption.

EC-COI-83-9 — A former state attorney who now works for a law firm may not, under §5(a), represent private clients in connection with particular matters in which he participated as a state employee. Under §5(b), for a year after he leaves his state job, he may not appear personally on behalf of a private client before a state agency or court in connection with any particular matter which was under his official responsibility for the two years before he left his state job. In addition, he will be prohibited by §23 from improperly disclosing confidential information he acquired during his state service, or using such information to further his personal interests.

EC-COI-83-10 — A part-time employee of the General Court may also represent a municipality in litigation, because the litigation is not pending in the General Court and he has neither participated in nor had official responsibility for it. However, §6 will prevent him, in his state position, from participating in special legislation in which that municipality has a financial interest. As attorney for the municipality, he will also be a special municipal employee subject to the municipal provisions of c. 268A.

***EC-COI-83-11** — A regional school committee member may not participate in contract negotiations which will affect the financial interests of the member's spouse who is a teacher in one of the member municipalities. He may participate in the consideration of a sabbatical leave request of a regional high school teacher from another town even though his spouse is covered by the same contract terms regarding sabbatical leave.

***EC-COI-83-12** — Under an exemption to §4, a full-time employee may represent a member of his immediate family (in this case, his wife) in a proceeding before a state agency as long as (1) he did not participate in or have official responsibility for the proceeding as a state employee, and (2) his appointing official approves.

***EC-COI-83-13** — A full-time state employee may not receive monies under a grant funded by the agency which employs him. However, he may be paid under the grant for work done prior to his becoming a state employee.

EC-COI-83-14 — A state employee whose responsibilities include contract administration and monitoring may work on his agency's contract with a firm which employs his spouse since his spouse will not have a financial interest in that contract; she works in a division of the firm which is not related to the contract, and will perform no work related to it.

***EC-COI-83-15** — An employee of a regional transit authority is a state employee. He therefore cannot accept an honorarium from a federal agency for participating on a review panel on its behalf because he has official dealings as a state employee with the federal agency.

***EC-COI-83-16** — A registered land surveyor employed by the state may not serve as surveyor for a private company in connection with surveys conducted for a state agency. He also may not be listed as that company's surveyor in connection with bids submitted to the state agency.

***EC-COI-83-17** — A member of a state board may not work as a consultant for a private party on a project where that board not only must issue a permit authorizing the project, but also oversees all phases of the project.

EC-COI-83-18 — A state employee may serve as an unpaid member of the Board of Directors of a non-profit corporation which lobbies for support of his agency's budget because his own activities as a Board member would not involve particular matters of direct and substantial interest to the state but general issues or policy. As a state employee, he cannot participate in matters in which the corporation has a financial interest and may not disclose confidential information acquired as a state employee.

***EC-COI-83-19** — A member of a state board may not receive free travel to or accommodations at an out-of-town reception from a business group whose constituents are directly affected by the board's action and which may seek public funding from the board.

***EC-COI-83-20** — An attorney employed by a state agency may represent a former state employee in a lawsuit arising out of the former employee's actions while working for the state. Assuming he is directed to do so by his superiors, such representation would be "in the proper discharge of his official duties" and therefore not prohibited by §4.

EC-COI-83-21 — Members of a task force set up by the Governor, and professionals of firms offering their services to the task force, are not "state employees" because the task force is an unpaid *ad hoc* body with no binding authority over any state agency or employees and with only the power to make recommendations to the Governor and/or the legislature.

EC-COI-83-22 — The head of a state agency may serve as the unpaid Chairman of the Board of a private, non-profit corporation which has no regulatory relationship or regular dealings with that agency, even though the corporation has the same goals.

EC-COI-83-23 — A supervisor in a Department of Social Services (DSS) area may serve as an unpaid member of the Board of Directors of a DSS vendor in the same area. She may not participate as a DSS employee in any matters in which the vendor is interested and may not appear as an agent of the vendor in matters of direct and substantial interest to the state.

EC-COI-83-24 — A state employee may not act as his private consulting firm's agent in its efforts to obtain state contracts. Acting as agent includes preparing or helping to prepare submissions to state agencies even if he does not actually appear before them. He will not violate §7 because he intends to terminate his state employment before his firm enters into any state contracts.

***EC-COI-83-25** — A newly-appointed state employee will not violate §7 if the contract between her private company and her state agency is transferred to a federal agency. She cannot participate on behalf of the state agency in connection with the transfer. She also may not exercise her authority over public and private agencies administering the contract after the transfer unless she is given written permission to do so by her appointing official after fully disclosing the circumstances to him.

***EC-COI-83-26** — A state employee may work for a municipality in connection with a sewer construction project which will be monitored by state and federal agencies as long as he does not act on any matter which is within the purview of his state agency.

***EC-COI-83-27** — A state employee may work for a private educational institution which has a cooperative agreement with his state agency provided that:

1) he does not receive compensation from the institution for performing any services, or act as its agent, in connection with contracts or agreements between that institution and state agencies or facilities;

2) he does not participate in his state capacity in any particular matter in which the institution has a financial interest;

3) he neither improperly discloses nor uses confidential information gained in his official position to further his own or the institution's interests;

4) in his state position, he avoids granting unwarranted consideration to the institution's interests over others with whom his state agency has similar relationships;

5) he complies with guidelines imposed by his state agency as a prerequisite to his permission to hold the private position.

***EC-COI-83-28** — A former municipal employee, who is also a special state employee, may sell land to the town by which he was formerly employed because he did not participate as a municipal employee in connection with the sale and would be appearing in connection with the sale on his own behalf rather than as someone's agent. If the sale is conditioned upon the town's receipt of state money from the state agency which employs him, he would have a direct financial interest in a contract made by his state agency and would be required to obtain an exemption from the Governor with the advice and consent of the Executive Council.

EC-COI-83-29 — A state employee may not appear before a state agency on behalf of a private firm in connection with a bid submitted to the agency by that firm. If he becomes a partner in that firm, he cannot participate as a state employee in particular matters in which the firm has a financial interest or share in any profits or funds coming from a state contract. After he leaves state service, he may not act as agent for, or receive compensation from, the firm in connection with matters in which he actually participated as a state employee. For one year, he may not appear personally on the firm's behalf before any state agency in connection with matters which were within his official responsibility as a state employee.

*EC-COI-83-30 — Members of a state job training coordinating council are state employees for the purposes of G.L. c. 268A, §1(q), but are not subject to the financial disclosure requirements of G.L. c. 268B since they are unpaid.

EC-COI-83-31 — The president of a private firm which assists and represents entities in administrative appeals before a state agency may serve simultaneously on an advisory council to the same agency since, as a council member, he is a special state employee serving less than 60 days annually and he neither participates in nor has official responsibility for matters involving appeals before the agency. However, he must not participate as a council member in particular matters in which his firm has a financial interest unless he receives an exemption under §6 from his appointing official. Whenever such a matter comes up, he must notify his appointing official and the Ethics Commission.

EC-COI-83-32 — A state employee may participate in the activities of various organizations including the media, educational institutions and non-profit corporations as a liaison for his state agency without violating §4(c) because his activity is called for in the proper discharge of his official duties. However, he must comply with §23 by not using his access to confidential information and officials at his agency for the benefit of the private groups with whome he deals.

*EC-COI-83-33 — A former state employee may represent private parties in matters involving his former agency since he neither participated in nor had official responsibility for the matters while a state employee. However, he must not disclose confidential information acquired during his state employment.

*EC-COI-83-34 — A state employee who is a lawyer may participate in particular matters in which a business organization for whom he does some private legal work has a financial interest since the amount of his time and income attributable to the private work is too small to make him an employee of the organization under §6.

*EC-COI-83-35 — A full-time state employee may accept part-time employment with another state agency provided he satisfies the criteria in §7 (as recently amended) applicable to contracts for personal services:

1) he is not employed by the contracting agency or an agency which regulates the activities of the contracting agency;

2) he does not participate in or have official responsibility for any activities of the contracting agency;

3) the contract is made pursuant to public notice (advertising the position at least two weeks prior to filling the position in a newspaper of general circulation in the area serviced by the contracting agency);

4) the services are provided outside of the normal working hours of the employee;

5) the services are not required as part of the employee's regular duties;

6) he does not earn compensation from the contracting agency for more than 500 hours annually;

7) the head of the contracting agency makes and files with the Ethics Commission a written certification that no employee of that agency is available to perform the services as part of his regular duties.

*EC-COI-83-36 — Under §6, a state employee may not participate in deciding whether the state should participate in a program offered by a corporation in which he is an officer or director. He must also refrain under §4 from actng as the agent for the corporation in matters under his official responsibility as a state employee. Further, under §23, he may not advocate participation in the corporation's program to anyone subject to his authority as a state employee.

*EC-COI-83-37 — Under §7, the financial interest in a state contract of a state employee's spouse will be imputed to the state employee where:

1. the state employee assigned his financial interest in the state contract to his spouse;

2. the spouse has no independent experience or background in the matters covered by the contract;

3. the spouse gave nothing to the state employee in return for the financial interest in the contract; and

4. the assignment was based in part on their relationship and there is no evidence of an "arm's length transaction".

The state employee may nonetheless have a financial interest in a second state contract because he satisfies the exemption criteria under §7, ¶(b).

*EC-COI-83-38 — A town councillor is a municipal employee under G.L. c. 268A and may not have a financial interest in a contract made by the fire department of the municipality which employs him. He is not eligible for an exemption under §20, ¶(b), because, as a town councillor, he approves personnel appointments and the budget of the fire department. He is also ineligible for an exemption under §20 applicable solely to selectmen.

EC-COI-83-39 — A state employee may keep a door prize which he won in a random drawing, where the prize was contributed by an unidentified donor at a professional conference. The employee has neither used his official position to secure the prize nor given reasonable basis for the impression that he would unduly favor the unidentified donor. Further, the prize was not received for or because of an official act by the state employee.

*EC-COI-83-40 — The superintendent of a state facility may also serve as a corporator of a bank where certain facility funds are deposited, provided he notifies his appointing official and receives a written determination that the financial interests of the bank are not so substantial as to affect the integrity of his state services. The superintendent may not be paid by or act as the agent of the bank in relation to matters in which the state has a direct and substantial interest such as Banking Commission audits.

EC-COI-83-41 — While still working for the state, a state employee who is forming a private consulting firm may not seek concultant contracts for that firm with state agencies. Further, he may not participate as a state employee in the approval of consultant contracts submitted by his firm to his state agency. If, after leaving his full-time state job, he becomes a consultant to a state agency, he would be a special state employee and therefore eligible to have a financial interest in contracts with state agencies as long as he neither participates in, nor has official responsibilities for the activities of those agencies as a special state employee.

*EC-COI-83-42 — A former state agency head may not be paid by a private organization in connection with the same compliance program he established as a state employee. He may, however, represent the organization in proposing amendments to state regulations which he authored while a state employee. He may also provide legislative testimony regarding general legislation.

*EC-COI-83-43 — A state legislator may not participate in special legislation or any other particular matter in which a banking and investment firm which employs him has a financial interest. He may not seek or accept business from legislative employees under his supervisory authority, members of their households, or persons or organizations which have or are likely to have matters before him as a legislator.

EC-COI-83-44 — A high-ranking state official whose spouse works with a firm which helps organizations plan their conventions may not take any action which would suggest to other state employees or to those doing business with the state that they should use his spouse's services. He should also not schedule a disproportionate number of his own speaking engagements at functions arranged by his spouse or her firm or direct or encourage other state employees to speak at such functions.

EC-COI-83-45 — A Department of Mental Health employee may testify without compensation involving a report which she prepared in her DMH capacity.

EC-COI-83-46 — A former state employee may not represent a private company in relation to the same request for proposals for which he gathered information and whose adoption he recommended while employed by the commonwealth.

***EC-COI-83-47** — A selectman whose responsibilities include the regulation of shellfishing and the exercise of authority over the position of shellfish constable may also act as a commercial shellfisherman licensed by the town, subject to several conditions. He may not vote or otherwise participate as a selectman in the issuance of shellfish licenses or in the decisions to open or close shellfish grounds, since he would have a financial interest in these matters as a commercial fisherman. He must also abstain from any matters before the board of selectmen which involve the position of shellfish constable.

***EC-COI-83-48** — An area director for the Department of Social Services (DSS) may serve as an unpaid member of the board of director of a private agency, ABC, which receives funding from DSS, subject to several conditions. She must refrain from participatng in her DSS capacity in any matters in which ABC has a financial interest, including funding applications submitted by ABC or competitor organizations, and contract compliance determinations. She must also refrain from influencing DSS determinations affecting ABC and may not act as the agent of the ABC in relation to its contracts with DSS.

EC-COI-83-49 — A state mediator may be paid for out-of-state conciliation activities involving parties and law firms with whom she does not deal as a state mediator.

EC-COI-83-50 — A state inspector may operate a private business but must refrain from participating in inspections involving his own business or businesses with which it is in geographic competition. He may not use his official state position to secure business for the company. If his immediate family members were to operate the business, the prohibitions on his participation as a state employee would continue. Additionally, he may not appear on behalf of the family business in relation to state inspections and other particular matters in which the commonwealth is a party or has a direct and substantial interest, unless his appointing official approves.

***EC-COI-83-51** — A selectman may also serve as an elected member of the town board of health, but may receive compensation for only one of those positions.

***EC-COI-83-52** — A DSS official may not participate in the inception, execution, supervision or evaluation of a contract in which his spouse has a financial interest. The official must also transfer to another DSS employee the responsibility for authorizing the removal of children from their homes in those emergency situations where his spouse has recommended such removal.

***EC-COI-83-53** — A former state official may not work for a private firm to develop a project in which he participated through supervision and discussion with communities and corporations while employed by the commonwealth. His partners will share this prohibition for a one-year period following his resignation from his state position. The former state official must also refrain for a one-year period following his resignation from appearing before a state court or state agency in relation to a project which came under his official responsibility during the two-year period prior to his resignation.

EC-COI-83-54 — A former state official may not represent a company in relation to any hearings, adjudications or other particular matters in which he rendered decisions or otherwise participated while serving as a state official. For a one-year period following his termination of state service, he may not appear before any state court or state agency in relation to particular matters which were pending in his state agency and therefore were under his official responsibility during the two-year period prior to his termination.

EC-COI-83-55 — A part-time consultant to a state agency may not also be paid for handling repair and service contracts with the same state agency.

*EC-COI-83-56 — A legislator, whose spouse has a financial interest in a business, may not vote on special legislation which would affect his spouse's financial interest. Additionally, his spouse, who is a full-time state employee, may not have a financial interest in a contract between her business and a state agency unless she complies with the conditions for an exemption under §7 ¶(b).

*EC-COI-83-57 — A state program development specialist who is responsible for implementing contracts between his state agency and DEF, a private company, may not continue to participate in these contracts because he has an arrangement concerning prospective employment with DEF. Following his departure from state employment he may not be paid by or act as agent of DEF in relation to any referrals or other particular matters in which he participated as a state employee.

*EC-COI-83-58 — A full-time state employee who is also an attorney in private practice is prohibited by §4(c) from representing criminal defendants in state courts, and juvenile defendants in state juvenile courts, because in both instances the Commonwealth is a party to such matters. He may, however, represent criminal defendants in federal cases which do not involve state funds or property, because the Commonwealth would neither be a party nor have a direct and substantial interest in such cases.

*EC-COI-83-59 — Under the special provisions of §4 applicable to legislators, a member of the General Court who is also an attorney may not represent for compensation an applicant for a common carrier certificate in a hearing before the Department of Public Utilities since 1) the award of such a certificate by the DPU is not a ministerial matter, 2) the hearing is not a quasi-judicial proceeding, and 3) counsel for the DPU may appear at the hearing to oppose the application.

EC-COI-83-60 — A former employee of the Executive Office of Communities and Development who approved the installation of a particular product in a housing project, cannot now challenge the adequacy of that product in order to sell an authority his own competing product.

*EC-COI-83-61 — A new state employee who formerly was part-owner of a business which had an indirect financial interest in state contracts will be considered to have divested himself of the financial interest for purposes of §7 where he has sold his share to his business partner in return for a personal note of indebtedness, since the note is in no way contingent upon the business's success or state-funded work.

EC-COI-83-62 — Both a former member of the General Court who also served as the chairman of a legislative committee and his associate may lobby state agencies and may appear for an agency which was affected by legislation considered by his committee as long as such lobbying efforts relate to general, not special, legislation. He may not lobby before the General Court on behalf of a private entity for one year from his termination of state service.

EC-COI-83-63 — A Regional Housing Authority (RHA) is a county agency and its members are county employees who may not have a financial interest in rent subsidy contracts made by the RHA.

*EC-COI-83-64 — A municipal employee does not violate the conflict of interest law where an attorney for whom he previously worked is hired by his municipal agency at his suggestion, since 1) he disclosed the prior relationship, 2) he abstained from the voting authorizing the attorney's employment and 3) the attorney is qualified for the position and his fees are not excessive.

*EC-COI-83-65 — An employee of the Division of Capital Planning and Operations (DCPO) should refrain from participating in decisions about design contracts where one of the competing architectural firms is owned by an individual with whom the employee has a private business agreement.

EC-COI-83-66 — A full-time Budget Bureau employee may have a financial interest in a consulting contract with the Board of Regents provided that the "public notice" and other requirements of Section 7(b) are satisfied.

*EC-COI-83-67 — A consultant to a city law department may assist a private plaintiff in a lawsuit in which the city law department may file an *amicus curiae* brief. Filing an *amicus* brief does not make the city a party to the lawsuit and the effect of any precedent set by the decision in this suit does not give the city a direct and substantial interest in the proceeding.

*EC-COI-83-68 — A board of aldermen may not designate one member of the School Committee a "special municipal emloyee" and retain regular employee status for the remaining members. The board may designate all members of the School Committee "special municipal employees" despite the fact that the Mayor is a member *ex officio*. The Mayor, however, remains a regular municipal employee for other purposes.

EC-COI-83-69 — A special state employee may testify on an unpaid basis as an expert for a private organization in a lawsuit against a state agency; the mere act of testifying does not make him an agent for the purposes of §4. Such testimony also qualifies for a specific exemption in §4.

EC-COI-83-70 — A state official whose responsibilities include the development and approval of state contracts with certain schools and the supervision of students from these schools in clinical course work may not accept unpaid faculty appointments from these schools in recognition of his contribution to their programs.

EC-COI-83-71 — State employees may work after hours or on a part-time basis in a group residence home which operates on an uninterrupted twenty-four hour per day basis and which is funded pursuant to a state contract because this facility falls within the definition outlined in a recently enacted exemption to §7.

EC-COI-83-72 — State employees may work after hours on a part-time basis in an inpatient unit which provides medical coverage on a continual, twenty-four hour per day basis pursuant to a state contract. The inpatient unit qualifies as an eligible facility under a recently enacted exemption to §7.

*EC-COI-83-73 — State employees may not work after hours on a part-time basis for a private corporation which operates a state funded respite care program under which employees are assigned to visit homes on an occasional or "as-needed" basis. The respite care program does not qualify as an eligible facility under a recently-enacted exemption to §7 because the program is not run on an uninterrupted twenty-four hour per day basis. State employees may work after hours on a part-time basis in the corporation's group respite home because that home qualifies as an eligible facility under the new exemption to §7. (See EC-COI-83-71.)

EC-COI-83-74 — Members of Private Industry Councils (PIC's) who are selected by municipal officials and who will, with those officials, make decisions about job training plans, selection of grant recipients and expenditures of public funds under the new Federal Job Training and Partnership Act are "municipal employees" for the purposes of G.L. c. 268A.

EC-COI-83-75 — A state employee who, as part of his state position, supervises a private university student under a placement program, may not accept an unsolicited $290 stipend from the university as an expression of appreciation. However, he would not violate G.L. c. 268A if he refrained from accepting the stipend and requested the university to donate the stipend to a local citizen's organization to be used for charitable purpose.

EC-COI-83-76 — Employees of a state agency may accept a $500 merit award from a private organization which does not have regular dealings with that agency's employees. The head of the state agency would not violate §23 by recommending a particular agency employee for an award since the organization's award standards must be met, the agency head must outline, in writing, the basis of his recommendation, and the organization makes the final decision.

EC-COI-83-77 — A special state employee may maintain a financial interest in a consultant contract with a second state agency following his compliance with the disclosure requirements of §7(d). Although there is an interrelation between the two state agencies, the employee does not "participate in or have official responsibility for any of the activities of the contracting agency."

EC-COI-83-78 — Under §4(c), a member of the Arts Lottery Council who serves less than sixty days a year may not act as agent for outside groups in matters which come under the Council's official responsibility or in which she participates as a Council member; she may not, under §6, participate in the Council's funding decisions concerning groups in which she is either an officer or employee; and under §23 she should refrain from participating in funding decisions involving her colleagues from one of the outside groups.

***EC-COI-83-79** — Under §20 (as amended by St. 1982, c. 107), a selectman who resigned as town health director prior to becoming a selectman cannot be appointed health director until he has been out of the selectman's job for six months; because several years have passed since he resigned as health director, such an appointment would not be considered a reappointment, as discussed in EC-COI-82-107.

EC-COI-83-80 — A former state employee who participated as such in a contract between the state and a team of consultants to perform a particular study may now be compensated as an employee of a corporation contracting with the same consultant team in connection with a new study which is independent of the first and which was proposed and awarded after he left state service.

***EC-COI-83-81** — A former city solicitor who now is counsel in a law firm and holds no ownership interest in the firm is not considered a partner for purposes of §18(c) or (d); under the last paragraph of §18, he may be paid by the firm to provide legal services to the city pursuant to a contract between the city and the firm, as long as the head of the city agency involved files the certification required by that paragraph.

***EC-COI-83-82** — The head of a state agency may appear in a privately-produced film on the work of his agency, as long as he does not give the impression that the film is state-sponsored or endorsed by him; members of his staff may provide the filmmakers with technical information that is generally available to the public; agency personnel may appear in this film if they will also be allowed to appear in any such production, and if the filmmaker pays the Commonwealth for time they spend on the project during their usual working hours.

EC-COI-83-83 — An individual may hold two different positions with the same state agency without violating G.L. c. 268A where he receives only one paycheck which reflects the duties of each position.

EC-COI-83-84 — A member of the local housing authority remains a municipal employee when he takes a leave of absence from the authority to serve on its staff as Executive Director. Although the dual employment arrangement does not violate §21A, he must comply with §20(d) in order to maintain both positions.

EC-COI-83-85 — An employee of a Regional Planning District Commission (RPDC), a municipal agency, may not simultaneously serve as an employee of a Regional Transit Authority (RTA), a state agency, since his duties for the RTA involve determinations of direct and substantial interest to the RPDC.

***EC-COI-83-86** — A DMH employee may hold a municipal position since his duties as a municipal employee do not come within the purview of his state agency. He must refrain from participating as a DMH employee in those matters which come before him in which the municipality has a financial interest.

*EC-COI-83-87 — A member of the General Court who is invited to speak at a convention may have his travel, lodging and meal expenses provided by the group having the convention as long as the expenses are limited to transportation to and from the site, lodging at the site made necessary by the speech, and those meals immediately surrounding the speech and as long as the speaking engagement is legitimate. For the speaking engagement to be considered legitimate, it would have to be:

1. formally scheduled on the agenda of the convention or conference;
2. scheduled in advance of the legislator's arrival at the convention or conference;
3. before an organization which would normally have outside speakers address them at such an event; and
4. the speaking engagement must not be perfunctory, but should significantly contribute to the event, taking into account such factors as the length of the speech or presentation, the expected size of the audience, and the extent to which the speaker is providing substantive or unique information or viewpoints.

*EC-COI-83-88 — A member of the General Court, elected from a particular city, may be reimbursed by a private group promoting the city for expenses incurred in connection with his legitimate appearances at a promotional event organized by the private group and held out of state. Those expenses must be limited to transportation to and from the out-of-state location, necessary lodging and necessary meals.

*EC-COI-83-89 — The definition of a state employee in §1(q) has not been applied to a corporation or a partnership as an entity, but only to individuals; thus, the conflict of interest law does not apply to an accounting firm which is under contract with a state agency.

EC-COI-83-90 — The dean of administrative services of a state-funded college is not eligible for the "teaching exemption" under §7 because he participates in and has official responsibility for the financial management of the same educational institution at which he would like to teach.

EC-COI-83-91 — A former state employee may represent a private party before his former state agency in an appeal involving a regulation which he voted to adopt as a state employee since the appeal does not involve a challenge to the validity of the regulation.

EC-COI-83-92 — An attorney who formerly worked for a state agency where he reviewed matters filed with the agency and made recommendations with respect to those filings is now an associate in a law firm; §5(a) does not prohibit him from representing clients who file new matters with his former agency, since he did not participate in those matters as a state employee; because he is an associate in his firm and not a partner, §5 does not apply to the firm's partners.

*EC-COI-83-93 — A member of the General Court may travel out of state for a speaking engagement at the expense of a private corporation because he has had no prior dealings with the corporation or any of its representatives and it has no special interest in his actions as a legislator.

*EC-COI-83-94 — The executive director of a private non-profit corporation which receives funds from the state to run certain programs is not a state employee because she performs her services for the corporation, and not the state, and she is not specifically designated in any state contract to provide the services called for therein.

*EC-COI-83-95 — A full-time state employee may not maintain his financial interest in a consultant contract with another state agency where proposals for the contract were solicited by "word of mouth" rather than through a publicly advertised process.

EC-COI-83-96 - A probation officer may serve as an uncompensated director and treasurer of a privately-funded non-profit corporation which provides recreational programs to youths on probation because neither he nor the corporation has any financial interest in the assignment of youths to the program by the probation office. He may not, however, act as the corporation's agent in matters before state agencies.

* **EC-COI-83-97** - A full-time state employee may consult for another state agency because he qualifies for the exemption in §7(b). The §7(b) requirement of "public notice" is satisfied by advertisement of the position in the appropriate trade journals.

EC-COI-83-98 - A Department of Mental Health (DMH) consultant qualifies for an exemption from §7 and may be paid by a vendor out of DMH contract funds because 1) his clients are on public assistance; 2) the rate which he is paid for the services is the same as that set by the Rate Setting Commission; and 3) his clients avail themselves of his services voluntarily.

* **EC-COI-83-99** - A former state employee and his private company may be hired by another private firm to work on a contract with his former state agency because he neither participated in nor had official responsibility for any matters related to the contract while a state employee.

EC-COI-83-100 - The chairman of a state agency may, after leaving state service, be hired by a company regulated by that agency provided he complies with the provisions of §§5 and 23 regarding former state employees.

EC-COI-83-101 - A full-time employee of the Department of Mental Health may not accept compensation from a private agency to lead a therapy group to which DMH and other state agencies make referrals.

* **EC-COI-83-102** - A member of the General Court may sign a letter soliciting gifts for a raffle being held as a part of a voter registration drive. This endorsement alone does not constitute a misuse of public office to further a private or personal interest.

* **EC-COI-83-103** - A part-time member of a state appellate board is a special state employee. As a private consultant he may be paid by non-state parties in relation to proceedings before other state boards, since such matters would not fall within his official responsibilities as an appellate board member. He may also contract with other state agencies in whose activities he neither participates nor has official responsibility.

* **EC-COI-83-104** - A full-time state employee may not be employed by a country as an assistant medical examiner because all of his activities in that position would be of direct and substantial interest to state law enforcement and regulatory agencies.

* **EC-COI-83-105** - A salaried member of a town counsel's law firm may also serve as Chairman of the Town's Zoning Board of Appeals (Board) as long as he does not work on any matters in his private capacity which pertain to the Board. As Chairman of the Board, he must not participate in matters in which the law firm has a financial interest.

* **EC-COI-83-106** - An employee of a Housing Court may work part-time as a real estate salesman as long as he does not deal with any party who has a matter before the Housing Court. Further, he should avoid taking action on matters before the Housing Court involving persons with whom he has or had dealings in his private capacity.

EC-COI-83-107 - A full-time DMH employee may work after-hours in a state-funded camp program because her own agency does not fund the program and because she satisfies the other requirements in the applicable exemption to §7 [see §7(b)]. However, she may not accept payment for consultation concerning children referred to the program by DMH, since she participates in DMH activities as a state employee.

* **EC-COI-83-108** - A full-time security employee for a state agency may not also be paid by a city as a police officer assigned to the same state agency. His municipal responsibilities, which would include making decisions and arrests in the enforcement of state criminal laws and prepairing and filing arrest reports with his state agency, are particular matters of direct and substantial interest to the commonwealth for which he may not receive compensation from the municipality.

* **EC-COI-83-109** - Employees of the Division of Capital Planning and Operations, whose regular duties include the construction of offices for state agencies, may not work after hours and receive compensation from other state agencies to perform office construction work. Under such an arrangement, they would have a financial interest in a second contract made by a state agency. They would not qualify for an exemption under §7(b) because the services which they would provide after hours are required as part of their regular duties.

* **EC-COI-83-110** - Members of a legislative committee may use computer equipment which has been loaned to the committee by a private company as long as the equipment is used for official, as opposed to personal, use. Because the committee does not consider any legislation which would directly affect the company, acceptance of the equipment would not give reasonable basis for the impression that the committee would unduly favor the company.

* **EC-COI-83-111** - Where a state employee transfers his interest in a parcel of land to his spouse for no consideration two months before the spouse sells the land to the state employee's agency, the employee will be deemed to retain a financial interest in the sale of the land in violation of §7.

EC-COI-83-112 - Section 7 allows a state employee to work for a vendor and be paid from state funds where his clients receive public assistance and his rate of pay is set by the Rate Setting Commission.

* **EC-COI-83-113** - A bond issued by a state agency is a contract. A special state employee may purchase bonds issued by his own agency only if he discloses his interest in the bond purchase and receives an exemption from §7 from the governor.

* **EC-COI-83-114** - A mayor who is on leave of absence from a private company may not sign a contract with the company on behalf of the city. The city should therefore submit the contract to the city clerk for his approval pursuant to G.L. c. 43, §27.

EC-COI- 83-115 - A state official may not participate in matters affecting the financial interests of an institution with which he is negotiating prospective employment. Following his departure from state employment he may not represent the institution in relation to any matter in which he participated while a state employee.

* **EC-COI-83-116** - A member of the judiciary may participate in court referrals to an alcohol treatment program which employs his stepson where 1) the initial decision to use that program was made not by the court but by a state agency, 2) the stepson's employment was not conditioned on such referrals, 3) except in emergency situations, another judge routinely makes such referrals, and 4) the judge did not discuss the stepson's employment with his employer.

* **EC-COI-83-117** - An employee of a housing authority may not receive a rental subsidy administered by the authority because he would have a financial interest in a contract made by his own municipal agency.

EC-COI-83-118 - An employee of a state agency which administers a federal program and which has regular dealings with a federal agency may not, in his private capacity, submit a contract bid to the same federal agency without informing his appointing official. Following disclosure, the appointing official must determine whether to allow the employee to continue to have regular dealings with the federal program as a state employee.

* **EC-COI-83-119** - The wife of a municipal official responsible for awarding contracts is employed by a company seeking those contracts. The official would not have a financial interest in the contracts if his wife has no ownership interest in the company and her salary is paid from other contracts. However, under §23, he must refrain from disclosing to his wife confidential information related to the company and from discussing with the company his wife's promotion. He also may not give subordinates evaluating the company's performance the impression that his personnel decisions will be affected by their recommendations concerning his wife's company.

* **EC-COI-83-120** - A state employee who serves as a city councillor may vote on local initiative matters since such matters are not customarily of direct and substantial interest to the state. The filing by his state agency of an **amicus curiae** brief in a suit challenging a local procedure related to the initiative does not give the state a direct and substantial interest in his vote.

EC-COI-83-121 - Under §5, three former state officials who are now members of a firm that is bidding for a state contract may continue their activities on behalf of the firm because they did not, while state employees, either participate in or have official responsibility for the project for which they are making a bid.

* **EC-COI-83-122** - A member of a municipal board of assessors may not use a free cinema pass given him by a movie company whose property assessment is at issue before the board.

* **EC-COI-83-123** - A state employee will not be deemed to have a financial interest in a state contract by virtue of his wife's contract with the state when he does not share in the management or control of his wife's contract. In particular, his wife's financial interest will not be attributable to him if 1) he divests himself irrevocably and for consideration equal to book value of all stock in the corporation through which his wife delivers her services, 2) he resigns all positions with the corporation, 3) the funds his wife uses to purchase his stock are derived from accounts or holdings not jointly controlled by him and his wife, and 4) his spouse has independent experience and background in the subject matter of the contract with the state.

EC-COI-83-124 - When a county plans to transfer a hospital to a private corporation, G.L. c. 268A will place restrictions on county officials or employees who also serve on the board of directors of the corporation. As county employees, they may not participate in the approval of the proposed transfer. As members of the corporation's board of directors, they may not represent the corporation before a county agency or any other body in any matters involving the proposed transfer.

* **EC-COI-83-125** - A state college employee who has invested in a family business and who regularly participates as an employee in financial decisions of that business would violate §7 if the business contracted with his state college.

EC-COI-83-126 - A state official may participate in a proceeding in which one of the parties is represented by a lawyer who belongs to the same law firm which also handles the official's personal financial matters. This is permissible because the attorney handling the official's private matters does not discuss these matters with the attorney involved in the proceeding who works in a different department of the firm.

EC-COI-83-127 - A state auditor may be employed after hours by an educational collaborative to perform an internal audit because the audit would not be a matter of direct and substantial interest to a state agency.

* **EC-COI-83-128** - An assistant district court clerk may not be paid as a director of a company which provides blood alcohol contents testing to drunk driving suspects, since he would be receiving compensation in relation to particular matters in which the state is a party. He must also refrain from participating as assistant clerk in any case where the defendant has used the services of his company. He may serve as an unpaid director of the company and receive dividends as a stockholder.

* **EC-COI-83-129** - An employee of a vendor to a state agency is considered a "state employee" for the purposes of G.L. c. 268A because his services are specifically contemplated by the terms of the vendor's contract with the state. As a state employee he may not maintain a financial interest in a second contract made by the same state agency.

EC-COI-83-130 - Under §4, a full-time state employee may not be employed after-hours as a county correctional officer because virtually all of his work would be subject to regulation by the state Department of Corrections and therefore of direct and substantial interest to the state.

EC-COI-83-131 - A full-time state attorney may work part-time as a consultant to a private lawfirm in a civil tort suit, since the lawsuit is not a matter in which the commonwealth is a party or has a direct and substantial interest.

EC-COI-83-132 - A legislative consultant to a state agency who also serves as president and part-owner of a corporation which provides training in the legislative process may conduct solicitation and training activities on behalf of the corporation as long as:

1) he does not train personnel regarding the enactment of special legislation which is pending in his state agency, and

2) he avoids soliciting or training clients who currently appear before either legislative committees or legislators on matters related to his state agency, or who are likely to do so.

* **EC-COI-83-133** - A member of a state agency had formerly worked for a city. While in the employ of the city, he had negotiated a contract in its behalf with a private firm. Pursuant to the contract, the firm was to make certain determinations. As a state employee, he may now participate in disputes arising out of those determinations since his former participation as a municipal employee related to only the terms of the firm's contract and not to the determinations the firm would make.

EC-COI-83-134 - A state orthopedic technician may continue to operate a private shoe business after hours as long as he does not provide services to any individuals referred by a state agency.

EC-COI-83-135 - A member of the General Court who serves as president of a museum which receives funding under a state contract will not violate G.L. c. 268A as long as he neither receives compensation from nor acts as the agent of the company in relation to the state contract.

* **EC-COI-83-136** - An employee of the Office of Communities and Development (EOCD) may begin to develop a computer business while remaining an EOCD employee as long as he does not attempt to sell his services to local housing authorities and other entities subject to EOCD regulations or to any other entity using state funds to purchase his services. Following his departure from EOCD, he may market his services to local housing authorities because he would not have participated in promoting or regulating computerization by these agencies while employed by EOCD.

* **EC-COI-83-137** - The legal counsel to a legislative committee may not act as attorney for the committee chairman and other members and employees of the committee in their private capacity in a lawsuit in which a state agency is a party and has a direct and substantial interest because this representation would not occur "in the proper discharge of his official duties."

EC-COI-83-138 - A full-time state employee may also work for a private group residence home funded under a DMH contract, but may not work more than four hours at the home on days in which he is compensated as a state employee.

EC-COI-83-139 - A town councillor will be treated as a city councillor and therefore does not qualify for "special municipal employee" status or for any other exemptions under Section 20. Accordingly, he may not be employed as a laborer by a housing authority in the same town.

* **EC-COI-83-140** - A former DMH employee who participated as such in the establishment of a trust for a resident of a state school may not now be employed as an attorney by the trust.

* **EC-COI-83-141** - An employee of the Office for Children (OFC) whose duties involve licensing group day care facilities and evaluating college courses offered to satisfy educational requirements for group day care center staff may teach early childhood education courses part-time at a private college, subject to certain restrictions:

1. he may not be paid by a private college for teaching a course offered to satisfy OFC requirements although he may be compensated for courses he teaches at state colleges;
2. in his state capacity, he may not evaluate for OFC licensing requirements a course which he teaches or which is offered by the private college where he teaches;
3. he may not, as a state employee, license a group day care center operated by or located at a private college where he teaches;
4. he may not improperly exploit his access to OFC officials and information or his authority over OFC licensees to benefit his part-time employment.

EC-COI-83-142 - A full-time employee of the Massachusetts Commission for the Blind (MCB) cannot be paid by non-state parties to provide mobility instruction to individuals who have been referred to her by any state agency or who are eligible for the same services from a state agency.

* **EC-COI-83-143** - A full-time state employee may not also be paid as a bail commissioner because he would be receiving compensation from someone other than the Commonwealth (a defendant), in relation to a particular matter in which the Commonwealth is a party (an arrest, judicial proceeding or determination).

EC-COI-83-144 - A special state employee may also work as a consultant for a municipal agency as long as he is not compensated by the municipality in relation to particular matters in which he participated or over which he has had official responsibility as a state employee.

* **EC-COI-83-145** - Employees of a state mental health facility may serve as unpaid members of the advisory board of a private corporation established to provide assistance to that facility as long as they do not represent the corporation in particular matters before state agencies. The employees must also avoid giving the impression that they are favoring the corporation in pursuing their state duties or divulging confidential information to the corporation.

EC-COI-83-146 - A part-time state employee may also work part-time for another state agency. While she would have multiple employment contracts, as a special state employee in both positions she qualifies for the §7(d) exemption.

* **EC-COI-83-147** - A state employee who holds less than 1% of the principal and net income of a trust which has invested in bonds issued by her agency will not violate §7. Because her state duties do not involve the issuance, redemption or administration of the bonds, her ownership interest in the trust does not violate the standarts of conduct set out in §23.

* **EC-COI-83-148** - A full-time state employee may also work part-time as an engineer at a state correctional institution, because he qualifies for the exemption of §7 permitting part-time employment at a correctional facility under certain conditions.

EC-COI-83-149 - A full-time state employee may maintain her foster care contract with the Department of Social Services (DSS) because by terms of the DSS contract she qualifies for a §7 exemption for providers of services to recipients of public assistance.

EC-COI-83-150 - A county commissioner who intends to resign to pursue a full-time insurance brokerage business may not, while an incumbent county commissioner:

1. appear before a county agency or otherwise act as the agent for any insurance company with respect to the county's insurance contracts;
2. participate in county insurance contracts on which he plans to bid as a private insurance broker; or
3. otherwise use his official position to create the opportunity for his subsequent brokerage activities.

Once he resigns as county commissioner, he must limit his brokerage activities with the county to the renewal of contracts, and is prohibited from acting on any contract in which he had participated or over which he had official responsibility.

EC-COI-83-151 - An employee of Massachusetts Community Development Finance Corporation (CDFC), who also serves on the board of directors of a private organization involved in financing worker cooperatives, may take an overseas study trip paid for by that private organization because there is no overlap in the work of CDFC and the private organization.

EC-COI-83-152 - An attorney employed by the legislature, who, while a city official previously participated in the transfer of certain land from a state agency to that city, would not now violate the conflict law by representing a private party in an attempt to purchase a portion of that land from the city because: a) the state is neither a party to, nor has a direct and substantial interest in, the land or its sale and b) the proposed purchase of the land is a different particular matter from the transfer in which he participated as a municipal employee.

* **EC-COI-83-153** - A municipal building commissioner may construct buildings for subsequent sale on land in the town owned jointly by him and his wife. However, he may not personally appear before any town agency to secure the various permits and approvals required for this construction unless his appointing official gives him permission. Even with such permission, he cannot appear on matters within the authority of the building commission. Moreover, he cannot take any action as building commissioner in connection with his property unless permitted to do so by his appointing official, and he must avoid exploiting his access to town officials to aid his construction plans or, as a commissioner, unduly favor contractors who might work on his property.

EC-COI-83-154 - A member of a state board may write a book concerning a topic regulated by that board and incorporating information from board meetings as long as that information is not confidential or otherwise inaccessible to the general public. The receipt by a state employee of royalties from the private publication of a book concerning a state agency and its procedures, but unrelated to any specific case involving the state, is not related to a particular matter and therefore not prohibited by the conflict law.

EC-COI-83-155 - A nurse employed full-time by the Department of Mental Health cannot be employed after hours by private nursing homes to satisfy licensure requirements imposed by state Department of Public Health regulations.

* **EC-COI-83-156** - A Department of Public Welfare employee who also has a real estate license cannot accept a broker's commission from a real estate sale by a recipient of public assistance whom she has represented in a child support case because she was in a position to exploit her official relationship with that individual.

* **EC-COI-83-157** - The Suffolk County Mosquito Control Project (Project) is a "state agency" for purposes of the conflict of interest law, and its employees are subject to that law's provisions. An employee of the Project wishing to seek outside employment as a consultant on mosquito control matters must therefore comply with §§4 and 7.

* **EC-COI-83-158** - A pathologist employed full-time by the UMass Medical Center may also be employed as a part-time assistant medical examiner and paid as such with state funds provided he is hired in compliance with the provisions of the exemption contained in §7(b).

EC-COI-83-159 - A member of the Board of Environmental Management (Board), which oversees the Department of Environmental Management (DEM), is a special state employee. He may not have a financial interest in a contract between DEM and a private party unless granted an exemption by the Governor because he participates in and has official responsibility for the activities of DEM as a member of the Board.

EC-COI-83-160 - A dentist employed by the Department of Public Health (DPH), with decision-making responsibilities in connection with dental services for welfare patients, may treat welfare patients and be reimbursed by the state for those services, because of the "welfare exemption" to §7. He must comply with the provisions of §6 and §23 in performing his duties at DPH.

* **EC-COI-83-161** - An employee of the Cape Cod Planning and Economic Development Commission of Barnstable County is a "county employee" for purposes of G.L. c. 268A. He may seek outside employment with other public and private entities provided that the matters on which he works are not of direct and substantial interest to Barnstable County.

EC-COI-83-162 - A state employee who was formerly employed by a local rent control board may appear before that board in connection with a rent adjustment application filed after he left the board. He may not represent a landowner in a local tax abatement hearing because the state has a direct and substantial interest in such hearings by virtue of the Department of Revenue's authority over laws relating to the evaluation, classification and assessment of property.

EC-COI-83-163 - The conflict of interest law regulates the transition from public employment to consultant work for the government or to private employment within the same subject area. Prior to termination, a state employee would be subject to the limitations of §4 (in conjunction with representing or receiving compensation from a non-state party), §6 (involving participation in matters in which the state employee or his prospective employer has a financial interest) and §23 (concerning misuse of his state position to secure an unwarranted privilege for himself).

If the individual became a consultant to the government upon termination of his state agency position, he would still be considered a state employee for the purposes of G.L. c. 268A and would remain subject to its provisions. If, on the other hand, he began work with a private company, he would be considered a former state employee and would be subject to the limitations of §23 (dealing with the disclosure and/or misuse of confidential information) and §5.

* **EC-COI-83-164** - Under §19, a municipal teacher who takes an unpaid leave of absence from his teaching position to serve as the Mayor of that municipality must refrain from participating in any matter affecting the compensation for his teaching position. In his capacity as Mayor, which includes chairing the School Committee, he must not vote on or discuss the merits of such determinations with other committee members. He would also be subject to the standards of conduct contained in §23, particularly the provisions of para. 2(2) and (3).

* **EC-COI-83-165** - An individual who worked as a subconsultant under another consultant's contract with a state agency, whose services were specifically called for under that contract, was a state employee for the purposes of G.L. c. 268A. As an exhibit design producer, such an employee is not subject to the conditions of the 1977 amendment to §1(q) since he was not involved in the engineering and environmental analysis of the construction project.

EC-COI-83-166 - A state employee does not violate §4(a) by receiving compensation from private sources for written and oral teaching activities in connection with exams administered by a state agency for which he used to serve as a consultant, because such teaching activities are not of direct and substantial interest to the state. Inasmuch as the exam itself is of interest to the state, however, §4 would prohibit him from receiving compensation from or acting as agent or attorney for anyone other than the state in connection with the exam. Section 23 would further prohibit him from improperly disclosing confidential information obtained by reason of his previous consulting activity for the state agency or using such information to further his personal interest.

EC-COI-83-167 - A state employee, who is an officer, employee and stockholder of a corporation, will violate G.L. c. 268A if the corporation performs work for a town under a state grant **unless** (1) the corporation is paid by the town out of non-grant funds **and** (2) he totally disassociates himself from the grant project as an officer and/or employee of the corporation.

EC-COI-83-168 - A former municipal employee is not prohibited by §18(a) from acting as a consultant to a private developer in connection with its most recent proposal to the employee's former agency, because such proposal is a different particular matter than earlier proposals which the developer had submitted to the agency and on which the employee had worked. Further, because he resigned more than one year ago, the law firm with which he is associated does not fall within the coverage of the §18(c) prohibition. He is subject to the standards of conduct regarding the use of confidential information obtained in his official position, however.

EC-COI-83-169 - A full-time psychologist for a state agency is prohibited by §4(a) from being compensated by a private attorney for evaluating a mother's competence in a child custody suit, because the state has a direct and substantial interest in the suit.

EC-COI-83-170 - A special education program monitor, employed by a state agency, may accept a part-time position with a private firm which is developing drug education contracts with schools in his region. While such contracts are particular matters within the meaning of G.L. c. 268A, §1(k), they do not concern a subject matter sufficiently regulated by the state to rise to the level of being of direct and substantial interest to the state.

* **EC-COI-83-171** - A full-time state employee may not serve as a local sealer of weights and measures because his municipal duties involve particular matters of direct and substantial interest to the state and are within the purview of his state agency.

EC-COI-83-172 - A full-time state employee at a community college may work as a consultant to a vocational school district since her consultant duties will involve conducting a preliminary feasibility study which is not of direct and substantial interest to the state.

EC-COI-83-173 - A special state employee may lease office space to individuals who are consultants to a state agency because he does not supervise the consultants, and the rental income he will be receiving does not constitute compensation under law. Further, the rental fee charged is independent of a state fee schedule and the consultant's receipt of state payments and the financial interest of the consultant in a state contract is not attributable to the special state employee.

* **EC-COI-83-174** - A municipal official may not select a member of his immediate family to serve as his administrative assistant. Section 19 also prohibits the municipal official from:

1. recommending the appointment of his family member;
2. participating in the determination of the salary of the family member, and
3. determining the terms and conditions of employment or evaluating the job performance of the family member.

EC-COI-83-175 - A former employee of a legislative committee may not act as a legislative agent before the legislature for a one year period following his completion of employment. The prohibition under §5(e) applies irrespective of his status as a part-time or special state employee.

* **EC-COI-83-176** - A municipal official may represent clients prosecuted by the state police because the municipality for which he works does not have a direct and substantial in the matter. However, he may not, while serving in office, represent clients prosecuted by the municipal police because in his municipal position he has responsibility for matters arising in the police department.