STATE ETHICS COMMISSION
ENFORCEMENT ACTIONS
ADVISORY OPINIONS
1984

Massachusetts State Ethics Commission

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PUBLISHED BY
THE MASSACHUSETTS STATE ETHICS COMMISSION

TABLE OF CASES*

(By subject or respondent)

*Cases are numbered consecutively [illegible]
1979-1983 appear in prior volum[illegible]

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 234

IN THE MATTER
OF
VERA C. HARRINGTON

Appearances:

Marilyn Lyng O'Connell, Counsel for Petitioner State Ethics Commission

Harvey F. Rowe, Jr., Counsel for Respondent Vera C. Harrington

Commissioners:

Diver, Ch.; Brickman, Burns, McLaughlin, Mulligan

DECISION AND ORDER

I. Procedural History

The Petitioner filed an Order to Show Cause on September 27, 1983 alleging that the Respondent, Vera C. Harrington, was in violation of M.G.L. c. 268A, §20[1]/ by serving as an elected member of the Swampscott Board of Assessors (Board) and the chief clerk for the Board. In lieu of an adjudicatory hearing, the Petitioner and Respondent stipulated to the relevant facts, submitted briefs, and orally argued before the Commission on December 13, 1983. In rendering this Decision and Order, each member of the Commission has reviewed the evidence and arguments presented by the parties.

II. Findings

A. Jurisdiction

The parties have stipulated that the Respondent, in her capacity as an elected Board member, is a municipal employee within the meaning of M.G.L. c. 268A, §1(g).[2]/ The board is a municipal agency within the meaning of M.G.L. c. 268A, §1(f).[3]/

B. Findings of Fact

1. The Respondent has been employed by the Board since 1961 as the chief clerk, a full-time position with a current annual salary of $17,000.

2. The Respondent is, and has been since 1977, an elected member of the Board and currently earns $1,000 a year in that position.

3. On October 19, 1982, the Commission advised the Respondent through a Compliance Letter that, as a municipal employee, her financial interest in her employment contract as the chief clerk to the Board was prohibited by M.G.L. c. 268A, §20. The Commission informed her that the violation could be cured if: 1) the selectmen designated members of the Board as "special municipal employees," as defined in §1(n) of M.G.L. c. 268A and granted her an exemption under §20(d); or 2) she resigned one of her positions.

4. On November 18, 1982, the Swampscott board of Selectmen voted to designate temporarily the members of the Board as "special municipal employees" as defined in §1(n) of M.G.L. c. 268A, allowing Harrington to qualify for the exemption to the restrictions of M.G.L. c. 2268A, §20 set forth in §20(d).[4]/

5. On May 12, 1983, the Board of Selectmen voted to discontinue the designation of Board members as "special municipal employees."[5]/

6. Notwithstanding the elimination of her status as a special municipal employee, the Respondent has maintained both her chief clerk and Board member positions since May 12, 1983.

III. Decision

By maintaining her chief clerk position with the Board while also serving as a Board member, the Respondent has violated, and continues to violate G.L. c. 268A. §20. As a municipal employee, the Respondent is prohibited by §20 from having a financial interest, directly or indirectly, in a contract made by a municipal agency of the same town. The Respondent's employment contract as the chief clerk to the Board constitutes a prohibited financial interest under §20. It is well-established that the scope of the contractual financial interests prohibited under G.L. c. 268A includes contracts for personal services as well as for goods. **In the Matter of Henry M. Doherty,** 1982 Ethics Commission 115, 116; EC-COI-80-118, 80-97;

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[1]/M.G.L. c. 268A, §20 prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by a municipal agency of the same town, in which the town is an interested party, in which financial interest the employee has knowledge or reason to know.

[2]/"Municipal employee" is defined as "a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, 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." M.G.L. c. 268A, §1(g).

[3]/"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).

Buss, **The Massachusetts Conflict of Interest Statute: An Analysis,** 45 B.U. Law Rev. 299, 368, 372 (1965). Additionally, the Respondent has a financial interest in the collective bargaining agreement which covers a bargaining unit in which she is included as chief clerk of the Board.

While it may be true, as the Respondent suggests, that a purpose of §20 was to prevent employees from abusing their public positions to secure multiple municipal contracts, the plain language establishes a preventive rule which assumes that any employee is in a position to influence the awarding of contracts. "Because it is impossible to articulate a standard by which one can distinguish between employees in a position to influence and those who are not, all will be treated as though they have influence." Buss, **supra** 374. Thus, even though the Respondent's contract may have preceded her election as a Board member, the statute recognizes that, once elected as a Board member, the Respondent is in a position to influence the maintenance or renewal of her employment contract.

None of the exemptions under §20 apply to the Respondent. In particular, she does not qualify for the exemption under §20(d) because she is no longer a special municipal employee.

The Board of Selectmen did not exceed its authority by revoking the classification of the position of Board member as a special municipal employee. The classification process, by definition, involves a judgment as to the needs of a governmental body at any given time and is not irrevocable. The judgment as to whether to relax the requirements of G.L. c. 268A rests with the Board of Selectmen, and is subject to reevaluation as circumstances change. See, Buss, **supra,** 316-318. Nor did the voters implicitly condone the Respondent's dual employment status by reelecting her as a member of the Board. The statute prescribes the steps which a municipal employee must follow to hold a financial interest in a second municipal contract. There is no provision in §20 for overriding these steps by implication. Nor can such a result reasonably follow from the defeat by the voters of the referendum which would have permitted the Respondent to continue as a special municipal employee.

IV. Penalty

Following a finding of a violation of G.L. c. 268A, the Commission is authorized by M.G.L. c. 268B, §4(d) to issue an order requiring the violator to cease and desist from such violation and requiring the violator to pay a civil penalty of not more than $2000 for each violation of M.G.L. c. 268A. This is not the first occasion which the Commission has applied M.G.L. c. 268A to employment contracts, and the Respondent has been aware since October 19, 1982 of the consequences under §20 of her retaining her chief clerk position while not having special municipal employee status as a Board member. Accordingly, the Commission orders the following sanctions to reflect the seriousness with which it views the Respondent's continuing violation of the statute and her disregard of prior determinations by the Commission.

V. Order

Pursuant to its authority under M.G.L. c. 268B, §4, the Commission orders the Respondent to:

1. Cease and Desist from violating M.G.L. c. 268A, §20 by either resigning as a Board member or terminating her financial interest in her employment contract as the chief clerk to the Board within fourteen (14) days of notice of this Decision and Order, and

2. Pay three hundred dollars ($300) to the Commission as a civil penalty for violating M.G.L. c. 268A, §20. In addition, if the Respondent maintains her prohibited financial interest and fails to comply with paragraph one of this order, the Respondent is further ordered to pay the Commission a daily civil penalty of fifty dollars for each day that the Respondent continues to be in violation of §20 up to a maximum of seventeen hundred dollars ($1700).

DATE: January 12, 1984

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[4]/Section 20 does not apply "(d) to a special municipal employee who files with the clerk of the town a statement making full disclosure of his interest and the interests of his immediate family in the contract, if the board of selectmen approve the exemption of his interest from this section."

[5]/Although the reasons for the "de-designation" are not included in the record, the parties suggested in their briefs and oral arguments that the voters at the annual town meeting in April, 1983 rejected an advisory referendum question which asked whether the Board of Selectmen should continue to grant special municipal employee status to Harrington.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory
Docket No. 215

IN THE MATTER
OF
TERRENCE J. McGEE

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

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

DECISION AND ORDER

I. Procedural History

The Petitioner filed an Order to Show Cause on August 30, 1983 alleging that the Respondent, Terrence J. McGee, had violated M.G.L. c. 268B, §5[1]/ by failing to file his Statement of Financial Interests for 1982 (Statement) within ten days of receiving from the Commission a Formal Notice of Delinquency. The Respondent did not file an Answer to the Order to Show Cause, the Petitioner filed a Motion for Summary Decision on October 14, 1983. 930 CMR 1.01(6)(f).

Pursuant to notice served on the Respondent in hand on October 28, 1983, a hearing on the Motion was conducted on November 14, 1983 before Commissioner Bernard P. McLaughlin, a duly designated presiding officer. See, M.G.L. c. 268B, §4(c). David J. Burns, Esq., appeared on behalf of the Petitioner. No appearance was made on the Respondent's behalf. 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, Terrence J. McGee, was a Systems Analyst in the Office of the Chief Administrative Justice of the trial Court for the Commonwealth of Massachusetts from March, 1981 until October, 1982.

2. In December, 1982, the Respondent was designated by the Chief Administrative Justice of the Trial Court as a person in a "major policymaking position"[2]/ for the year 1982. As a result, he was a "public employee" as defined in M.G.L. c. 268B, §1(o)[3]/ and was required to file a Statement for 1982 on or before May 1, 1983.

3. The Respondent failed to file his 1982 Statement by May 1, 1983.

4. On May 11, 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 adjudicatory proceedings.

7. Respondent has not filed his 1982 Statement or formally answered this action by the Commission.

III. Decision

The evidence demonstrates that the Respondent received notice of his obligation to file a Statement for 1982, and that he received the Formal Notice of Delinquency. He did not file a Statement within ten days of receiving that Notice, and as of the date of the hearing, had not filed such a Statement. Therefore, the Respondent violated M.G.L. c. 268B, §5.

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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 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]/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 a 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]/For the purposes of M.G.L. c. 268B, "public employee" is defined as "any person who holds a major policymaking position in a governmental body; provided, however, that any person who receives no compensation other than reimbursements for expenses, or any person serving on a governmental body that has no authority to expend public funds other than to approve reimbursements for expenses shall not be considered a public employee for the purposes of this chapter; provided, however, that the members of the board of bar examiners shall not be considered public employees for the purposes of this chapter." M.G.L. c. 268B, §1(o).

IV. Sanction

The Commission, upon finding that there has been a violation of M.G.L. c. 268B, may issue an order requiring the violator to (1) cease and desist such violation; (2) file any statement or other information required by M.G.L. c. 268B; or (3) pay a civil penalty of not more than $2000 for each violation. M.G.L. c. 268B, §4(d). In the only other case in which a Respondent failed to file a Statement and to formally Answer the Commission's proceeding, a penalty of $1000 was imposed.[4]/ A similar penalty is appropriate in this case. The Respondent has disregarded his statutory obligation to file a Statement for 1982. The record in this case contains no evidence of mitigating circumstances.

V. Order

The Petitioner's Motion for Summary Decision is granted. The Respondent, Terrence J. McGee, is ordered to:

1. File a statement for 1982 within seven (7) days of receipt of this Decision and Order; and

2. Pay a civil penalty of one thousand dollars ($1,000.00) to the Commission within thirty (30) days of receipt of this Decision and Order.

DATE: January 13, 1984

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 233

IN THE MATTER
OF
SEAN G. MULLIN

Appearances:

Marilyn L. O'Connell, Esq.: Counsel for Petitioner State Ethics Commission
Sean G. Mullin: **pro se**

Commissioners:

Diver, Ch.; McLaughlin, Brickman, Burns

DECISION AND ORDER

I. Procedural History

The Petitioner filed an Order to Show Cause on September 27, 1983 alleging that the Respondent, Sean G. Mullin, had violated M.G.L. c. 268B, §5[1]/ by failing to file his Statement of Financial Interests 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 15, 1983 before Commissioner David Brickman, a duly designated presiding officer. See, M.G.L. c. 268B, §4(c). The parties waived their right to present oral arguments before the full Commission and the Petitioner submitted a brief in support of its position. The Respondent did not file a brief. 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, Sean G. Mullin, was an Assistant Appointments Secretary of the Governor's Office, from September 20, 1982 until December 31, 1982.

2. In November, 1982 the Respondent was designated by the Governor as a person in a "major policy-making position"[2]/ for the year 1982. As such, he was a public employee[3]/ and was required to file a Statement for 1982 on or before May 1, 1983.

3. The Respondent failed to file his 1982 Statement by May 1, 1983.

4. On May 17, 1983, the Respondent received from the Commission a Formal Notice of Delinquency (Notice) requring him to file his Statement within ten days of receipt of the Notice.

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[4]/See In the Matter of Allison Goodsell, 1981 Ethics Commission 38.

[1]/M.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...

...

(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 ineresets 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]/For the purposes of M.G.L. c. 268B, major policy making position is defined as: the executive or administrative head or heads of a governmental body; all members of the judiciary; 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; the head of each division, bureau or other major administrative unit within such governmental body; and persons exercising similar authority... (M.G.L. c. 268B, §1(l).

[3]/For the purposes of M.G.L. c. 268B, public employee is defined as: "any person who holds a major policymaking position in a governmental body..." M.G.L. c. 268B, §1(o).

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 adjudicatory proceedings.

7. The Respondent filed his 1982 Statement on July 22, 1983, thirty-eight days after the expiration of the ten-day period contained in the Notice.

8. The Respondent admits receiving the Commission's Notice but states that because of his out-of-state employment commitments between May, 1983 and July, 1983, he forgot 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.

IV. Sanction

Under M.G.L. c. 268B, §4(d), the Commission 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 calculated on the number of days which elapse after the expiration of the ten-day period following the Commission's Notice.[4]/ 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. However, without condoning the Respondent's disregard of the filing requirement, the Commission finds that a civil penalty of $500, rather than $660 is appropriate. See, fn. 4, supra.

V. Order

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

DATE: January 13, 1984

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 232

IN THE MATTER OF NICHOLAS PALEOLOGOS

Appearances:

Marilyn L. O'Connell, Esq.: Counsel for Petitioner State Ethics Commission

Nicholas Paleologos: pro se

Commissioners:

Diver, Ch.; Brickman, Burns, McLaughlin, Mulligan

DECISION AND ORDER

I. Procedural History

The Petitioner filed an Order to Show Cause on September 26, 1983 alleging that the Respondent,

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[4]/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 ten working days and $20.00 per working day thereafter. In the instant case, where the Respondent filed his Statement thirty-eight days after the expiration of the ten-day period following the Commission's Notice, a fine of $660.00 would ordinarily be warranted. However, for the reasons stated in the Commission's decision in **In the Matter of Vernon Thornton** 1984 Ethics Commission _____ issued today, the maximum fine in late-filed cases is $500.00.

[5]/The Respondent has demonstrated that full payment of this fine in a single transaction would impose financial hardship on him. Accordingly, the Commission will allow the Respondent to make two monthly payments of $250.00 each to commence thirty days after he is notified of this Decision an Order. The second payment should be made within the following thirty days. Compare, **In the Matter of Thomas Chilik**, 1983 Ethics Commission 130.

Nicholas Paleologos, had violated of M.G.L. c. 268B, §5[1]/ by failing to file his Statement of Financial Interests 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 15, 1983 before Commissioner David Brickman, a duly designated presiding officer. See, M.G.L. c. 268B, §4(c). The parties filed post-hearing briefs but waived their right to present oral arguments 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, Nicholas Paleologos, has been a State Representative from Woburn since 1977.

2. As a person holding "public office"[2]/ in 1982, the Respondent was a "public official"[3]/ and was required to file a Statement for 1982 on or before May 31, 1983.

3. The Respondent failed to file his 1982 Statement by May 31, 1983.

4. On June 7, 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 July 19, 1983 pursuant to the Respondent's failure to file his 1982 Statement and thereafter authorized the initiation of adjudicatory proceedings.

7. The Respondent filed his 1982 Statement on July 18, 1983, twenty days after the expiration of the ten-day period contained in the Notice.

8. The Respondent admits receiving the Commission's Notice but states that he made a "conscious decision" to put the Notice aside until his General Court activities during that time period had subsided.

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 official (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.

IV. Sanction

Under M.G.L. c. 268B, §4(d), the Commission 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 calculated on the number of days which elapse after the expiration of the ten-day period following the Commission's Notice.[4]/ 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.[5]/

V. Order

On the basis of the foregoing, the Commission concludes that Nicholas Paleologos 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. Paleologos to pay a civil penalty of three hundred dollars ($300.00).

DATE: January 13, 1984

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

(b) Every public official shall file a statement of financial interests for the preceding calendar year with the commission on or before the last Tuesday in May of each year that such public official holds such office and on or before May first of the year after such public official leaves such office...

...

(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.

[2]/For the purposes of M.G.L. c. 268B, "public office" is defined as: any position for which one is nominated at a state primary or chosen at a state election...M.G.L. c. 268B, §1(p).

[3]/For the purposes of M.G.L. c. 268B, "public official" is defined as: anyone who holds a public office, as defined by clause (p) of this section...M.G.L. c. 268B, §1(q).

[4]/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 ten working days and $20.00 per working day thereafter.

[5]/The Respondent asserts that his participation in the House Budget Debates and the remodeling of his office between May and July caused him to forget to file his Statement as required. However, disruption such as the Respondent has described can not serve as a mitigating factor where the Respondent was on notice to file his Statement and deliberately chose to delay complying with the law. Compare, In the Matter of David Kopelman, 1983 Ethics Commission 124.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 217

IN THE MATTER
OF
VERNON R. THORNTON

Appearances:

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

Vernon R. Thornton: pro se

Commissioners:

Diver, Ch.; Brickman, Burns, McLaughlin, Mulligan

DECISION AND ORDER

I. Procedural History

The Petitioner filed an Order to Show Cause on August 30, 1983 alleging that the Respondent, Vernon R. Thornton, had violated M.G.L. c. 268B, §5 by failing to file his Statement of Financial Interests for calendar year 1982 (1982 SFI) within ten days of receiving a Notice of Delinquency (Notice) from the Commission. The Respondent filed an Answer which conceded the allegations but which questioned the wisdom of imposing a civil penalty.

Pursuant to notice, an adjudicatory hearing was conducted on November 18, 1983 before Frances Burns, a member of the Commission duly designated as presiding officer. See, M.G.L. c. 268B, §4(c). The parties waived the submission of briefs and presentation of oral argument before the full Commission. In rendering this Decision and Order, the members of the Commission have considered the evidence and arguments presented by the parties.

II. Findings of Fact

1. The Respondent served as a member of the Board of Registration in Veterinary Medicine from December, 1978 until August, 1983.

2. In December, 1982, the Respondent was designated by the Executive Office of Consumer Affairs as a "person holding a major policy-making position"[1]/ for the purposes of filing a 1982 SFI.[2]/

3. The Respondent received the 1983 SFI forms and instructions from the Commission in March, 1983 and in April, 1983 received a postcard from the Commission reminding him that his SFI was due on May 1, 1983 and that failure to file by that date could subject him to civil penalties of $2000.

4. On May 10, 1983, the Respondent received a Formal Notice of Delinquency notifying him that the Commission would commence enforcement proceedings unless he filed his 1982 SFI within ten days. Later that month, at the request of the Commission, the Director of the Division of Registration contacted the Respondent regarding his SFI.

5. The Commission authorized a preliminary inquiry in June, 1983 regarding the Respondent's failure to file his SFI and notified the Respondent that he was the subject of a preliminary inquiry.

6. The Commission authorized adjudicatory hearings into this matter in July, 1983. Following notification of the Commission vote, the Respondent filed his 1982 SFI on August 3, 1983, forty-nine business days after the ten-day grace period of the Notice.

III. Decision

M.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 employee 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, 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 of delinquency.

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[1]/ For the purposes of M.G.L. c. 268B, major policy making position is defined as: the executive or administrative head or heads of a governmental body; all members of the judiciary; any person whose salary equals or exceeds that of state employee classified in step one of job groups XXV of the general salary schedule contained in Massachusetts General Laws c. 30, §46 and who reports directly to said executive or administrative head; the head of each division, bureau or other major administrative unit within such governmental body; and persons exercising similar authority.

[2]/ The parties agree that the Respondent was at all time relevant, subject to the provisions of M.G.L. c. 268B, §5.

Inasmuch as the Respondent admits the facts which constitute a G.L. c. 268B, §5 violation, the Commission concludes that he violated M.G.L. c. 268B, §5 by failing to file his 1982 SFI within ten days of receiving a Notice from the Commission.

IV. Sanctions

Under M.G.L. c. 268B, §4(d), the Commission 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 calculated on the number of days which elapse after the expiration of the ten-day period following the Commission's notice. The fine schedule, which was adopted in April 1983, imposes a daily fine of $10.00 for the first ten working days and $20.00 per working day thereafter. The purpose of the schedule is to assess fines in a fair manner without regard to the timing of administrative proceedings related to the delinquency. Although the schedule has been effective in securing compliance with the M.G.L. c. 268B filing requirements, the fine level accumulated under the schedule at times has been excessive and disproportional to the offense. In the Respondent's case, the filing of an SFI forty-nine business days late amounts to a fine of $880.00. Without condoning the Respondent's consistent disregard of the filing requirement, the Commission believes that a ceiling of $500 would be appropriate in cases where individuals such as the respondent have filed SFIs late.

V. Order

On the basis of the foregoing, the Commission concludes that the Respondent violated M.G.L. c. 268B, §5. Pursuant to the authority granted it by M.G.L. c. 268B, §4(d), the Commission orders the Respondent to pay a civil penalty of $500.00 within thirty days of notice of this Decision.

DATE: January 13, 1984

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 248

IN THE MATTER
OF
CORNELIUS J. FOLEY, JR.

DISPOSITION AGREEMENT

This disposition agreement ("agreement") is entered into between the State Ethics Commission ("Commission") and Cornelius J. Foley, Jr. ("Mr. Foley") pursuant to section 11 of the Commission's **Enforcement Procedure.** This agreement constitutes a consented to final order of the Commission enforceable in superior court under G.L. c. 268B, §4(d).

On February 4, 1983, the Commission initiated a preliminary inquiry into possible violations of G.L. c. 268A, §5(e), by Mr. Foley, formerly employed as the principal administrative assistant to the Health Care Committee of the Massachusetts House of Representatives and subsequently (and currently) employed as Director of Government Affairs by the Massachusetts Medical Society ("MMS"). The Commission concluded that preliminary inquiry and, on December 13, 1983, found reasonable cause to believe that Mr. Foley had violated chapter 268A.

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

1. Mr. Foley was principal administrative assistant to the House Health Care Committee from approximately 1979 until July 1981. As such, Mr. Foley was a state employee, as that term is defined in §1(q) of G.L. c. 268A.

2. Before he left the legislature, Mr. Foley sought and received an advisory opinion from the Commission concerning any limitations imposed by chapter 268A on his activities on behalf of his prospective employer, the Massachusetts Medical Society ("MMS").

3. The Commission's opinion (EC-COI-81-80, dated June 30, 1981) advised Mr. Foley that §5(e) of G.L. c. 268A prohibited him, for one year after leaving state service, from acting as a legislative agent as that term is defined in §39 of Chapter 3 for anyone other than the Commonwealth before the governmental body with which he was then associated. The Commission's opinion concluded that Mr. Foley could not therefore act as a "lobbyist on behalf of MMS before either branch of the General Court" for the year after he left. The opinion referred Mr. Foley to an opinion by the attorney general for general guidance in the area of what activities on his part, on behalf of MMS, more specifically would constitute lobbying.

4. Mr. Foley began work for MMS on July 13, 1981 as its Director of Government Affairs. In this position, his responsibilities included identifying matters coming before the legislative and executive branches of state government that were of interest to the MMS membership, following the progress of those matters and reporting on their status to the appropriate MMS personnel and committees.

5. During the course of the year in which §5(e) restricted his activities (July 13, 1981 – July 12, 1982), Mr. Foley obtained from MMS's principal legislative agent information about legislation, which Mr. Foley

communicated to MMS. Mr. Foley also communicated MMS's positions on different pieces of legislation to MMS's principal legislative agent, who used this information in his own lobbying activities for MMS, including such activities before the General Court, between July 13, 1981 and July 12, 1982.

6. During the legislature's closing sessions in December 1981, Mr. Foley, according to his expense memorandum, "remained on the hill during the late night sessions because we (MMS) had several important pieces which we were following, and which could have gone either way if there was no one to answer late night inquiries or give other information concerning such issues if necessary."

7. Also during the course of his first year with MMS, Mr. Foley participated in discussions of MMS's strategy on particular pieces of legislation. He helped draft letters to legislators from MMS concerning MMS's stand on different bills. These letters went out under the signatures of MMS's president and the chairman of its committee on legislation.

8. In addition, Mr. Foley, during the July 13, 1981-July 12, 1982 period, wrote to the president of the Massachusetts Radiological Society suggesting that the society send letters in support of MMS's opposition to a bill to particular legislators in addition to those to whom the radiologists had already written.

9. By the actions described above in paragraphs 5-8 — communicating information about legislation and MMS's positions to and from MMS and MMS's principal legislative agent, helping to formulate and articulate those positions, and soliciting and assisting the lobbying activities of others by participating in the drafting of letters to legislators and by advising others how most effectively to support MMS's positions — Mr. Foley violated §5(e) of chapter 268A.* That section prohibited him from acting as a legislative agent on MMS's behalf before the General Court, and those actions constituted acting as a legislative agent.

10. The statutory definition of legislative agent contained in G.L. c. 3, §39 includes "any person who for compensation or reward does any act to promote, oppose or influence legislation" (emphasis added). (Section 5(e) of chapter 268A cites this definition in identifying the activities to which it applies.) In addition, the preamble to the statute enacting G.L. c. 3 states that lobbying activities are reimbursed efforts to persuade legislators to take specific legislative action both by "direct communications" to members of the General Court and by "solicitation of others to engage in such efforts." (This part of the preamble was quoted in the attorney general opinion referenced in the Commission's advisory opinion to Mr. Foley.)

In the Commission's view, this broad concept of lobbying promotes one of §5(e)'s purposes: to prevent a former legislator or legislative staff member from using his special knowledge of or access to the General Court to promote private interests during his first year away from that body. The need to insulate the legislative process from the former employee's inevitable special knowledge and access during this initial period is the same whether the former employee is doing the lobbying directly or is instead advising and directing the lobbying activities of someone else.

11. For all these reasons, Mr. Foley should have known that his activities as described in paragraphs 5-8 herein violated §5(e). At a minimum, Mr. Foley should have appreciated the risk that they did and asked for clarification.

Based on the foregoing, the Commission has determined that the public interest would be served by the disposition of this matter without further Commission enforcement proceedings on the basis of the following terms, to which Mr. Foley has agreed:

(a) that he pay to the Commission the sum of $500.00 forthwith as a civil penalty for violating G.L. c. 268A, §5(e), by acting as a legislative agent on behalf of his private employer on legislative matters within one year of leaving the staff of the legislature; and

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

DATE: January 20, 1984

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 251

IN THE MATTER
OF
LOWELL L. RICHARDS, III

DISPOSITION AGREEMENT

This disposition agreement ("agreement") is entered into between the State Ethics Commission

*During the course of its preliminary inquiry, the Commission found insufficient evidence for reasonable cause to believe that Mr. Foley had violated G.L. c. 268A, §5(e) by directly lobbying legislators or their aides.

("Commission") and Lowell L. Richards, III ("Mr. Richards") pursuant to section 11 of the Commission's **Enforcement Procedures.** This agreement constitutes a consented to final order of the Commission enforceable in superior court under G.L. c. 268B, §4(d).

On July 19, 1983, the Commission initiated a preliminary inquiry into possible violations of G.L. c. 268A, §23, by Mr. Richards, Collector Treasurer of the City of Boston ("City"). The Commission concluded that preliminary inquiry and, on December 13, 1983, found reasonable cause to believe that Mr. Richards had violated chapter 268A.

The parties hereto, being desirous of reaching an agreement that satisfies the public interests and those of the parties, and no order to show cause having been issued and no hearings having been held with respect to these matters, hereby agree to the following findings of fact and conclusions of law:

1. Mr. Richards is Collector Treasurer of the City of Boston ("City") and, as such, a municipal employee, as that term is defined in G.L. c. 268A, §1(g).

2. In addition to his responsibilities as Collector Treasurer, Mr. Richards also served as City Parking Clerk and deputy Parking Clerk during the 1981-83 period. In this capacity, he had authority to dismiss parking tickets.

3. In January or early February 1983, Mr. Richards dismissed 21 of 25 parking tickets owed by Colleen McGee ("Ms. McGee"), daughter of Speaker Thomas McGee, on a car registered in her name. This represented a release of $420 of her $500 liability to the City.

4. In early February 1983, Mr. Richards dismissed 27 of 39 tickets Ms. McGee owed on another car she had been using, a car registered in her brother's name. This represented a release of $540 of her $789 liability to the City.

5. Mr. Richards has been unable to explain why he dismissed some of these tickets and those reasons are not apparent. The records of the dismissals do not provide legitimate reasons supporting some of these dismissals.* According to Ms. McGee, she did not tell Mr. Richards or anyone else why her tickets should be dismissed. As a result, it appears that Mr. Richards dismissed some of the tickets owed by Ms. McGee because she was the daughter of Speaker McGee.

6. Section 23 (¶2)(3) prohibits 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.

7. By dismissing parking tickets for the daughter of a powerful Massachusetts political figure without legitimate reasons apparent for some of these dismissals, Mr. Richards gave reasonable basis for the impression that her family connections had unduly and improperly influenced his decisions, thereby violating §23(¶2)(3).

In light of the foregoing, the Commission has determined that the public interest would be served by terminating this matter without further enforcement proceedings or the imposition of a civil penalty. In deciding not to impose a fine, the Commission has taken into consideration the following factors: Mr. Richards obtained no personal benefit or financial gain from dismissing these tickets; and dismissals under these circumstances appear to have been the exception rather than the rule in Mr. Richards' handling of tickets.

In disposing of this matter by means of this disposition agreement, Mr. Richards has agreed to 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 13, 1984

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory
Docket No. 250

IN THE MATTER
OF
G. SHEPARD BINGHAM

DISPOSITION AGREEMENT

This disposition agreement (agreement) is entered into between the State Ethics Commission (Commission) and G. Shepard Bingham (Mr. Bingham) pursuant to §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).

*Construing the facts favorably to Mr. Richards, of the 48 tickets dismissed, there is no explanation for 23 of these dismissals. That is, of the other 25 tickets dismissed, 21 lacked a street number identifying the location of the violation and were therefore incomplete; 3 misidentified the make of the car; and 1 was issued before 1980. Each of these 3 reasons for dismissal was used regularly by Mr. Richards in making decisions to dismiss tickets. On the other hand, where Ms. McGee did not plead her case, no reason for dismissal regularly used by Mr. Richards is apparent for the other 23 dismissals.

On October 25, 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. Bingham, a member of the Lynnfield Conservation Commission. The Commission has concluded that preliminary inquiry and, on November 15, 1983, found reasonable cause to believe that Mr. Bingham violated G.L. c. 268A, §§17(a) and 17(c). The parties now agree to the following findings of fact and conclusions of law:

1. Mr. Bingham has been a member of the Lynnfield Conservation Commission (Conservation Commission) since July, 1981. All members of the Conservation Commission were previously classified as special municipal employees pursuant to G.L. c. 268A, §1(n).

2. At all times relevant hereto, Mr. Bingham was also an attorney engaged in the private practice of law with an office in Lynnfield. During 1982 and 1983, Mr. Bingham provided professional legal services to Rocco Botta, a private contractor and developer, in connection with a residential subdivision located on Bryant Street in Lynnfield (subdivision).

3. On March 23, 1982, Mr. Bingham appeared on behalf of Mr. Botta, as his attorney, in connection with a public hearing before the Conservation Commission relating to that subdivision. At that time, Mr. Bingham excused himself from sitting as a member of the Conservation Commission during those proceedings.

4. On February 15, 1983, Mr. Bingham represented Mr. Botta at a meeting of the Conservation Commission. At that time, Mr. Bingham requested that the Conservation Commission release certain lots within a subdivision owned by Mr. Botta which was subject to a prior Order of Conditions imposed by the Conservation Commission. Mr. Bingham proposed, and the Conservation Commission accepted, the posting of a performance bond by Mr. Botta to ensure that the work required by the prior Order of Conditions would be completed. Mr. Bingham abstained from participating as a member of the Conservation Commission in that matter.

5. Mr. Bingham received compensation from Mr. Botta for his professional services rendered as an attorney on behalf of Mr. Botta in connection with the foregoing matters. That compensation included Mr. Bingham's legal services in connection with the foregoing appearances before the Conservation Commission in 1982 and 1983.

6. G.L. c. 268A, §§17(a) and 17(c) prohibit a special municipal employee, otherwise than in the proper discharge of his official duties, from receiving compensation or acting as attorney for a private party in connection with any particular matter in which his town has a direct and substantial interest, and (a) in which he, as a special municipal employee, has at any time participated in, or (b) which is or within one year has been the subject of his official responsibility, or (c) which is pending in the municipal agency in which he is now serving. Each of the foregoing appearances by Mr. Bingham on behalf of Mr. Botta before the Conservation Commission were matters which had been a subject of Mr. Bingham's official responsibility as a member of the Conservation Commission and which were pending in the municipal agency in which Mr. Bingham served. By his actions set out in the foregoing paragraphs, Mr. Bingham violated G.L. c. 268A, §§17(a) and 17(c).

WHEREFORE, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings on the basis of the following terms and conditions agreed to by Mr. Bingham:

1. That he, in the future, refrain from acting as attorney for or receiving compensation from private parties in connection with particular matters in which the town of Lynnfield has a direct and substantial interest, prohibited by G.L. c. 268A, §§17(a) and 17(c); and

2. that he pay to the Commission a civil penalty in the amount of $750 for violating G.L. c. 268A, §§17(a) and 17(c); 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: February 21, 1984

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 235

IN THE MATTER
OF
BILL OWENS

Appearances:

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

Bill Owens: pro se

Commissioners:

Diver, Ch.; McLaughlin, Brickman, Burns, Mulligan

DECISION AND ORDER

I. Procedural History

The Petitioner filed an Order to Show Cause on October 3, 1983 alleging that the Respondent, Bill Owens, had violated M.G.L. c. 268B, §5[1]/ by failing to file his Statement of Financial Interests for 1982 (SFI) within ten days of receiving from the Commission a Formal Notice of Delinquency.

Pursuant to notice, an adjudicatory hearing was conducted on January 10, 1984 before Commissioner David Brickman, a duly designated presiding officer. See, M.G.L. c. 268B, §4(c). Oral argument was heard before the full Commission at its meeting on January 30, 1984. 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 served as a state senator until the end of 1982, and was therefore a public official within the meaning of G.L. c. 268B, §1(q).

2. As a public official through 1982, the Respondent was required to file an SFI for 1982 on or before May 31, 1983.

3. The Respondent failed to file his 1982 SFI by May 31, 1983.

4. On June 15, 1983, the Respondent received a Formal Notice of Delinquency (Notice) from the Commission requiring him to file his SFI within ten days of receipt of the Notice.

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

6. The Commission authorized a preliminary inquiry on July 19, 1983 and the initiation of adjudicatory proceedings against the Respondent thereafter.

7. The Respondent filed his 1982 SFI on August 17, 1983, thirty-seven working days after the expiration of the ten-day period contained in the Notice.

III. Decision

The elements necessary to establish a G.L. c. 268B, §5 violation are: (1) the subject was a public official or 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 an SFI; and (3) the subject did not file an SFI within ten days of receiving notice of delinquency. The Respondent conceded at both the adjudicatory hearing and at oral argument before the full Commission that he had failed to file his 1982 SFI within ten days of receiving the Commission's Notice, and has offered no legal defenses. The Commission therefore concludes that the Respondent violated G.L. c. 268B, §5.

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 $2,000 for each violation. In cases involving SFIs which are filed late, the Commission imposes a fine based on the number of days which elapse after the expiration of the ten-day period following the Commission's Notice. The schedule the Commission adopted on April 12, 1983 calls for a daily fine of $10 per day for the first ten working days and $20 per working day thereafter, or a total of $640 in the instant case. However, the Commission recently adopted a $500 limitation on the civil penalty to be imposed on late filers. See, **In the Matter of Vernon R. Thornton,**

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

(b) Every public official shall file a statement of financial interests for the preceding calendar year with the Commission on or before the last Tuesday in May of each year that such public official holds such office and on or before May first of the year after such public official leaves office.

...

(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.

1984 Ethics Commission _____. While the Commission does retain the discretion to adjust a civil penalty in recognition of mitigating circumstances, none of the factors warranting mitigation below the $500 ceiling are present in this case.[2]/ Compare, **In the Matter of Delabarre F. Sullivan**, 1983 Ethics Commission 128.

V. Order

On the basis of the foregoing, the Commission concludes that Bill Owens violated M.G.L. c. 268B, §5. Pursuant to the authority granted it by M.G.L. c. 268B, §4(d), the Commission orders Mr. Owens to pay a civil penalty of five hundred dollars ($500.00).

DATE: February 28, 1984

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 231

IN THE MATTER
OF
LUCIAN F. PERREAULT

Appearances:

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

Lucian F. Perreault: pro se

Commissioners:

Diver, Ch.; McLaughlin, Brickman, Burns, Mulligan

DECISION AND ORDER

I. Procedural History

The Petitioner filed an Order to Show Cause on September 14, 1983 alleging that the Respondent, Lucian F. Perreault, had violated M.G.L. c. 268B, §5[1]/ by failing to file his Statement of Financial Interests 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 January 11, 1984 before Commissioner Joseph I. Mulligan, a duly designated presiding officer. See, M.G.L. c. 268B, §4(c). The parties waived their right to present oral arguments before the full Commission and did not submit briefs. 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, Lucian F. Perreault, was a consultant to the Massachusetts Committee on Criminal Justice, from March through September, 1982.

2. In December, 1982 the Respondent was designated by the Secretary of Public Safety as a person in a "major policy-making position"[2]/ for the year 1982. As such, he was a public employee[3]/ and was required to file a Statement for 1982 on or before May 1, 1983.

3. The Respondent failed to file his 1982 Statement by May 1, 1983.

4. On May 19, 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 adjudicatory proceedings.

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[2]/The Respondent raised a number of factors in an attempt to eliminate or reduce any civil penalty which might be imposed, including (1) he was traumatized over losing the election in November, 1982; (2) he had no willful intent not to file his SFI; (3) he was out of town frequently during the first half of 1983, and (4) there was some confusion as to which form had not been filed, and which of his two accountants handled such matters. The Commission concludes that none of these factors is sufficient to warrant mitigation.

[1]/M.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 . . .

(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.

[2]/For the purposes of M.G.L. c. 268B, major policy making position is defined as: the executive or administrative head or heads of a governmental body; all members of the judiciary; any person whose salary equals or exceeds that of a state employee classified in step one of job group XXV of the general salary schedule contained in Massachusetts General Laws c. 30, §46 and who reports directly to said executive or administrative head; the head of each division, bureau or other major administrative unit within such governmental body; and persons exercising similar authority . . . M.G.L. c. 268B, §1(l).

[3]/For the purposes of M.G.L. c. 268B, public employee is defined as "any person who holds a major policy-making position in a governmental body" . . . M.G.L. c. 268B, §1(o).

7. The Respondent filed his 1982 Statement on July 26, 1983, thirty-eight days after the expiration of the ten-day period contained in the Notice.

8. The Respondent admits receiving the commission's Notice and states that he was "negligent" in this matter.[4/]

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.

IV. Sanction

Under M.G.L. c. 268B, §4(d), the Commission 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 calculated on the number of days which elapse after the expiration of the ten-day period following the Commission's Notice.[5/] 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. However, without condoning the Respondent's disregard of the filing requirement, the Commission finds that a civil penalty of $500, rather than $660 is appropriate. See, fn. 5, supra.

V. Order

On the basis of the foregoing, the Commission concludes that Lucian F. Perreault violated M.G.L. c. 268B, §5. Pursuant to the authority granted it by M.G.L. c. 268B, §4(d), the Commission orders Mr. Perreault to pay a civil penalty of five hundred dollars ($500.00).

DATE: February 28, 1984

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 216

IN THE MATTER
OF
KENNETH M. NASH

Appearances:

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

E. Melvin Nash, Esq.: Counsel for Respondent Kenneth M. Nash

Commissioners:

Diver, Ch.; McLaughlin, Brickman, Burns, Mulligan

DECISION AND ORDER

I. Procedural History

The Petitioner filed an Order to Show Cause on August 30, 1983 alleging that the Respondent, Kenneth M. Nash, had violated M.G.L. c. 268B, §5[1/] by failing to file his Statement of Financial Interests 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 December 2, 1983 before Commissioner Bernard McLaughlin, a duly designated presiding officer. See, M.G.L. c. 268B, §4(c). The parties

[4/] The Respondent also stated that he decided not to cooperate with Commission staff in resolving this matter because he thought he "was being taken" when a staff member allegedly told him that he could make a "deal." The staff member in question testified during the hearing and denied using the word "deal" in his conversations with the Respondent. Whatever misunderstanding the Respondent may have had concerning this discussion is not relevant to the factual issue of whether the Respondent was delinquent number G.L. c. 268B, §5.

[5/] 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 ten working days and $20.00 per working day thereafter. In the instant case, where the Respondent filed his Statement thirty-eight days after the expiration of the ten-day period following the Commission's Notice, a fine of $660.00 would ordinarily be warranted. However, for the reasons stated in the Commission's decision **In the Matter of Vernon Thornton** 1984 Ethics Commission ____ issued on January 13, 1984, the maximum fine in late-filed Statement cases is $500.00.

thereafter presented oral arguments before the full Commission and submitted briefs in support of their positions. 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, Kenneth M. Nash, was a member of the Massachusetts Aeronautics Commission (MAC), from May, 1979 until January 29, 1982.

2. Due to funding problems with MAC, the Respondent decided to resign in October, 1981. He wrote his formal letter of resignation on January 22, 1982, but he neither received money from MAC nor participated in MAC activities in 1982.

3. In January, 1983, the Respondent was designated by the Secretary of the Executive Office of Transportation and Construction as a person in a "major policy-making position"[2]/ for the year 1982. As such, he was a public employee[3]/ and was required to file a Statement for 1982 on or before May 1, 1983.

4. The Respondent failed to file his 1982 Statement by May 1, 1983.

5. On May 11, 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.

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

7. 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 adjudicatory proceedings.

8. The Respondent filed his 1982 Statement on August 2, 1983, forty-nine days after the expiration of the ten-day period contained in the Notice.

9. The Respondent admits receiving the Commission's Notice and ignoring it, thinking it was sent in error. He testified that it was the first correspondence he had received regarding this matter because the Commission had been using an incorrect address.

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.

The Respondent maintains that he was not a member of MAC and therefore, not a "public employee" during 1982 since it was his intention to resign from MAC in October, 1981. He argues that the date of his formal resignation, January 29, 1982, should not be controlling. However, for the purposes of the Commission's regulations, 930 CMR 2.00, Designations of Public Employees, a "public employee" is defined as "any person holding a major policy-making position in a governmental body for eight days or more during a reporting year. . ." 930 CMR 2.02 (15). The regulations define "holding a major policy-making position in a governmental body for eight days or more" as occupying that position for that period of time, without regard to days of actual service. 930 CMR 2.02(10). In view of these definitions, it is clear that the Respondent was a public employee as defined by the statute during 1982. Based on his date of resignation, he occupied a position with a governmental body for more than eight days in 1982. The fact that the Respondent received no money, nor participated in any MAC activities in 1982 is not relevant because MAC is a governmental body authorized to expend public funds.[4]/ His failure to receive compensation due to lack of funding does not exempt him from the law.[5]/ Until the Respondent formally resigned from MAC on January 29, 1982, he was a member of MAC and, as such, he was required to file his 1982 Statement by May 1, 1983.

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[1]/M.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. . .

. . .

(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.

[2]/For the purposes of M.G.L. c. 268B, major policy making position is defined as: the executive or administrative head or heads of a governmental body; all members of the judiciary; any person whose salary equals or exceeds that of a state employee classified in step one of job group XXV of the general salary schedule contained in Massachusetts General Laws c. 30, §46 and who reports directly to said executive or administrative head; the head of each division, bureau or other major administrative unit within such governmental body; and persons exercising similary authority . . M.G.L. c. 268B, §1(l).

[3]/For the purposes of M.G.L. c. 268B, public employee is defined as: "any person who holds a major policy making position in a governmental body; provided, however, that any person who receives no compensation other than reimbursements for expenses, or any person serving on a governmental body that has no authority to expend public funds other than to approve reimbursements for expenses shall not be considered a public employee for the purposes of this chapter. . . M.G.L. c. 268B, §1(o).

The respondent also contends that he did not have proper notice of the filing requirement and the ensuing penalty for failing to file as required. To support his position he maintains that he did not receive prior Commission correspondence which was mailed to his business address rather than his home address. He also states that the Commission's Notice sent in May was the first letter he received on this matter. However, the Respondent admittedly received Commission material, such as the Notice sent to his business address. Since the Notice informed the Respondent of his delinquency and addressed the imposition of a civil penalty, he received proper notice for the purposes of establishing a violation under M.G.L. c. 268B, §5.[6]/ After receiving the Notice, the Respondent could have filed his Statement or contacted the Commission within the ten-day grace period provided. He did neither, choosing instead to ignore the material. 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.

IV. Sanction

Under M.G.L. c. 268B, §4(d), the Commission 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 calculated on the number of days which elapse after the expiration of the ten-day period following the Commission's Notice.[7]/ 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. However, without condoning the Respondent's disregard of the filing requirement, the Commission finds that a civil penalty of $500, rather than $880 is appropriate. See, fn. 7, supra.

V. Order

On the basis of the foregoing, the Commission concludes that Kenneth M. Nash violated M.G.L. c. 268B, §5. Pursuant to the authority granted it by M.G.L. c. 268B, §4(d), the Commission orders Mr. Nash to pay a civil penalty of five hundred dollars ($500.00).

DATE: February 28, 1984

[4]/Pursuant to M.G.L. c. 6, §57, MAC is authorized to pay its members $25.00 for each day of service as a commissioner.

[5]/For the purposes of the Commission's regulations, 930 CMR 2.00, Designations of Public Employees, "person who receives no compensation" is defined as a person serving in a position for which no compensation is authorized or a person serving on a board, commission or council no member of which is authorized to receive compensation. 930 CMR 2.02(14).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 252

IN THE MATTER
OF
EUGENE P. RILEY

DISPOSITION AGREEMENT

This disposition agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Eugene P. Riley ("Mr. Riley") pursuant to section 11 of the Commission's **Enforcement Procedures.** The agreement constitutes a consented to final order of the Commission enforceable in superior court under G.L. c. 268B, §4(d).

On September 13, 1983, the Commission initiated a preliminary inquiry into a possible violation of G.L. c. 268A, §23(¶2)(2), by Mr. Riley, formerly Massachusetts Foreign Business Council executive director. The Commission concluded that preliminary inquiry and, on January 10, 1984, found reasonable cause to believe that Mr. Riley had violated chapter 268A.

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

1. Mr. Riley was executive director of the Massachusetts Foreign Business Council ("MFBC") from September 1, 1981 to March 23, 1983, and, as such, was a state employee, as that term is defined in G.L. c. 268A, §1(q).

2. Over the course of his first year as MFBC executive director, Mr. Riley submitted 66 gasoline charge slips to the MFBC and received $1,400 in reimbursement. He submitted no mileage or destination statements with the MFBC to support his claim for reimbursement and has no records which might verify

[6]/Although receipt of other materials prior to the Notice is not a relevant factor in establishing a violation of M.G.L. c. 268B, §5, the Commission credits the position of the Petitioner that the Respondent did in fact receive the prior Commission material regarding the filing of his Statement mailed to his business address. See, **Duato v. Commissioner of Public Welfare, 359 Mass. 635, 641 (1971).**

[7]/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 ten working days and $20.00 per working day thereafter. In the instant case, where the Respondent filed his Statement forty-nine days after the expiration of the ten-day period following the Commission's Notice, a fine of $880.00 would ordinarily be warranted. However, for the reasons stated in the Commission's decision **In the Matter of Vernon Thornton** 1984 Ethics Commission ____ issued January 13, 1984, the maximum fine in late-filed Statement cases is $500.00.

the extent of his travel for the MFBC. Of the 66 charge slips, 57 were for fill-ups from service stations near Mr. Riley's home. Also included in these charges were approximately $150 in repairs.

3. In September 1982, Mr. Riley submitted for reimbursement a $2,500 charge to cover depreciation, repairs and insurance costs for his car for the previous 12 months. In fact, Mr. Riley had already received reimbursement for $150 in repairs in his submission of gas slips, as noted in paragraph 2, which this $2,500 flat charge, in theory, covered. He had the MFBC issue him a check for this charge.

4. These charges (referenced in paragraphs 2 and 3) by Mr. Riley to the MFBC for the use of his car exceeded state mileage reimbursement policy, which provided for reimbursement at the rate of 20¢ per mile for the use of a personal car on state business.

5. Also in September 1982, Mr. Riley submitted a bill for $654 to the MFBC for reimbursement. This charge was a one-year air travel insurance policy for $900,000 coverage. Mr. Riley had the MFBC issue a check to pay for this policy.

6. Air travel insurance was not a type of insurance the MFBC ordinarily covered for its staff. This $654 charge was an expense Mr. Riley should have paid for himself.

7. Section 23 (¶2)(2) of chapter 268A prohibits a public official from using his official position to obtain unwarranted privileges or exemptions for himself or others.

8. Mr. Riley sought and received from the MFBC more reimbursement of car use charges than he was entitled to receive. He also failed to keep records required by the state relating to his car use charges. He sought and received from the MFBC reimbursement for an insurance policy expense that he was not entitled to receive. By so doing, Mr. Riley violated §23(¶2)(2).

9. In determining the penalty to be imposed in this case, the Commission has taken into consideration the fact that on September 27, 1983, Mr. Riley, on his own initiative, reimbursed the MFBC for his gas charges, the $150 in repairs included in the gas slips he had submitted for reimbursement and the cost of this air travel insurance policy, totalling approximately $2,100.

Based on the foregoing, the Commission has determined that the public interest would be served by the disposition of this matter without further Commission enforcement proceedings on the basis of the following terms, to which Mr. Riley has agreed:

(a) that he pay to the Commission the sum of $500 forthwith as a civil penalty for violating G.L. c. 268A, §23(¶2)(2), by seeking and receiving reimbursement from the MFBC for car expenses he was not entitled to receive, failing to keep required records, and receiving reimbursement from the MFBC for an insurance policy he was not entitled to have covered; and

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

DATE: March 2, 1984

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory
Docket No. 254

IN THE MATTER
OF
JOHN PIGAGA

DISPOSITION AGREEMENT

This disposition agreement ("agreement") is entered into between the State Ethics Commission ("Commission") and John Pigaga ("Mr. Pigaga") pursuant to section 11 of the Commission's **Enforcement Procedures.** This agreement constitutes a consented to final order of the Commission enforceable in superior court under G.L. c. 268B, §4(d).

On December 28, 1983, the Commission initiated a preliminary inquiry into possible violations of G.L. c. 268A, §6 by Mr. Pigaga, chairman of the Auto Damage Appraiser Licensing Board. The Commission concluded that preliminary inquiry and, on January 30, 1984, found reasonable cause to believe that Mr. Pigaga had violated chapter 268A.

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

1. Mr. Pigaga was appointed chairman of the Auto Damage Appraiser Licensing Board ("Board") in April 1982 and, as such, was a state employee, as that term is defined in G.L. c. 268A, §1(q).

2. The board, established by statute in 1981, is empowered to license inviduals to appraise damage to motor vehicles arising from motor vehicle damage claims. A license may be issued only after an applicant

successfully completes an exam prepared and administered by the Board. No appraiser may complete an auto damage report unless he is duly licensed.

3. At a meeting in November 1982, the Board, including Mr. Pigaga, discussed the questions compiled by one of the Board members to be used for the Board's first licensing exam. During this meeting, the Board decided on acceptable answers for each of the questions and recorded the answers on an answer key. Mr. Pigaga took custody of the answer key after this meeting.

4. On November 30, 1982, the Board administered its first licensing exam to approximately 180 applicants. Each applicant was checked in at the exam site by three of the Board members who were serving as proctors and paid a $50 application fee before taking the exam. After the test, the exam papers were divided up to be graded by the three Board members who had served as proctors. (Mr. Pigaga was not one of these three.)

5. At some point around the time of the November 30, 1982 exam, Mr. Pigaga took the licensing exam himself. He did not take it when it was administered on November 30, 1982. Mr. Pigaga also graded his own exam. He passed.

6. In December 1982, Mr. Pigaga added his name to the list of license applicants who had taken the November 30, 1982 exam. On or about December 12, 1982, he paid and recorded the receipt of the $50 license fee. He also put his exam in with the test papers of the applicants who had taken the exam at the officially-scheduled time. He then issued himself an auto damage appraiser's license, along with the other applicants who had passed the November 30, 1982 exam.

7. Section 6 of chapter 268A prohibits a state employee from participating as such in a particular matter in which, to his knowledge, he has a financial interest.

8. By all the actions he took in connection with his own licensing, Mr. Pigaga participated in his official capacity in a particular matter in which he had a financial interest. Most particularly, he performed the critical step in the process of obtaining a license for himself: he took the exam, graded it himself, put it back in the group of exams completed by applicants who had taken the exam when it was administered on November 30, 1982, and then issued himself a license. His right to a license, conditioned by statute on his passing an exam, was questionable, at best, where he knew (and indeed had helped formulate) the correct answers beforehand. None of the other Board members knew that Mr. Pigaga had taken the November 30, 1982 exam for the purpose of obtaining a license. If he had disclosed his actions and his purpose, he would not have obtained the license. By his participation in his own licensing process, then, Mr. Pigaga violated §6.

Based on the foregoing, the Commission has determined that the public interest would be served by the disposition of this matter without further Commission enforcement proceedings on the basis of the following terms, to which Mr. Pigaga has agreed:

(a) that he pay to the Commission the sum of $2,000 for violating G.L. c. 268A, §6, by participating in the process by which he obtained an appraiser's license — taking the exam, grading it himself and issuing himself the license; and

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

DATE: May 8, 1984

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 236

IN THE MATTER
OF
THOMAS W. WHARTON

Appearances:

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

Thomas W. Wharton: pro se

Commissioners:

Diver, Ch.; Brickman, Burns, McLaughlin, Mulligan

DECISION AND ORDER

I. Procedural History

The Petitioner initiated these proceedings on September 30, 1983 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, Thomas W. Wharton, a former president of the Community Development Finance Corporation (CDFC), a state agency, violated the conflict of

interest law (specifically, §5 of G.L. c. 268A) by receiving compensation from a private company in connection with matters in which he had participated while at CDFC.

The Respondent filed an answer in which he denied "each and every allegation, conclusion and finding in the Order to Show Cause." He also filed three "Motions for Dismissal" which will be discussed below.

The adjudicatory hearing on this matter was held on four separate days (January 26, 1984, January 27, 1984, February 10, 1984, and February 22, 1984), before Commissioner Joseph I. Mulligan, Jr., the Presiding Officer designated pursuant to G.L. c. 268B, §4(c). The parties thereafter filed briefs with the Commission and presented oral arguments before the full Commission on April 17, 1984. In rendering this Decision and Order, each of the participating Commissioners has heard and/or reviewed the evidence and arguments presented by the parties.

II. Findings of Fact[1]/

1. The Community Development Finance Corporation was established by the Legislature pursuant to G.L. c. 40F, §§1 et seq. to invest state funds in small businesses within economically depressed areas of the Commonwealth.

2. Wharton was president of CDFC from August, 1980 to June 30, 1982.

3. In May of 1981, Wharton identified Computer Components Systems, Inc. (CCS), a corporation located in Lawrence as a good prospect for involvement by CDFC. CCS was engaged in the fabrication of precision sheet metal components.

4. In October of 1981, CCS submitted a proposal to CDFC seeking to have CDFC invest in it.

5. In his capacity as president of CDFC, Wharton toured CCS and met with its president, Larry Johnston, assigned a CDFC financial analyst to perform a management audit of CCS, submitted to the Board of Directors of CDFC "historical and projected financial information" on CCS, and presented CCS's investment proposal to the Board at its December 17, 1981 meeting.

6. The Board authorized Wharton to make the investment which involved an initial equity investment of $10,000 and subseqent promissory notes aggregating $240,000. The Board further noted that the Investment Agreement to be entered into must "provide for adequate reporting of financial data from [CCS] to [the local community development corporation] and the CDFC, including an annual audit of [CCS's] books."

7. The Investment Agreement was executed on February 4, 1982 with Wharton signing on behalf of CDFC. As part of that Agreement, CCS agreed to furnish CDFC annual financial reports and monthly financial statements which would include a balance sheet and statements of profit and loss. CCS further agreed to furnish CDFC full information pertinent "to any matter in connection with the company's business," and to permit CDFC representatives to visit and inspect any of its properties, including its books and "to discuss its affairs, finances and accounts with its officers."

8. At the end of March, 1982, Wharton tendered his resignation to the CDFC Board, to be effective June 30, 1982.

9. In the early part of 1982, CCS lacked adequate financial management. Neither its president nor vice president possesed the requisite financial skills. This need for strong financial management was of concern to the CDFC Board at the time the investment was approved and continued to be of concern to the CDFC staff after closing.

10. CCS attempted to "solve [its] need for financial planning and control" in various ways, first with the presence of a financial consultant on its Board of Directors, then by hiring outside consultants, and finally by hiring a controller. Thomas Wharton took over as controller, informally on July 23, 1982 and formally on August 3, 1982.

11. As of July 15, 1982, the balance of funds available to CCS from CDFC was $85,000. Johnston had requested $30,000 of that. On July 15th, CDFC responded to that request by sending a check for $23,488.83. In a letter acompanying that check, CDFC's investment officer noted that: "To advance monies to you without accurate financial information on a long-term financial program for survival of CCS is to say the least making me feel uncomfortable." Among the items requested by CDFC before the next "drawdown request" were "weekly flash reports," a "revised payout schedule," a "revised break even analysis," and a "demonstrated plan for achieving profitability."

12. A week later, on July 23, Wharton met with CCS's president (Johnston), vice president (Ham) and another employee (Payne). A "survival strategy" was mapped out, the gist of which was to "[t]ake the money, invest it back into raw materials, salaries, production and collection. Sell, produce and collect for a period of 60 to 70 days." Responsibilities were assigned: Johnston and Ham were to be in charge of sales and Payne of production; Wharton was to collect funds, and coor-

[1]/Included are those findings relevant to the Motions for Dismissal.

dinate the sales and production areas. The four participants at the July 23rd meeting "set goals in sales, shipping, production and backlogs...[T]hey set up weekly sales and production report [sic] that would...give [them] the information" as to whether these goals were being met.

13. Six days later, on July 29, 1982, Johnston responded to the conditions set by CDFC "before any drawdown request [could] be acted upon" and made a new drawdown request. Johnston noted that an "internal weekly report has been designed," and a "revised payout schedule was prepared along with a cash flow schedule," that the "strategy for the next 60 to 90 days [was] basically to conserve all cash and first apply it to raw materials and salary," and that there would be closer coordination between production, sales and finance. Johnston further noted that in order to solve its cash flow problem, CCS needed the cooperation of CDFC, Arlington Trust Company (its major secured creditor) and its other secured and unsecured creditors. CDFC's cooperation was termed "crucial."

14. On August 2, 1982, Arlington Trust initiated foreclosure proceedings but agreed to a temporary stay while CCS tried to come up with a plan to avert foreclosure. As consideration for this forebearance, CDFC agreed to advance CCS $5,000 which would be paid to Arlington Trust. (At this time, CDFC advanced CCS a total of $12,000). Arlington Trust also indicated that it would "entertain an offer of approximately $160,000 [from CDFC] to assume [the bank's] present collateral position."

15. Wharton was among those representatives of CCS who met with CDFC's investment officer on August 3 and August 4, 1982 to discuss the pending foreclosure by Arlington Trust. Wharton also indicated to CCS's Board of Directors that among other measures that had to be taken, the company needed "the balance of the drawdown from CDFC."

16. On August 5, 1982, Wharton was informed by CDFC's counsel that the conflict of interest law would "prevent [him] from working for [CCS] on any matter relating to its Investment Agreement with CDFC." On the same day, Wharton sought an advisory opinion from the Ethics Commission in which he indicated that his role in CCS would not involve "any appearance or direct contact by [him] with CDFC."

17. On August 9, 1982, Johnston reported to CDFC that CCS "ha[d] developed the financial strategy to overcome the serious crisis that it [was then] facing," submitted "supporting documents that detail[ed] that strategy," and requested that CDFC release to CCS $8,000 a week for six weeks and defer interest payments. Wharton prepared those supporting documents, knowing they would be used to support the drawdown request to CDFC: Wharton had been present at the management meeting on August 4, 1982 at which CDFC's investment officer discussed a "to-do list" for gathering documentation on CCS's financial position for presentation to CDFC's investment committee; Wharton had stressed the need for more money from CDFC; the documents Wharton prepared correlated to that "to-do list;" and their content was more consistent for submission to CDFC than to Arlington Trust.

18. On August 16,1982, Wharton stated to the chief of the Legal Division of the Ethics Commission that his role at CCS was limited to dealing with banks, that he was not dealing with CDFC, and that he was not performing the functions of controller as set out in his contract.

19. On August 19, 1982, Johnston asked CDFC to obtain from the Ethics Commission a "waiver" to allow Wharton to be CCS's controller.

20. On August 23, 1982, the CCS Board of Directors voted to fire Wharton.

21. On or before August 24, 1982, Wharton prepared for Johnston a status report to be given to CCS's Board of Directors. In that report, it is stated: "Although Computer Component Systems continues to operate according to plan, there still remains a need for the release of [CDFC] funds."

22. On August 25, 1982, Wharton resigned from CCS.

23. On August 27, 1982, the chief of the Legal Division of the Ethics Commission orally advised Wharton that the conflict law would prohibit him from becoming involved with CCS in any matters related to the CDFC loan or conditions established under the loan. That oral advice was confirmed in writing on August 30, 1982.

24. Wharton returned to work at CCS on August 31, 1982, and performed services for the company through September 17, 1982.

25. The Commission rendered its formal advisory opinion to Wharton on September 13, 1982.

26. Wharton again resigned from CCS on September 18, 1982.

27. For the nine-week period from July 16, 1982 through September 17, 1982, Wharton performed services for CCS on 44 days and received a total of $14,690 from the company.

28. The preliminary inquiry into Wharton's activities was initiated by the Commission on December 20, 1982. On March 22, 1983, it was extended to June 1, 1983 but ended on April 12, 1983 when the Commission found reasonable cause to believe that the law had been violated.

29. The Order to Show Cause in this case issued on September 30, 1983 and a hearing was scheduled for December 14, 1983. Less than two weeks before the hearing, Wharton's attorney withdrew from the case and asked for a two-month continuance. A six-week continuance was granted to January 26, 1984. On January 20, 1984, Wharton sought a further continuance to March 15, 1984; his request was denied. The hearing took place over four days: January 26, 1984, January 27, 1984, February 10, 1984 and February 22, 1984.

III. Decision

A. Motions to Dismiss

Wharton first argues that the proceedings against him should be dismissed because he was denied a continuance and thereby denied an adequate opportunity to prepare his defense. Four months elapsed in this case between the issuance of the Order to Show Cause and the hearing. For approximately the first half of that period, Wharton was represented by counsel. When counsel withdrew from the case, Wharton was given an additional six weeks to prepare his defense. In addition, the two weeks between the second and third hearing days and the twelve days between the third and fourth hearing days were available to him. Thus, there was an adequate opportunity for Wharton to prepare his defense. Accordingly, this Motion to Dismiss is denied.

Wharton next argues that the proceedings should be dismissed because the informal advice he received from the chief of the Commission's Legal Division was "radically different" than that contained in his advisory opinion and that the chief of the Legal Division had no authority to give informal advice. The informal advice Wharton received was consistent with the advisory opinion ultimately rendered by the Commission. While such informal advice is not binding on the Commission and does not have the legal effect of an advisory opinion (see, G.L. c. 268B, §3(g)), it is permitted, and, indeed, often contributes to the efficient administration of the Commission's statutory responsibilities. Accordingly, this Motion to Dismiss is denied.

Finally, Wharton argues that these proceedings should be dismissed because of the length of the preliminary inquiry and the delay in issuing an Order to Show Cause after reasonable cause was found. The Commission's procedures provide a 90-day limit on the length of an inquiry unless the Commission votes to extend the inquiry. While the inquiry in this case took more than 90 days, it was extended by the Commission. It is of no consequence, absent a showing of prejudice, that the extension was granted after the 90-day period (here, by one day since the 90th day fell on a Sunday).[2]/ The 90-day rule is not based on any statute, but reflects the Commission's desire that inquiries be conducted as expeditiously as possible. Its principal purpose is to make the Commission aware of the length of inquiries and to require its acquiescence for them to go beyond 90 days. That purpose is satisfied whether the extension is granted before or after the initial 90-day period ends. With respect to the time period after the finding of reasonable cause, it should be noted that neither the provisions of c. 268B dealing with investigations (see §4) nor the Commission's procedures impose any requirement as to when the Order to Show Cause must issue. Here again, there is no showing that Mr. Wharton was prejudiced or that the Petitioner gained any undue advantage by the delay. Indeed, during the argument, Wharton indicated that during this period his lawyer was negotiating with the Petitioner over resolution of the case by way of a Disposition Agreement. Accordingly, this Motion to Dismiss is denied.

B. G.L. c. 268A, §5

Section 5 of G.L. c. 268A prohibits, in part, a former state employee from receiving compensation from a private party in connection with any particular matter in which the state is a party or has a direct and substantial interest **and** in which the former employee had participated while with the state. An "application," "submission," "contract," "decision," and "determination" are all among the items included in the definition of "particular matter." See G.L. c. 268A, §1(k).

Section 5 is grounded on several policy considerations. The undivided loyalty due from a state employee while serving is deemed to continue with respect to some matters after he leaves state service. Moreover, §5 precludes a state employee from making official judgements with an eye, wittingly or unwittingly, consciously or subconsciously, toward his own personal future interest. Finally, the law ensures that former employees do not use their past friendships and associations within government or use confidential information obtained while serving the government to derive unfair advantage for themselves or others.

Applying the law to this case, CDFC is a state agency. It was created by the legislature as a "public instrumentality" and placed in the state's Department of Community Affairs. See G.L. c. 40F, §2. Its available funds are derived from the state Treasury. See G.L. c. 40F, §4. Wharton, thus, is a former state employee by virtue of his prior employment as CDFC's president. See

[2]/The inquiry ends with the Commission's finding of reasonable cause.

G.L. c. 40F, §3(j). After he left state service, Wharton was compensated by CCS, i.e., someone other than the Commonwealth of Massachusetts. The Investment Agreement entered into between CDFC and CCS was a contract and thus a particular matter as that term is defined in G.L. c. 268A, §1(k) and used in §5. The state was a party to and had a direct and substantial interest in that matter. See EC-COI-79-122; 82-79; 82-130. The questions left to be resolved are:

1. whether Wharton had participated in the Investment Agreement while a state employee, and

2. whether his subsequent work for CCS for which he was compensated was in connection with that Agreement.

Clearly, Wharton participated in the Investment Agreement as a state employee. Among other things, he identified CCS as a good prospect for investment by CDFC; he submitted background information on CCS to the CDFC Board; he presented CCS's proposal to the Board; he was the one authorized to make the investment; and he signed the Investment Agreement on behalf of CDFC. Such actions constituted personal and substantial participation in that agreement as required by the conflict law. See G.L. c. 268A, §1(j); see also EC-COI-82-156; 82-143; 81-58.

In view of the concern expressed by CDFC over the financial management of CCS and the importance of CDFC funds to CCS, arguably, everything Wharton did to help solve the company's troubled financial situation was in connection with the Agreement with CDFC. The Commission need not decide that issue, however, since Wharton's activities at CCS directly related to the Investment Agreement in the following three instances: (1) The Agreement clearly contemplated a close monitoring by CDFC of CCS's financial affairs. As part of that monitoring, CDFC's investment officer expressed concern over the need for accurate information as to how CCS planned to survive financially and required various items from CCS before any further money could be advanced. Wharton was directly involved in planning such a survival strategy and helping the company respond to CDFC's request. (Findings of Fact Nos. 11-13). (2) When Arlington Trust threatened to foreclose, CDFC's cooperation became critical to CCS. The company requested that CDFC release to it under the Investment Agreement $8,000 a week for six weeks and agree to defer interest payments. Wharton prepared the documents to support that request. (Findings of Fact Nos. 14-17). (3) Finally, Wharton prepared a status report to the CCS Board of Directors which directly related to the further release of CDFC funds under the Investment Agreement. (Findings of Fact No. 21).

By the activities listed above, Wharton violated §5(a) of G.L. c. 268A. It is immaterial whether Wharton did a good job or a bad job for CCS, or whether the company would or would not be able to survive without his services. Section 5 establishes one standard for all former state employees. It could not be fairly applied if in each instance the quality of the necessity of the work performed had to be analyzed. Moreover, such an analysis would be irrelevant to the purposes underlying the rule.

IV. Order

On the basis of the foregoing, we conclude that Thomas W. Wharton violated G.L. c. 268A, §5(a). Pursuant to authority under G.L. c. 268B, §4(d), we hereby order Mr. Wharton to pay a civil penalty of $1,000 (one thousand dollars).[3]/ We order Mr. Wharton to pay this penalty to the Commission within 30 (thirty) days of receipt of this Decision and Order.

DATE: May 8, 1984

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 255

IN THE MATTER
OF
ROBERT FARLEY

DISPOSITION AGREEMENT

This disposition agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Robert Farley ("Mr. Farley") 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 August 16, 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. Farley, acting supervisor of the Division of Elevator Inspections in the Department

[3]/ While in some circumstances, the fact that a person sought an advisory opinion might be considered a factor in mitigation of a violation, we decline to do so here. Wharton appears to have sought an opinion only after being forced to do so by CDFC counsel. Moreover, in his opinion request and discussions with Commission staff, he inaccurately described his role at CCS.

of Public Safety. The Commission has concluded that preliminary inquiry and, on March 12, 1984, found reasonable cause to believe that Mr. Farley violated G.L. c. 268A, §6.

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

1. Except for a nine-month period in August, 1981, Mr. Farley has been an elevator inspector for the Division of Elevator Inspections under the jurisdiction of the Department of Public Safety since 1979. For the past year and a half he has been the acting supervisor of that division. As an inspector, he is a state employee as defined in §1(q) of G.L. c. 268A.

2. While employed as a state elevator inspector, Mr. Farley was hired by two elevator companies, Otis Elevator (Otis) and Montgomery Elevator (Montgomery), to do what is referred to in the industry as "stand-by" work. This work required the presence of a union mechanic at a job site when non-union personnel drilled hydraulic wells. Although the union bargaining agreement mandates the presence of a union member, it has traditionally been a "no-show" position. Mr. Farley was paid $12,000 in total by Otis and Montgomery for approximately 750 hours of this no-show work.

3. As an elevator inspector, Mr. Farley conducted safety inspections on several hundred elevators either built by or under a service contract with Otis or Montgomery. Consequently, Montgomery and Otis each had a financial interest in the outcome of numerous safety inspections conducted by Mr. Farley.

4. Section 6 of G.L. c. 268A prohibits a state employee from participating in a particular matter in which his employer has a financial interest.

5. Therefore, Mr. Farley violated G.L. c. 268A, §6 on each occasion he conducted an inspection as a state inspector of an elevator either built by Otis or Montgomery or on which Otis or Montgomery had a service contract, while at the same time he was employed by Otis and Montgomery.

In view of the foregoing multiple violations of G.L. c. 268A, §6, 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. Farley:

1. that he pay to the Commission the sum of $6500 as a civil penalty for violating G.L. c. 268A, §6;

2. that in the future he refrain from participating as a state elevator inspector in any particular matter, including safety inspections, in which a business organization by which he is employed has a financial interest, 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: May 8, 1984

May 9, 1984

Frederick C. Langone, Esq.
165 North Street
Boston, MA 02110

RE: **Public Enforcement Letter 84-1**

Dear Mr. Langone:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that as a Boston city councillor you conducted a substantial portion of your private law practice out of your City Hall office. The results of our investigation (discussed below) indicate that the conflict of interest law may have been violated in this case. However, in view of certain mitigating circumstances (also discussed below), the Commission does not feel further proceedings are warranted. Rather, the Commission has determined that the public interest would better be served by bringing to your attention the facts revealed by our investigation and explaining the application of the law to such facts, trusting that this advice will ensure your future understanding of the law. By agreeing to this public letter as a final resolution of this matter, the Commission and you are agreeing that there will be no formal action against you and that you have chosen not to exercise your right to a hearing before the Commission.

I. The Facts

1. At all relevant times, you were a Boston city councillor, and as such, a "municipal employee" as defined in G.L. c. 268A, §1(g).

2. The city of Boston provided you, as a city councillor, with an office at Boston City Hall, including the customary support personnel and equipment.

3. While a city councillor, you also maintained a private law practice, generating gross income before office expenses of $13,000 in 1981 and $22,000 in 1982.

4. While a city councillor, you also maintained a private law office and telephone at your own expense.

5. For the years 1981 and 1982, you conducted a portion of your private legal practice out of your Boston City Hall office by:

a. meeting some clients at City Hall;

b. installing and using a private phone paid for by you personally in your City Hall office and listing that phone number and your City Hall address in both the white and yellow telephone directory pages;

c. using city employees during regular city hours to answer your private phone, and to do the typing and xeroxing for your private legal practice; and

d. using City Hall typewriters and xeroxing equipment.

II. The Conflict Law

Section 23 of G.L. c. 268A provides a code of conduct for public officials and employees. Section 23(¶2)(2) prohibits a public official from using his official position to obtain unwarranted privileges for himself. In the past, the Commission has stated that this section prohibits a public employee's use of public facilities and agency time for transacting private business. See, e.g., EC-COI-84-43 (a state legislator cannot use state equipment, supplies or personnel in the pursuit of his private employment). See also EC-COI-82-112 (a state legislator cannot use a word processor, leased with his personal funds but located in his state office, for personal or campaign purposes because it would involve the use of state-supplied office space, electricity, lighting, and so forth); EC-COI-81-88 (a state legislator cannot make his state office space, telephones or other facilities available to a certain non-profit organization); **In the Matter of Roger Whitcomb,** Commission Adjudicatory Docket No. 189 (disposition agreement) (a court officer may not transact his private constable business in the courthouse, on state time and using courthouse facilities and equipment).

The facts as set forth in this letter, if proven, would suggest a possible violation of §23(¶2)(2) because they would indicate that you used your position as city councillor to obtain an unwarranted privilege, namely transacting more than a minimal part of your private law practice out of your City Hall office.

You have asserted that the Commission has to take a realistic approach to elected officials whose salaries are not substantial and who as a result must pursue private employment to generate additional income. Such a "realistic approach," you suggest, would recognize that some minor overlap will inevitably occur between one's public and private duties.*

The Commission recognizes that elected officials are generally allowed to maintain outside employment. It also recognizes that elected officials have a unique need to meet with and provide services to their constituents. Consequently, there probably will be some unavoidable overlap between the public and private employment duties. For example, notwithstanding the public official's best efforts to keep his public and private jobs separate, on occasion an individual may reach the elected official either in person, by mail or telephone for the purpose of conducting private rather than public business. In addition, the line between what is private business and public constituency services, especially for attorneys, may not always be clear.

Neverehtless, for the public to have confidence that their elected officials are not unduly combining their private and public duties, these officials should make every effort to avoid anything which gives the appearance of or actually creates an overlap. Calls, correspondence and appointments can be screened to ascertain whether the purpose is private or public business. Private business matters then can and should be conducted in private business quarters.

In any event, your situation is not one where an uncertain boundary line has been approached and perhaps inadvertently or insignificantly crossed. Rather, meeting of clients at City Hall, the installation at City Hall of a private phone and the listing of that phone and the City Hall address in the telephone books, the use of City Hall secretaries and equipment to provide private legal services, separately and especially taken together, indicate that you substantially crossed the line. The Commission has decided, however, that this case does not warrant the initiation of formal adjudicatory proceedings because:

1. some of your private legal work done at City Hall was pro bono constituent services;

2. you contend that the secretaries were fully and privately paid, and working in effect on their own time;

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*You have also asserted that the secretaries doing private legal business on city time for you were on compensatory time; and, in addition, that you paid these secretaries privately for their services. The evidence is unclear whether you paid the full value of these services; nor were any records kept showing that this private work was being done on compensatory time. But even assuming that you did fully pay the secretaries and that they were doing these services on their private compensatory time rather than public time, the Commission would still find the practice unacceptable under §23. Section 23 is as much concerned with appearances as actual conflict. **Starr v. Board of Health of Clinton,** 356 Mass. 426, 429 (1969). For a municipal employee to be providing private legal secretarial services at City Hall using City Hall equipment during City Hall hours cannot help but create an impression that the public official who has asked that these services be performed is obtaining an unwarranted privilege.

3. you paid for all the charges on your private phone out of your own funds;

4. you took steps to eliminate the private use of your office after 1982; and

5. you have cooperated fully throughout our inquiry and have provided all information requested.

III. Disposition

Based on its review of this matter, the Commission has determined that the sending of this letter should be sufficient to ensure your understanding of the law. This matter is now closed. Thank you very much for your cooperation. If you have any questions, please contact me at 727-0060.

Very truly yours,

Robert V. Greco
Executive Director

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 258

IN THE MATTER
OF
ALFRED WELCH, III

DISPOSITION AGREEMENT

This disposition agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Alfred Welch, III ("Mr. Welch") 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 3, 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. Welch, chairman of the Falmouth Board of Appeals. The Commission has concluded that preliminary inquiry and, on April 17, 1984, found reasonable cause to believe that Mr. Welch violated G.L. c. 268A.

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

1. Mr. Welch has been a member of the Falmouth Board of Appeals, which considers and rules on applications for special permits for construction projects, for approximately five years; he has been Board chairman for the last two. As a member of the Board, he is a municipal employee as defined by §1(g) of G.L. c. 268A.

2. Mr. Welch has been in the furniture and floor covering business for 25 years in the Falmouth area.

3. In April, 1982, the Board granted a special permit to the Green Company to develop a parcel of land known as the Boatyard, a 32-unit residential condominium project. Mr. Welch participated as Board chairman in the granting of that permit.

4. In October, 1982, Mr. Welch approached Alan Green ("Mr. Green"), president of Green Company, and expressed his interest in submitting a bid for floor covering at the Boatyard project. Mr. Welch also suggested the possibility of purchasing one of the units for himself. At this time, and through April 4, 1983, Mr. Green's company had no matter pending before Mr. Welch's Board.

5. Mr. Green advised Mr. Welch that he would have his project manager contact him.

6. In January, 1983, Mr. Green's project manager contacted Mr. Welch and invited him to submit bids for the floor covering work.

7. On January 27, 1983, Mr. Welch submitted a bid.

8. Sometime prior to March, 1983, Mr. Green's company entered into negotiations with the owner of a parcel of land adjacent to the Boatyard project, with the intention of purchasing and combining this parcel with the existing project. These negotiations resulted in an option to purchase, contingent upon the Board of Appeals granting a special permit for an additional condominium project.

9. In March, 1983, Mr. Welch again discussed with Mr. Green his interest in purchasing a condominium unit and supplying flooring, labor and materials to the Boatyard project. Mr. Green promised to have his project manager contact Mr. Welch. At the end of March, the project manager contacted Mr. Welch and made an appointment to meet with him on April 5.

10. Mr. Welch was unaware of the Green Company's option to purchase the adjoining lot until approximately April 6, 1983, when he became aware of the fact that the Green Company had submitted an application for a special permit to develop that parcel.

11. On April 4, 1983, the Green company submitted an application to the Board to develop the parcel of land adjacent to the Boatyard project. The Green Company also sought to amend the Boatyard permit at the time in order to combine the original parcel with the parcel it had the option to purchase.

12. The Board's secretary scheduled a hearing on these matters for April 19, 1983 and notice of the hearing ran in the newspaper on April 5 and 15.

13. On April 5, 1983, Mr. Green's project manager went to Mr. Welch's store. Mr. Welch agreed that his bid may have been high, but stated that his final bid figures were dependent on Mr. Green's price of a condominium unit. The project manager advised that he would refer the matter to Mr. Green and made an appointment with Mr. Welch for April 13, 1983.

14. On April 13, 1983, Mr. Green and the project manager visited Mr. Welch at this store. Messrs. Green and Welch discussed the bid, but Mr. Green indicated that no decision could be made because he had yet to set a price of the condominium units.

15. During this same conversation, Mr. Green and Mr. Welch also discussed the amendment to the Boatyard permit Mr. Green was seeking at the April 19 hearing.

16. On April 19, 1983, The Board held a hearing on the permit application for the adjacent parcel and the amendment of the original permit. The applications were taken under advisement, pending a site visit.

17. At the site visit, the board discovered that the existing Boatyard project did not conform to the original plan as submitted by the Green Company. At several hearings in June/July, 1983 relative to the adjacent parcel, Mr. Welch and the board pursued the issue of discrepancies between the original project, as-approved and as-built.

18. On July 12, 1983, while Mr. Welch's bid for the floor covering contract was still pending, the three-member Board, including Mr. Welch, unanimously voted to deny Mr. Green's application for ten units on the adjacent parcel. (Only one vote was required to defeat the application.) Mr. Green had asked the Board to deny the application (rather than approve a lesser number of units) if it was unwilling to grant the full number of units requested in the application.

19. Mr. Welch, as chairman, continued his efforts to have the Town make the Green Company comply with the as-approved plan of the original project. The building commissioner (who is the building enforcement officer for the Town), however, felt that the Green Company was in substantial compliance and decided not to seek any enforcement action. Mr. Welch, after conferring with the Town planner, whose Board also had jurisdiction over the Boatyard project, unsuccessfully sought Town funds from the Board of Selectmen to file an appeal of the building commissioner's Boatyard project decision.

20. Section 23(¶2)(3) of G.L. c. 268A, prohibits a municipal employee from giving reasonable basis for the impression that anyone can improperly influence his official actions.

21. At the April 13, 1983 meeting in Mr. Welch's store, when Mr. Welch discussed the bid and the purchase of a condominium unit with Mr. Green at a time when, as they also discussed, Mr. Green had matters pending before Mr. Welch's Board, Mr. Welch gave reasonable basis for the impression that Mr. Green could improperly influence his official actions.

22. Moreover, that Mr. Welch had a bid pending with Mr. Green when Mr. Welch presided over matters of significance to Mr. Green in April-July, 1983, created an impression that his public action may have been unduly affected by his private concerns.

In view of the foregoing violations of G.L. c. 268A, §23(¶2)(3), the Commission has determined that the public interest would be served by a disposition of this matter without further enforcement proceedings on the basis of the following terms and conditions agreed to by Mr. Welch:

1. that he pay to the Commission the sum of $750 as a civil penalty for violating G.L. c. 268A, §23(¶2)(3);

2. that in the future he refrain from giving reasonable basis for the impression that he can be unduly influenced in the performance of his official duties; 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: June 12, 1984

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory
Docket No. 263

IN THE MATTER
OF
FRANCIS J. MOLLOY

DISPOSITION AGREEMENT

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

On May 8, 1984 the Commission initiated a preliminary inquiry into whether Mr. Molloy violated G.L. c. 268A by virtue of being a full-time municipal employee while also serving as a member of the Franklin Town Council. The Commission concluded that preliminary inquiry and on May 29, 1984 found reasonable cause to believe that Mr. Molloy violated G.L. c. 268A, §20. The parties now agree to the following findings of fact and conclusions of law.

1. Mr. Molloy served as a Franklin town councillor from April, 1981 to July 1, 1984. The Franklin Town Council, the legislative body for the town, is composed of 15 members who are elected for two-year terms.

2. Mr. Molloy was employed by the Franklin fire department as a full-time paid fireman throughout the period he served as a member of the town council.

3. In March, 1983, Mr. Molloy requested an opinion from the Commission as to whether his dual positions with the town of Franklin were a violation of G.L. c. 268A.

4. On March 22, 1983, the Commission provided Mr. Molloy with an opinion indicating that G.L. c. 268A, §20 did not permit him to have a financial interest in the fire department position while also maintaining his membership on the town council.

5. Mr. Molloy thereafter continued to hold both positions although he had received the Commission's opinion and was fully aware that he was in violation of G.L. c. 268A.

6. In April, 1984, Mr. Molloy ran for re-election to the town council, despite the fact that he had previously been informed that his two positions with the town violated G.L. c. 268A; Mr. Molloy was re-elected.

7. On or about May 9, 1984, Mr. Molloy resigned from the town council, effective July 1, 1984.

8. Section 20 of G.L. c. 268A prohibits a municipal employee from having a financial interest in a contract made by an agency of the same municipality.

9. By having a financial interest in the Franklin fire department position while also being a Franklin town councilor, Mr. Molloy violated §20.

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 terms agreed to by Mr. Molloy:

1. that he pay to the Commission the sum of $250 forthwith as a civil penalty for violating G.L. c. 268A, §20; and

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

DATE: August 14, 1984

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory
Docket No. 265

IN THE MATTER
OF
THOMAS JOY

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Thomas Joy (Mr. Joy) pursuant to section 11 of the Commission's **Enforcement Procedures.** The Agreement constitutes a consented to final order of the Commission enforceable in superior court under G.L. c. 268B, §4(d).

On March 12, 1984, the Commission initiated a preliminary inquiry into possible violations of G.L. c. 268A by Mr. Joy, chief building inspector for the city of Malden. The Commission concluded that preliminary inquiry and, on August 14, 1984, found reasonable cause to believe that Mr. Joy had violated c. 268A.

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

1. Mr. Joy is chief building inspector for the city of Malden. As such, he is a municipal employee, as that term is defined in G.L. c. 268A, §1(g).

2. Domenic Cibene (Mr. Cibene) worked for Mr. Joy as an assistant building inspector from July 1982 until March 1983. At or about this same time, Mr. Cibene also owned and operated a construction company, Scorpio Construction, that primarily dealt in real estate investment and development.

3. On October 27, 1982, Mr. Cibene, acting for himself and Mr. Joy, signed a purchase and sale agreement to purchase a piece of property in Malden for $38,000.

4. The property was conveyed on December 31, 1982, and four months later resold at a net profit of $14,000. Mr. Joy and Mr. Cibene equally divided that profit.

5. During this same period of time, Mr. Joy and Mr. Cibene entered into another partnership arrangement to purchase a second piece of property in Malden.

6. This property was sold on March 27, 1983, again at a profit of approximately $14,000. Mr. Joy and Mr. Cibene also equally divided that profit.

7. In both ventures, Mr. Cibene made the full downpayment and used only his own financial information in securing the financing for the properties.

8. At or about the time Mr. Joy and Mr. Cibene were involved in the real estate ventures, Mr. Cibene gave Mr. Joy a short term, no interest loan in the amount of $2,000.

9. Mr. Joy, as the building inspector, also inspected Mr. Cibene's private construction work at a time when or soon after Mr. Cibene engaged in these private business relationships.

10. General Laws c. 268A, §23(¶2)(3) prohibits a public employee, as Mr. Joy, from giving reasonable basis for the impression that any person can unduly enjoy his favor in the performance of his official duties. By entering into private real estate transactions with and accepting a loan from Mr. Cibene, Mr. Joy violated §23(¶2)(3). Such conduct gave reasonable basis for the impression that Mr. Cibene would unduly enjoy the favor of Mr. Joy in any decisions he might make as his supervisor and also in inspecting his private construction work.

Based on the foregoing, 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, to which Mr. Joy has agreed:

(a) that he pay to the Commission the sum of $1250 forthwith as a civil penalty for violating G.L. c. 268A, §23(¶2)(3); and

(b) that he waive all rights to contest the findings of fact, conclusions of law and terms contained in the Agreement in this or any other related administrative or judicial proceedings in which the Commission is a party.

DATE: September 11, 1984

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 268

IN THE MATTER
OF
WILLIAM G. DOHERTY

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and William G. Doherty (Mr. Doherty) 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 March 12, 1984, the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Doherty, an industrial relations adjuster (mediator) for the State Board of Conciliation and Arbitration (SBCA). The Commission has concluded that preliminary inquiry and, on August 14, 1984, found reasonable cause to believe that Mr. Doherty violated G.L. c. 268A, §§23(¶2)(1) and (3). The parties now agree to the following findings of fact and conclusions of law:

1. Mr. Doherty has been employed as an SBCA mediator since 1949. As an SBCA mediator, he is a state employee as defined in G.L. c. 268A, §1(q). His duties typically include being assigned to labor disputes between management and union parties where, as an intermediary between those parties, he attempts to reconcile their differences.

2. Between April and August of 1983, Mr. Doherty was assigned to mediate three matters, each of which involved the Teamsters Union; one in late April 1983, another in June 1983, and the last in August 1983. In approximately the same period, Mr. Doherty accepted private employment as an arbitrator in two

disputes involving the Teamsters Union in August, 1983; Mr. Doherty received $1400 as compensation for providing these arbitration services, paid in equal shares by the union and management.

3. General laws c. 268A, §23(¶2)(1) prohibits a state employee from accepting other employment which will impair his independence of judgment in the exercise of his official duties.

4. General laws c. 268A, §23(¶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.

5. By accepting paid private arbitrations involving an organization with which he was currently working in SBCA mediations, Mr. Doherty both accepted employment which would have impaired his independence of judgment in the exercise of his official duties and by his conduct gave a reasonable basis for the impression that the private organization in question could improperly influence or unduly enjoy his favor in the performance of his official duties, thereby violating §§23(¶2)(1)* and (3), respectively.

WHEREFORE, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings on the basis of the following terms and conditions agreed to by Mr. Doherty:

1. that he pay to the Commission a civil penalty in the amount of five hundred dollars ($500.00) for violating G.L. c. 268A, §§23(¶2)(1) and (3);

2. that he pay to the Commission the economic benefit he obtained through these violations, namely the fourteen hundred dollars ($1400) he received for the two private arbitrations; 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 related administrative or judicial proceedings to which the Commission is a party.

DATE: September 24, 1984

*The Commission, in previously dealing with an SBCA mediator in a similar situation, observed, "It is well established that mediators must maintain complete independence in the resolution of contract disputes." EC-COI-82-7.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory
Docket No. 266

IN THE MATTER
OF
DONALD SOMMER

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Donald Sommer (Mr. Sommer) pursuant to section 11 of the Commission's **Enforcement Procedures**. The Agreement constitutes a consented to final order of the Commission enforceable in superior court under G.L. c. 268B, §4(d).

On October 3, 1983, the Commission initiated a preliminary inquiry into possible violations of G.L. c. 268A by Mr. Sommer, regional special education director for the state Department of Education (DOE). The Commission concluded that preliminary inquiry and has found reasonable cause to believe that Mr. Sommer violated chapter 268A.

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

1. Mr. Sommer is the regional special education director for the DOE. As such, he is a state employee, as that term is defined in G.L. c. 268A, §1(q).

2. As regional special education director, Mr. Sommer is responsible for the oversight and regulation of private special education schools; he supervised the other special education staff members in the Pittsfield office and designated one to act as chairman of the Pittsfield Regional Review Board (PRRB). (Until July 6, 1983, the PRRB was responsible for inspecting for approval purposes and monitoring special education schools. At the time, such responsibility was transferred to DOE's West Springfield regional office.) Mr. Sommer routinely participated in PRRB activities by, among other things, providing advice and assistance to the PRRB on approval issues.

3. In early 1983, the Plunkett Memorial Hospital (Hospital) of Adams, Massachusetts was offered for sale.

4. In early February 1983, Mr. Sommer inspected the Hospital site to determine its suitability for several possible uses, chief among which was use as a special education school.

5. Mr. Sommer made this inspection after discussing the property with James Pieri (Mr. Pieri), a Northampton attorney with whom Mr. Sommer was friends. Mr. Pieri and Mr. Sommer discussed putting together a group of investors to purchase the property. They also discussed establishing a special education school on the site.

6. Based on Mr. Sommer's inspection of the Hospital, Mr. Pieri decided to make an offer to purchase the property. Mr. Sommer called the real estate broker and outlined the terms of the offer Mr. Pieri would be submitting.

7. Mr. Sommer then wrote a check dated February 8, 1983, to Mr. Pieri in the amount of $10,000. This money was immediately deposited into Mr. Pieri's client trust fund account. On February 8, 1983, Mr. Pieri submitted a written offer to purchase the property and secured it with a check, also dated February 8, 1983, for $10,000. This check was drawn on his client's trust fund account. Mr. Pieri signed the offer as the attorney for unidentified buyers.

8. The sellers accepted Mr. Pieri's offer.

9. In the months that followed the offer, Mr. Sommer:

(a) had a number of discussions with Mr. Pieri about establishing a special education school on the site and securing other investors for the project;

(b) helped to identify potential investors and contact them about the project;

(c) prepared a budget outline for the proposed school;

(d) located, recruited and interviewed Wayne Smith (Dr. Smith), the person hired to be the school's executive director; and

(e) met with people involved in the project to discuss the application process the school was required to complete to be licensed by the state.

10. The application for the Cana School (Cana), as the school on the Hospital site was to be named, was submitted to DOE in late June 1983 to be included on the agenda for the July 5, 1983 meeting. The application was not complete. Despite this, a meeting of the PRRB to review and approve the application and to visit the site was arranged for July 5, 1983.

11. Mr. Sommer met with a Pittsfield regional office staff member whom Mr. Sommer had recently appointed to chair the PRRB, and suggested to him that the PRRB might give Cana a "contingent temporary approval" despite the fact that the application was incomplete. This "contingent temporary approval" would then allow Cana to apply to the state Rate Setting Commission for approval, according to Mr. Sommer.

12. On July 2, 1983, Mr. Sommer explained to Dr. Smith what needed to be done to prepare for the July 5th site visit by the PRRB.

13. On July 3, 1983, Mr. Sommer went to the Cana school and met the Cana cleanup crew which was preparing the facility for the upcoming PRRB site visit.

14. On July 5, 1983, the PRRB, chaired by a subordinate employee, met to consider Cana's application and to visit the site. Although there were questions about whether a quorum was present, and although some of the local permits that are a prerequisite to approval were lacking, the PRRB granted Cana contingent temporary approval. (Mr. Sommer did not attend this meeting.)

15. Soon after the July 5 meeting, DOE transferred responsibility for the special education schools in the Pittsfield region to the West Springfield regional office, and Cana's contingent temporary approval was rescinded.

16. G.L. c. 268A, §4(c) prohibits a state employee from acting as agent for a private party in connection with a particular matter in which the state has a direct and substantial interest. The establishing and licensing of a special education school is a matter of direct and substantial interest to the state. Accordingly, Mr. Sommer violated §4(c) when he acted as Cana's agent by: evaluating the Hospital site for a special education school use; seeking out potential investors and discussing the project with them; locating, recruiting and interviewing Dr. Smith and a consultant; reviewing the budget and other components of the approval application Dr. Smith was preparing; instructing Dr. Smith on what is needed to be done for the PRRB site visit and making arrangements to have it done before the visit; and suggesting the concept of contingent temporary approval to the chairman of the PRRB.

17. Mr. Sommer's private dealings with the Cana project occurred when matters concerning the project were pending before his agency or when it was reasonably forseeable that matters concerning the project would be pending before his agency in the near future.

18. By having substantial official and private dealings with the Cana project at the same time, Mr. Sommer gave reasonable basis for the impression that those involved with Cana could improperly influence him or unduly enjoy his favor, in violation of §23(¶2)(3).

Based on the foregoing, the Commission has determined that the public interest would be served by the disposition of this matter without further Commission

enforcement proceedings on the basis of the following terms, to which Mr. Sommer has agreed:

(a) that he pay to the Commission the sum of $2,000 forthwith as a civil penalty for violating G.L. c. 268A, §4(c), by acting as agent for the special education school project, a particular matter in which the state had a direct and substantial interest;

(b) that he pay to the Commission the sum of $1,000 forthwith as a civil penalty for violating G.L. c. 268A, §23(¶2)(3), by his substantial private involvement in a project over which he had official regulatory authority and which was pending in his agency — conduct which gave reasonable basis for the impression that Cana could improperly influence him and unduly enjoy Mr. Sommer's favor in his performance of his official duties;

(c) that he agree to dispose of any investment interest in Cana or the Hospital project that he may currently have and refrain from reinvesting in or working for Cana or any other entity in connection with the special needs school for a period of five (5) years from the date of this Agreement; and

(d) that he waive all rights to contest the findings of fact, conclusions of law and terms contained in this Agreement in this or any other related administrative or judicial proceeding in which the Commission is a party.

DATE: October 1, 1984

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 259

IN THE MATTER
OF
KENNETH R. STRONG

Appearances:

Marilyn Lyng O'Connell, Counsel for Petitioner State Ethics Commission

George W. Shinney, Jr., Thomas P. Callaghan, Jr., Counsel for Respondent, Kenneth R. Strong

Commissioners:

Diver, Ch., Brickman, Burns, McLaughlin, Mulligan

DECISION AND ORDER

I. Procedural History

The Petitioner filed an Order to Show Cause on July 6, 1984 alleging that the Respondent, Kenneth R. Strong, was in violation of G.L. c. 268A, §20[1]/ by serving as an elected common councilor for the city of Everett (City) and as a maintenance worker for the Everett Housing Authority (EHA). In lieu of an adjudicatory hearing, the Petitioner and Respondent stipulated to the relevant facts, submitted briefs, and orally argued before the full Commission on September 25, 1984. Based upon a review of the evidence and arguments presented by the parties, the Commission makes the following findings and conclusions.

II. Findings

A. Jurisdiction

The parties have stipulated that the Respondent, in his capacity as an elected common councilor, is a municipal employee within the meaning of G.L. c. 268A, §1(g).[2]/ Additionally, the EHA is a municipal agency for the purposes of G.L. c. 268A. See, G.L. c. 121B, §7.

[1]/G.L. c. 268A, §20 prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city in which the city is an interested party, in which financial interest the employee has knowledge or reason to know.

[2]/"Municipal employee" is defined as "a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, 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).

B. **Findings of Fact**

1. The Respondent has been employed as an EHA maintenance worker for the last twelve years.

2. The Respondent has also served as an elected common councilor in the City for the last twenty years.

3. On March 5, 1984, the Commission advised the Respondent through a compliance letter,[3]/ that as an elected common councilor and a maintenance worker for the EHA, he had a prohibited financial interest in a contract made by a municipal agency of the same city, in which the city is an interested party. The Commission informed him that the violation could be cured if he resigned one of his municipal positions within twenty days.

4. Notwithstanding receipt of the Commission's compliance letter, the Respondent has continued to maintain both positions.

III. Decision

The Respondent, as a municipal employee, is prohibited by G.L. c. 268A, §20 from having a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city in which the city is an interested party. The Respondent clearly has a financial interest in his employment contract with the EHA, a municipal agency. By maintaining his position as maintenance worker for the EHA while also serving as a common councilor for the City, the Respondent has violated and continues to violate G.L. c. 268A, §20.[4]/

The Respondent makes three arguments in support of his contention that he has not violated G.L. c. 268A: 1) the City is not an interested party in any contract he may have with the EHA; 2) the Commission's application of G.L. c. 268A, §20 deprives him of his right to be elected under Part 1, Art. 9 of the Massachusetts Constitution thus depriving him of equal protection of the law; and 3) §20 violates the equal protection provision of the U.S. Constitution because it treats selectmen differently from common councilors. For the following reasons, the Commission finds the Respondent's arguments without merit.

1. Contrary to Respondent's assertion, the City is necessarily an interested party in Respondent's employment contract with EHA. In **Collins v. Selectmen of Brookline,** 325 Mass. 562, 567 (1950) the court held that the principal activities of a housing authority are localized in the municipality and are of immediate and direct interest to the welfare of the municipality. Similarly, the City has a direct interest in the activities of the EHA. In a case construing G.L. c. 268A, §20, **Conley v. Ipswich,** 352 Mass. 201 (1967), the court held that a town was an "interested party" in a contract made by an independently elected board of public welfare and a selectman. The **Conley** court expressly rejected the argument that the town was not an interested party in the contract because of its limited participation in board of public welfare matters.

Here, the City is also an interested party to contracts the EHA enters into with the Respondent, a municipal employee of the City. The nature of the establishment and operation of a housing authority demonstrate that the City is an interested party in the activities of the EHA. Its enabling statute provides that no housing authority may transact business or exercise its powers until a need for the authority has been determined by city officials. Four of the five housing authority members are appointed by the mayor. G.L. c. 121B, §5. The City's status as an interested party is also reflected in its statutory responsibility to provide safe and sanitary dwellings for families or elderly persons of low income. See G.L. c. 121B, §3.

2. The Respondent's remaining arguments challenge the application of G.L. c. 268A on constitutional grounds. The Commission does not possess the judicial power to determine the constitutionality of the statutes which it enforces. Nonetheless, the Commission believes that G.L. c. 268A, §20 is constitutionally sufficient, and that the courts would sustain that position as well. See, **Massachusetts Public Interest Research Group v. Secretary of the Commonwealth,** 375 Mass. 85 (1978); **In the Matter of James R. Craven,** 1980 Ethics Commission 17, 20; aff'd sub nom. **Craven v. State Ethics Commission,** 390 Mass. 191 (1983).

Chapter 268A, §20 does not deprive the Respondent of his right to hold elective office under Part 1, Art. 9 of the Mass. Constitution. The right "to be elected" is not absolute. See **Opinion of the Justices,** 375 Mass. 795, 811 (1978). Contrary to the Respondent's assertion, G.L. c. 268A, §20 does not disqualify public employees as a class from holding elective office unless they resign their means of livelihood.

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[3]/A compliance letter is issued in certain cases in which the Commission concludes that there are sufficient facts to warrant a finding of reasonable cause to believe the law has been violated, but in which a formal adjudicatory proceeding may not be appropriate at that time. The letter notifies the individual that any further acts in violation of the law may be pursued in the context of a formal proceeding. See, State Ethics Commission Enforcement Procedures, §12: Compliance Letters.

[4]/None of the exemptions provided by G.L. c. 268A, §20 for special municipal employees is available to the Respondent. Specifically, G.L. c. 268A, §1(n) expressly prohibits a member of a city council from being designated a special municipal employee. For the purpose of §1(n), common councilors are the equivalent of city councilors.

It merely requires that a businessman who chooses to run for political office and upon election by virtue of G.L. c. 268A, §1, thereby becomes a municipal employee, is obliged to refrain from contracting with an agency of the same municipality. **Conley v. Ipswich,** 352 Mass. at 205.

3. The passage of an exemption to §20 in 1982 limited to members of boards of selectmen does not deny the Respondent the equal protection of law. See, St. 1982, c. 107.[5]/ As the Commission stated in EC-COI-83-38, the limitation of the exemption to selectmen reflects a reasonable legislative judgment that elected municipal officials who exercise legislative powers comparable to city councilors should remain subject to the provisions of §20.

IV. Penalty

Following a finding of a violation of G.L. c. 268A, the Commission is authorized by G.L. c. 268B, §4(d) to issue an order requiring the violator to cease and desist from such violation and requiring the violator to pay a civil penalty of not more than $2,000 for each violation of G.L. c. 268A. The Respondent has been aware since March 15, 1984, of the consequences under §20 of his retaining his position as a common councilor in the City and as maintenance worker for the EHA. Accordingly, the Commission orders the following sanctions to reflect the seriousness with which it views the Respondent's continuing violation of the statute.

V. Order

Pursuant to its authority under G.L. c. 268B, §4, the Commission orders the Respondent to:

1. Cease and desist from violating G.L. c. 268A, §20 by either resigning as a common councilor or terminating his financial interest in his employment contract as a maintenance worker for the EHA within fourteen (14) days of notice of this Decision and Order; and

2. Pay three hundred dollars ($300) to the Commission as a civil penalty for violating G.L. c. 268A, §20. In addition, if the Respondent maintains his prohibited financial interest and fails to comply with paragraph one of this Order, the Respondent is further ordered to pay the Commission a daily civil penalty of fifty dollars for each day that the Respondent continues to be in violation of §20 up to a maximum of seventeen hundred dollars ($1,700).

DATE: October 16, 1984

[5]/Under an equal protection analysis, the court employs a relatively relaxed standard reflecting its awareness that the drawing of lines that create distinctions is peculiarly a legislative task. **Dandridge v. Williams,** 397 U.S. 471 (1970). The classification which Respondent contends is unconstitutional need not be perfect. See **Massachusetts Board of Retirement v. Murgia,** 427 U.S. 307 (1976), **Personnel Admin. of Mass. v. Feeney,** 442 U.S. 256 (1979).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket Nos. 246, 247

IN THE MATTER
OF
FRANK WALLEN AND JOHN CARDELLI

Appearances:

Stephen P. Fauteux, Esq., Nancy R. Hayes, Esq., Counsel for Petitioner State Ethics Commission

Lawrence Siskind, Esq., Counsel for Respondent Frank Wallen

Richard Fell, Esq., Counsel for Respondent John Cardelli

Commissioners:

Diver, Ch., Brickman, Burns, McLaughlin, Mulligan

DECISION AND ORDER

I. Procedural History

The Petitioner initiated these adjudicatory proceedings on December 16, 1983 by filing Orders to Show Cause pursuant to the Commission's Rules of Practice and Procedure, 930 CMR 1.01(5)(a). The Order in Adjudicatory Docket No. 247 alleged that Frank Wallen, the Commissioner of the Brockton Department of Public Works (DPW), violated G.L. c. 268A, §3[1]/ and §23(¶2)(3)[2]/ by accepting $8,500 from Charm Construction Company (Charm) in two separate

[1]/Under G.L. c. 268A, §3, it is a violation for anyone to give or for a public employee to accept anything of substantial value for or because of any official act or acts within the employee's official responsibility performed or to be performed by the employee.

[2]/Section 23 (¶2)(3) prohibits a public 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.

transactions at a time when Charm had contracts and other business dealings with the DPW. The Order also alleged that Wallen violated §23(¶2)(3) by his official and private dealings with companies owned by Gerald J. Kelleher. The Order in Adjudicatory Docket No. 246 alleged that John Cardelli, an owner of Charm, violated G.L. c. 268A, §3(a) by giving Respondent Wallen $8,500 at times when Charm had contracts and other business dealings with the DPW.

The Respondents' Answers denied the material allegations and raised several affirmative defenses asserting the Commission's lack of jurisdiction and authority to adjudicate the factual allegations. Prior to the commencement of the hearings, the Respondents filed motions to dismiss addressing the timeliness of the Orders, the Commission's authority to issue summonses during a preliminary inquiry, and the appropriateness of admitting into evidence the results of a polygraph examination. These motions were ruled upon by Commission Chairman Colin Diver, who was designated as the Presiding Officer.[3]/ See, G.L. c. 268A, §4(c).

Hearings were conducted on nine days between April and July, 1984. The parties thereafter filed briefs with the Commission and presented oral arguments before the full Commission on September 11, 1984. In rendering this Decision and Order, all members of the Commission have considered the testimony, evidence and arguments of the parties.

II. Findings of Fact

1. Wallen was DPW commissioner from December 14, 1976 to June 29, 1982. In that capacity, he had direct supervisory responsibility for seven divisions, including the water and sewer divisions. He was authorized to make such contracts as were necessary to carry out the functions of the department, and he had general supervision of all subordinate officers of the department and general supervision of the seven divisions within the department. His duties included reviewing each division's budget and approving all contracts and invoices for payment after the appropriate subordinates had made their review and indicated their approval. In addition to approving budgets, projects, and payments for projects, he would on occasion become involved in resolving individual disputes or matters between division heads and contractors.[4]/

2. Charm was a Massachusetts corporation during all relevant periods covered by the Order to Show Cause. From 1978 through 1982 inclusive, Charm received approximately $1.3 million for various construction services provided to the DPW. Respondent John Cardelli and Domenic D'Allesandro were owners and officers from 1979 through January 31, 1981. In 1982, Cardelli redeemed D'Allesandro's stock, and the company ceased operations later in the year.

3. Gerald Kelleher is the owner of Sargent Supply Company (Sargent Supply), a building supply company in Brockton. Kelleher also owns Kelleher Contractors, a company which provides materials and equipment services.

The $8,000 payment to Kelleher on December 24, 1980

4. In March, 1980, Wallen purchased property at 55 Chilton Road in Brockton. In April through June, 1980, Wallen, acting as his own general contractor, began his home construction. He contracted with Kelleher Contractors to help clear the land, prepare the foundation, and provide cement for the foundation. Although the work was performed in April or May, Kelleher did not bill Wallen for these services and materials until December 18, 1980. The bill was approximately $11,600.

5. In early July, 1980, Wallen opened a credit account with Sargent Supply in order to buy building materials to construct his house. Wallen incurred a substantial number of charges on the accounts between July and December, 1980.

6. As of mid-December, 1980, Wallen owed $18,000 to Sargent Supply and $11,601.83 to Kelleher Contractors.

7. On December 24, 1980, Wallen paid $8,000 in cash to Kelleher on his Sargent Supply bill, leaving approximately a $10,000 balance.[5]/

The $500 military party check from Charm

8. As of early 1982, Charm had a number of contracts with the DPW but was beginning to wind down. Dominic D'Allesandro, who was in the process of dropping out of Charm, appeared in Wallen's office in early January 1982. He had learned of Wallen's recent military promotion and told Wallen that he wanted to

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[3]/ The substance of these motions is discussed, infra.

[4]/ It is undisputed that, during all relevant periods, Respondent Wallen has been a municipal employee for the purposes of G.L. c. 268A. See, G.L. c. 268A, §1(g).

[5]/ Contrary to the Petitioner's assertion, there is insufficient evidence to find that the source of the $8,000 cash was Charm. The Commission's reasoning appears in the Discussion, pp. 12-16, infra.

take him out to eat to celebrate the promotion and would pay for the dinner out of Charm's remaining fringe benefit account. Wallen responded that his military reserve duty commitments limited his availability, but that the officers who served under him were planning to take him out to eat at the Hanscom Field Officer's Club later in the month. D'Allesandro agreed to have Charm pay for the cost of the meal for all of the officers, including Wallen. Based on their discussions about the party, they understood that the cost would be approximately $500.

9. On Friday, January 22, 1982, D'Allesandro visited Wallen at his DPW office. He discussed with Wallen Charm's commitment to fulfilling its snowplowing contracts with the DPW despite the fact that Cardelli was hospitalized. There was a snowstorm that day, and D'Allesandro confirmed that the Charm equipment would be available. During this visit, D'Allesandro handed to Wallen a Charm check signed by John Cardelli. The purpose of the check was to pay for Wallen's military promotion party. It is not clear if Wallen filled in the dollar amount of the check ($500) upon receiving the check from D'Allesandro, or if the amount had already been filled in by D'Allesandro. It is also unclear whether Wallen filled in the name of the payee, Hanscom Field Officers Club, upon receiving the check.

10. The party was held on the scheduled date of January 23, 1982, but had to be relocated to the Sheraton Lexington Hotel due to a snowstorm. D'Allesandro did not attend, presumably because of the storm. Approximately eighteen officers did attend, and at least one officer was told by Wallen that someone was "picking up the tab" for the party.[6]/ At the end of the party, Wallen used the $500 Charm check to pay for the bulk of the bill, with the remaining charges distributed among the officers. Wallen changed the name of the payee on the Charm check to reflect the Sheraton Lexington Hotel.

Wallen's public and private dealings with Kelleher

11. Kelleher's companies, Sargent Supply and Kelleher Contractors, received approximately $225,000 for contract work for the DPW between 1978 and 1982.

12. As DPW Commissioner, Wallen was responsible for approving and overseeing the contracts. Additionally, Wallen participated as Commissioner in arranging for the DPW to use a Kelleher-owned building rent-free as of July, 1981 in lieu of Kelleher's paying property taxes.

13. In July, 1980, Wallen opened a credit account at Sargent Supply through which he arranged to purchase building supplies on account.[7]/ Wallen had also previously contracted to have Kelleher contractors perform services worth $11,600 on his house. See, ¶4, 5, **supra.**

14. In August, 1980, Kelleher agreed to give Wallen a ten percent discount totalling $2,277 on two bills which Wallen had paid promptly. A discount was customarily given to large-volume purchasers who paid their bills promptly, although the amount of the discount was discretionary. The discount was not formally credited to Wallen's account until December, 1980. Through a bookkeeping error, the discount was not reflected in Wallen's 1981 bills. Wallen corrected the error after discussions with Sargent Supply in October, 1981.

15. Wallen's purchases from Sargent Supply exceeded $40,000 in 1980, and Wallen fell behind in his payments towards the end of 1980.

16. Despite Wallen's failure to pay his bills to Sargent Supply, Kelleher permitted Wallen to charge new purchases exceeding $5,000 in late 1980.

17. As of May, 1981, Wallen's unpaid balance to Sargent Supply was $10,000. Wallen paid $1,000 to Kelleher in May, 1981 and paid off the remaining $9,000 in October, 1981. Although the Sargent Supply bills indicated that interest of one and one-half percent per month and eighteen percent annually would be charged on all past due accounts, Kelleher did not charge Wallen interest on his unpaid bills during this period.

18. From December, 1980 until November, 1981, Kelleher Contractor's $11,600 bill to Wallen remained unpaid. During that ten-month period, Kelleher neither formally notified Wallen that he was delinquent nor charged Wallen any interest on his unpaid bill.

[6]/The Presiding Officer's ruling denying the introduction of an investigation report relating to the party was a proper exercise of his discretion.

[7]/In addition to Sargent Supply, there were at least three other companies in the Brockton area which also sold building supplies. Sometime after December, 1980, Wallen changed companies and purchased his building materials from a company in Avon.

19. In November, 1981 Wallen executed a note to Kelleher for the $11,600 unpaid Kelleher Contractor bill at an annual twelve percent interest rate. Kelleher did not require Wallen to provide any collateral on the note until November, 1982.

20. The accommodations which Wallen received from Kelleher between 1980 and 1982 were significant to Wallen because of his cash flow difficulties during that period.

III. Discussion

A. Procedural Issues

Prior to and during the adjudicatory hearings, the Presiding Officer ruled on a number of procedural issues raised by the parties. To the extent that the parties have renewed their objections to the Presiding Officer's rulings, the Commission will briefly review those rulings. None of the objections is meritorious.

1. Statute of Limitations

The Petitioner's action was timely. The December 16, 1983 Order to Show Cause was issued within three years of the date of the acts upon which the §3 and §23 violations were alleged.[8]/ Contrary to Wallen's assertion, the statute of limitations is tolled on the date of issuance of the Order to Show Cause and not on the date of receipt by the Respondent. See, **In the Matter of John P. Saccone,** 1982 Ethics Commission 87; Commission's **Procedures Covering the Initiation and Conduct of Preliminary Inquiries and Investigations (Procedures),** §10; Mass. R. Civ. P. 3. The Respondent has not alleged any lack of due diligence in the Petitioner's effectuating service following the issuance of the Order to Show Cause, and, even if alleged, the assertion would not prevail. An examination of the certificate of service filed together with the Show Cause Order demonstrates that service by certified mail was effectuated simultaneously with the issuance of the Order to Show Cause on December 16, 1983. See, **Bates Mfg. Co. v. U.S.,** 303 U.S. 567, 572 (1938).

2. Commission Procedures

a) Contrary to Respondent Cardelli's assertion, the Commission did not violate its confidentiality mandate under G.L. c. 268B §7 by issuing a summons during the preliminary inquiry stage of the investigation. The Commission is authorized to issue summonses at the preliminary inquiry stage of an investigation. The Commission's enabling statute, G.L. c. 268B, §4, provides the Commission with summons issuance authority with respect to "any matter being investigated by it." The Commission's Procedures construe G.L. c. 268B, §4 to authorize expressly the issuance of summonses for investigative purposes during the course of any preliminary inquiry and full investigation. **Procedures** (1980) §9A. The Commission's interpretation of its own enabling statute is reasonable, **Baker Transportation Inc., v. State Tax Commission,** 371 Mass. 872, 877 (1977) and consistent with the conclusions of the Supreme Judicial Court in a comparable case, **Massachusetts Commission Against Discrimination v. Liberty Mutual Insurance Company,** 371 Mass. 186 (1976). Inasmuch as the summonses were issued pursuant to the Commission's authority, there was no violation of the confidentiality mandate of G.L. c. 268B, §7.

b) The fact that the investigative phase of the case was lengthy is not a basis for dismissal of the Order to Show Cause. The duration of a Commission preliminary inquiry and full investigation is within the discretion of the Commission. **Brotherhood of Railway Clerks v. Association for Benefit of Non-Contract Employees,** 380 U.S. 650, 661, 662 (1965); **Inland Empire District Council v. Millis,** 325 U.S. 697, 706 (1945); **In the Matter of John R. Buckley,** 1982 Ethics Commission 2, 5. The Commission's **Procedures** §6(C) and 8(B) establish a procedure for extending an inquiry or investigation. The Petitioner's compliance with these extension procedures did not violate the Respondent's due process rights.

c) The notice to Cardelli of the initiation of the preliminary inquiry was timely. The Commission notified Cardelli of the initiation of a preliminary inquiry within thirty days of the July 19, 1982 commencement of the inquiry pursuant to G.L. c. 268B, §4(a). Because the minutes of the Commission's meetings do not reflect an earlier initiation date of the preliminary inquiry with respect to Cardelli, there was no reason to provide earlier notice.

3. Polygraph Examination

Respondent Wallen, through his counsel, voluntarily initiated the proposal that he take a polygraph examination, agreed to a polygraph examiner, and thereafter voluntarily participated in the examination. The Commission finds no reason to preclude the admission of the results of the polygraph examination in the adjudicatory proceeding.

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[8]/ For the purposes of the statute of limitations, it is irrelevant which month Wallen actually received the discount from Sargent Supply. As will be seen, infra, the basis of Wallen's violation of §23 is the impression created by his exercising official DPW duties with respect to Kelleher's business while having received substantial accommodations from Kelleher.

The Commission is a state agency with civil enforcement powers, G.L. c. 268B, §3(i), and possesses the power to impose only civil fines and initiate only civil actions. G.L. c. 268B, §4(d). See, **Craven v. State Ethics Commission,** 390 Mass. 191, 201, (1983); **Opinion of the Justices,** 375 Mass. 795, 819 (1978). Because proceedings before the Commission are civil and not criminal in nature, the Commission is not bound by the strict rules of admissibility of evidence which prevail in criminal judical proceedings. None of the precedents cited by the Respondent holds that the results of polygraph tests would be inherently inadmissible in civil administrative proceedings in jurisdictions such as Massachusetts which have accepted the admissibility of such evidence. See, **Commonwealth v. Vitello,** 376 Mass. 426 (1978). However, as will be seen, **infra,** the weight to be given such evidence is a matter within the Commission's deliberative discretion.

In view of the Respondent's voluntary initiation of and participation in the polygraph examination, with the assistance of counsel, whatever fifth amendment privileges from self-incrimination were implicated by the Respondent's responses to the polygraph examination were therefore knowingly and intelligently waived. **Commonwealth v. Mandeville,** 386 Mass. 393 (1982); **Commonwealth v. Harris,** 11 Mass. App. 165 (1981); **Blaisdell v. Commonwealth,** 372 Mass. 753 (1977); **Johnson v. Zerbst,** 304 U.S. 458 (1938).[9]/

B. G.L. c. 268A Allegations

1. The $8,000 Kelleher Payment

The question which preoccupied the hearings was the source of Wallen's payment of $8,000 in cash to Kelleher on December 24, 1980 in partial payment for the substantial bill which Wallen had incurred in purchasing supplies for his new house. Although the Petitioner alleges that the $8,000 came from Charm and was given to Wallen for or because of his official acts as DPW commissioner, the evidence is not persuasive.

There is no direct evidence that Charm gave the money to Wallen. The evidence linking Charm and Wallen is circumstantial — that on the day before Wallen paid Kelleher $8,000, Charm wrote a check for $10,014 which was endorsed and cashed by Wallen's uncle, who could have given the cash to Wallen. The response of Wallen and Cardelli is two-fold:

a. The Charm check for $10,014 was a loan by Charm to Frank Barrett to pay off his gambling debts; that Albert Wallen cashed the check and gave Barrett the cash as a favor, and that Albert Wallen did not give the cash to Frank Wallen, and

b. The source of the $8,000 cash payment which Frank Wallen make to Kelleher was a loan from Edward R. Tautkus, Sr. on December 24, 1980.

The Petitioner's case is built on discrediting the testimony supporting the Respondents' version and asserting that the only remaining explanation is that the cash which Frank Wallen used to pay Kelleher on December 24, 1980 had to have come from Charm. Based upon a review of the record and consideration of the observations of the Presiding Officer who viewed the demeanor of the witnesses and heard first-hand their testimony, the Commission is not persuaded that the source of the $8,000 was Charm.

The Respondents' position regarding the $10,014 Charm check is plausible. In particular, the Commission credits the testimony of Francis Barrett. While there may have been potential reasons for Barrett to have participated in a cover-up for Frank Wallen, he made too many admissions against his own interest concerning his gambling history to conclude that he was lying about the check. Barrett's asserted reasons for having Albert Wallen endorse and cash the check are also believable. Having misrepresented to Charm that he was still affiliated with Shenanigan's Restaurant so that Charm could write the check to Shenanigan's in an odd figure as a business expense, Barrett could reasonably have doubted his ability to cash the check on his own. Rather than risk a bank questioning Barrett's authority to cash the check, Barrett endorsed the check to Albert Wallen who was in a better position to cash it. Albert Wallen was a reasonable choice because he knew of Barrett's debt problems and had previously assisted him.

There are fewer reasons for crediting the entire testimony of Wallen or his uncle. Wallen's hearing testimony conflicted with an earlier version which he had given to Commission investigators concerning the source of the $8,000. Moreover, the polygraph examiner's opinion was that Wallen was untruthful in denying in February, 1984 that he had received any of the money from Charm's $10,014 check to Barrett. Yet, even by limiting the weight of Wallen's hearing testimony and giving some probative value to the results

[9]/In his Answer, Respondent Wallen raised certain constitutional arguments which were not subsequently pursued during the hearing, in his brief or in oral argument. It is not necessary to address those arguments here, since they hae already been fully treated in prior court and Commission decisions. See, Craven v. State Ethics Commission, 390 Mass. 191 (1983) [separation of functions]; In the Matter of Rocco J. Antonelli, 1982 State Ethics Commission [constitutionality of G.L. c. 268A, §23(¶2)(3)]

of the polygraph examination,[10]/ the Commission is not persuaded that Wallen received any of the cash from Charm's $10,014 check to Barrett.

Albert Wallen did not come across as a completely reliable witness, but his testimony concerning the role he played in facilitating the cash payment to Barrett is believable. Moreover, if there were a master plan to conceal the routing of a payoff from Charm to Wallen through the $10,014, it is logical that Wallen's uncle would not have appeared as an endorser of the check. Rather than regarding the endorsement as a "mistake" in the execution of the plan, a more likely inference from the endorsement is that there is no plan.[11]/

There is no conclusive evidence in the record concerning the source of Wallen's $8,000 cash payment to Kelleher on December 24, 1984. While it may be true, as the Respondent contends, that the source of the money was a loan from Edward R. Tautkus, Sr., the documentary evidence which the Respondents provided at the hearing is questionable.

On the other hand, there is credible testimony from Jane Santos, the Tautkus' accountant, that Edward R. Tautkus, Sr. told her in early 1981 that he had given a $10,000 house loan to Frank Wallen. Whether Edward R. Tautkus, Sr. was telling Santos the truth or merely participating in a cover-up scheme is an open question. On balance, it does not seem likely that Tautkus, Sr. would have lied to his accountant in 1981 about a loan to Frank Wallen as part of a cover-up. It is also possible that the $10,000 loan to Frank Wallen was made by Tautkus but not through the questionable savings bank withdrawals. Because Tautkus was not available to testify, he could not shed any light on the matter.

We may never know for certain who gave Frank Wallen the money from which he paid Kelleher $8,000 in December, 1980. However, even if Edward R. Tautkus, Sr. were not the plausible source of the money, it does not necessarily follow that the source of the money was Charm. At best, the Petitioner has established a circumstantial case linking Charm to Frank Wallen's $8,000 payment to Kelleher, but one with too many competing inferences suggesting that Charm was not the source. Given the lack of direct witnesses linking Charm, the Respondents' plausible explanation of the course of the $10,014 Charm check, and the uncertainties presented by the Petitioner's circumstantial case, the Commission finds that the Petitioner was not established that the $8,000 came from Charm. Accordingly, the allegations in the Show Cause Orders relating to the $8,000 cash payment have not been proved by a preponderance of the evidence.

2. **The $500 party check**

The record amply supports the allegation that Wallen violated G.L. c. 268A, §23(¶2)(3) by accepting a $500 military party check from Charm in January, 1982.

As of January, 1982, Wallen was still exercising official responsibility over Charm's contracts with the DPW, and Charm would continue to perform such work during 1982. By accepting Charm's offer to pay for a military dinner in Wallen's honor during the same period as his exercise of official responsibility over Charm, Wallen gave reasonable basis for the impression that Charm would unduly enjoy his favor. In particular, the timing and location of the discussion of Charm's initial offer created the improper impression. Charm's offer was made in Wallen's DPW office. The actual check was given to Wallen in his DPW office during the discussion of whether Charm could satisfy the very contracts which Wallen was responsible for overseeing. While it may be true that there was no evidence of actual favoritism which Charm received from Wallen, §23(¶2)(3) does not require such a showing. Section 23 (¶2)(3) is intended to prevent public officials from intertwining their public and personal dealings with private parties, because such conduct raises questions over the integrity and impartiality of their official acts. By accepting the check, Wallen gave reasonable basis for the impression that Charm could unduly enjoy his favor. See, **In the Matter of Rocco J. Antonelli,** 1982 Ethics Commission 101.

The Commission does not find that Wallen's acceptance of the check, or Cardelli's authorization of the check, also violated G.L. c. 268A, §3. Although the evidence supports the conclusion that the check was given "for or because of" Wallen's official acts, it is not clear that what Wallen received was of "substantial value" to him. The prestige which Wallen may have gained with his officers by having found a sponsor for the party does not have sufficient prospective worth or utility value to be regarded as of substantial value to him. Compare, EC-COI-81-136. Whether Wallen's share of the party which Charm assumed ($25) was of substantial value to Wallen presents a closer question. One court decision has concluded that $50 is substantial

[10]/ While there were a number of problems in the administration of the examination which might have distorted the results, the examiner's opinion should be given some weight.

[11]/ John Cardelli did not testify or offer support for the Respondent's verson. However, the Commission is not required to draw an adverse inference against Cardelli. Cardelli was not under subpoena to appear after the beginning of the hearings; he never was called to testify while under subpoena to appear, and never refused to answer any questions.

value under §3, **Commonwealth v. Famigletti,** 4 Mass. App. 584 (1976), but no court cases or Commission decisions have found substantial value based on a cash payment of less than $50. See, **In the Matter of George Michael,** 1981 Ethics Commission 59, 69. On balance, given the potential §3 criminal sanctions which could also apply to these facts, it seems more appropriate to address the problems associated with the receipt of gifts of $25 or less under §23 rather than §3. Section 23 also provides more flexibility to appointing officials to determine when, if ever, nominal gifts are appropriate for employees under their authority, and what safeguards or standards can be established to avoid creating the impressions which §23 was designed to prohibit.

3. **Wallen's Public and Private Dealings with Kelleher**

The Commission concludes that Wallen violated G.L. c. 268A, §23(¶2)(3) by virtue of his substantial dealings with Kelleher in both his public and private capacities. Specifically, by Wallen's having purchased substantial products and services from Kelleher and having received numerous accommodations on his overdue accounts, while continuing to exercise his official responsibility with respect to Kelleher's contracts with the DPW in 1981 and 1982, Wallen gave reasonable basis for the impression that Kelleher's companies would unduly enjoy his favor.

The Commission's conclusion does not rest on whether any particular accommodation which Wallen received from Kelleher was unusual or excessive. Rather, it is based on the dimension of Wallen's private dealings with Kelleher and the importance of the accommodations to Wallen. In view of this private relationship with Kelleher, Wallen's official DPW dealings with Kelleher raised questions over his impartiality.[12]/ By failing to take any affirmative steps to eliminate or minimize the impression of favoritism towards Kelleher, Wallen gave reasonable basis for the impression that Kelleher's companies would unduly enjoy his favor. One such safeguard would have been to avoid altogether any private dealings with Kelleher while exercising official DPW responsibility over Kelleher. In Wallen's situation, there were at least three other building supply companies in the area which Wallen knew of and could have used instead of Kelleher's company.

Even assuming that Wallen's private dealings with Kelleher were unavoidable, Wallen was obliged to establish safeguards with his appointing official to avoid creating an improper impression. Recent Commission advisory opinions have required that an employee with significant public and private dealings with the same parties disclose the existence of these dealings to his appointing official. The appointing official may then either 1) assign that responsibility to another employee 2) assume the responsibility himself, or 3) make a written determination that the interest is not substantial enough to affect the employee in the performance of his official duties. See, EC-COI-83-25; 84-94. The appointing official is therefore responsible for overseeing the potential conflict of interest and for determining how the credibility and impartiality of the agency can be maintained. Wallen did not notify his appointing official about the private dealings with Kelleher and took no steps to establish safeguards against his appearance of undue favoritism.

This is not to say that §23(¶2)(3) rigidly prohibits public officials from any private commercial contact with parties over whom they also have official dealings. One factor is the relative dimension of the public and private dealings. Where the dealings are substantial, the impression of favoritism may be inevitable. For example, in **Antonelli, supra,** the Commission found that Antonelli's depositing large sums of county funds in the same banks at which he was seeking a large commercial loan during the same time period created the impression that the banks would unduly enjoy his favor. On the other hand, the private purchase of a small over-the-counter product at the same price as other members of the public pay does not create the same impression of favoritism. Wallen's dealing with Kelleher are analogous to **Antonelli** because substantial funds and accommodations were involved in both his public and private dealings with Kelleher.

IV. Conclusion and Order

Based upon the foregoing, the Commission concludes that Frank Wallen violated G.L. c. 268A, §23(¶2(3) by accepting from Charm a military party check in January, 1982 and by continuing to exercise official DPW responsibility over Kelleher's contracts while having received substantial private accommodations from Kelleher.

The Commission concludes that neither Frank Wallen nor John Cardelli violated G.L. c. 268A, §3 with respect to the $8,000 cash payment to Kelleher in December, 1980, or the $500 military party check in January, 1982.

[12]/ Wallen's official dealings included responsibility for approving and overseeing Kelleher's contracts with the DPW and arranging for the DPW to use a Kelleher-owned building rent-free in lieu of Kelleher paying property taxes.

[13]/ Under G.L. c. 268B, §4(d), the Commission may assess a civil penalty of up to $2,000 for each violation of G.L. c. 268A.

Pursuant to its authority under G.L. c. 268B, §4(d), the Commission orders Frank Wallen to pay six hundred dollars ($600) to the Commission as a civil penalty for his violation of §23(¶2)(3) attributable to the military party check.[13]/ In its discretion, the Commission does not impose a civil penalty for Wallen's violation of §23 attributable to his public and private dealings with Kelleher. While it is clear that Wallen violated this section and failed to take any steps to avoid creating an improper impression, specific steps which Wallen could have taken to establish safeguards have only been recently announced by the Commission. Because Wallen's dealings with Kelleher substantially predated these definitive guidelines, the Commission will apply civil penalties for failing to establish sufficient safeguards under §23(¶2)(3) only on a prospective basis.

DATE: October 29, 1984

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 274

IN THE MATTER
OF
JOHN J. WILLIS, SR.

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and John J. Willis, Sr. (Mr. Willis) 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, §4(d).

On July 17, 1984, the Commission initiated a preliminary inquiry pursuant to G.L. c. 268B, §4(d), into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Willis, former North Andover town counsel. The Commission concluded that preliminary inquiry and, on August 14, 1984, found reasonable cause to believe that Mr. Willis had violated c. 268A.

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

1. Mr. Willis was North Andover town counsel from 1978 until he resigned, effective on June 30, 1984.

2. Mr. Willis is an insurance agent and has operated the Hand'sel Insurance Agency in North Andover since 1956.

3. Since 1959, Mr. Willis has been a member of the North Andover Agents Association (Association). The Association is made up of insurance agents who reside in North Andover and was formed to advise the town on its insurance and to provide the recommended coverage. The commissions generated from these policies are distributed among all the members of the Association whether or not an individual actually wrote any policies for the town. Any agent who does place a town policy retains one-third of the commission earned and contributes the remainder for distribution among the Association members.

4. Mr. Willis has received $1500-$2000 annually as his share of the Association's distributions. In January, 1984, he received approximately $2000 for town insurance policies in effect in 1983.

5. Mr. Willis has no role in town actions or decisions regarding insurance as town counsel. He has not written any town insurance policies at any time during his tenure as town counsel.

6. Section 20 of G.L. c. 268A prohibits a municipal employee from having a direct or indirect financial interest in a contract made by the town in which he is employed. The funds distributed to members of the Association resulted from commissions paid in connection with the town's insurance policies. Those insurance policies are contracts within the meaning of that term in §20. Therefore, by sharing in the Association's distribution of funds resulting from town insurance contracts, Mr. Willis had an indirect financial interest in those contracts in violation of §20.

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 terms agreed to by Mr. Willis:

1. that he pay to the Commission the sum of two thousand dollars ($2000.00) as a civil penalty for violating G.L. c. 268A, §20, the amount of the penalty reflecting the amount received by Mr. Willis from the Association in January, 1984; and

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

DATE: November 8, 1984

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory Docket No. 261

IN THE MATTER
OF
JOHN J. ROSARIO

Appearances:
Thomas Driscoll, Esq., Counsel for Petitioner
State Ethics Commission

Michael E. Festa, Esq., Counsel for Respondent
John J. Rosario

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

DECISION AND ORDER

I. Procedural History

The Petitioner initiated these adjudicatory proceedings on July 25, 1984 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, John J. Rosario, violated G.L. c. 268A, §23(¶2)(3) by having a company which had a substantial contract with his municipal agency pave a portion of his private firm's parking lot. The Respondent filed an Answer which admitted the material facts alleged, but denied the conclusions of law asserted.

An adjudicatory hearing was held on October 11, 1984 before Commissioner David Brickman, a duly designated presiding officer. See, G.L. c. 268B, §4(c). The parties thereafter filed post-hearing briefs and presented oral argument before the Commission on November 8, 1984. In rendering this decision and order, each member of the Commission has heard and/or read the evidence and arguments presented by the parties.

II. Findings of Fact

1. John J. Rosario is one of five commissioners of the Barnstable Department of Public Works (BDPW). The BDPW commissioners oversee the management and operation of the BDPW, including awarding all contracts over $2,000, setting BDPW policy, establishing BDPW rules and regulations, and may affirm or overrule any decision made by the BDPW superintendent.

2. In 1982, BDPW contracted with QRS Corp. (QRS) in the amount of $280,000 for the installation of a sewer drainage system in Barnstable. Construction began in November of 1982, was shut down on December 23, 1982 for three months during the winter, and was completed in June of 1983.

3. Mr. Rosario is the principal stockholder and officer of Acme Refrigeration, Inc. (Acme) of Hyannis, MA.

4. Mr. Rosario sought to have a portion of the Acme parking lot paved in December of 1982. He received proposals from the Lawrence-Lynch Corporation and Tilcon, Inc. for the job, but both paving contractors subsequently closed down due to a snowstorm. On December 19, 1982, Mr. Rosario signed a contract with JJS, Inc. (JJS) for the paving of the Acme parking lot. Mr. Rosario admitted in his Answer that he had asked JJS to hire QRS to perform the paving work.

5. At the December 21, 1984 meeting of the BDPW, the commissioners (including Mr. Rosario) unanimously voted to close down QRS' sewer project for the winter.

6. QRS performed the paving work on the Acme parking lot on December 23, 1982.

7. By check dated December 31, 1982, Mr. Rosario paid JJS $2,720 for the Acme job. JJS wrote a check to QRS for $2,720 on the same date.

III. Decision

For the reasons stated below, the Commission concludes that Mr. Rosario's conduct violated §23 (¶2)(3), but that no monetary sanction is warranted under the circumstances.

A. Section 23(¶2)(3)

As a Commissioner of the BDPW, Mr. Rosario held an office in a municipal agency and was therefore a municipal employee subject to the provisions of the conflict of interest law. See G.L. c. 268A, §1(f) and §1(g). In pertinent part, §23(¶2)(3) of Chapter 268A prohibits a municipal 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..." A major purpose of §23(¶2(3) is "to avoid situations where employees engage in conduct which raises questions about the

credibility and impartiality of their work as [public] employees. The Commission has consistently applied the [§23(¶2)(3)] prohibitions whenever public employees have had private financial dealings with the same parties with whom they deal as public employees."[1]/ Commission Advisory 83-1. In cases where it is unrealistic or impossible for public employees to avoid such private dealings, the Commission has articulated a disclosure procedure which should be compiled with to insure the employee's impartial performance of his official duties. See Commission Advisory 83-1; EC-COI-83-25. A public employee's substantial dealings with a party in both his public and private capacities coupled with failure to take any affirmative steps to eliminate or minimize the impression of favoritism (e.g. disclosure to an appointing official) clearly creates the reasonable basis for the impression that the party will unduly enjoy the public employee's favor. **In the Matter of Frank Wallen and John Cardelli,** 1984 Ethics Commission 197.

During December of 1982, Mr. Rosario shared with his fellow commissioners the ongoing official oversight responsibilities with regards to QRS' contract with the BDPW. Specifically, Mr. Rosario participated in a matter at the December 21, 1982 BDPW meeting which would have a substantial impact on QRS: whether QRS's sewer project would be closed down for the winter. During this period, he also entered into a contract with JJS to have QRS pave a portion of his private firm's parking lot.

Mr. Rosario could have avoided questions concerning his impartiality by disclosing his private dealings to his fellow commissioners and then abstaining on QRS matters before BDPW. He did not. Mr. Rosario also failed to disclose these dealings to the Board of Selectmen. As his appointing officials, the Board of Selectmen could have taken the responsibility for overseeing the potential conflict of interest and for determining how the credibility and impartiality of the BDPW could be maintained.

In light of this non-disclosure, we find that Mr. Rosario's handling of the situation, i.e. doing business with QRS through the third party JJS, creates the appearance that he was trying to conceal these dealings. It may be true that there is no evidence of actual favoritism by Mr. Rosario on QRS' behalf. However, the Commission's consistent position, restated recently in its **Wallen** decision (**supra**), is that §23(¶2)(3) does not require such a showing. The §23 prohibition is intended to prevent more serious situations from occurring. Accordingly, we find that Mr. Rosario's conduct constituted a violation of §23(¶2)(3).

B. Sanction

In determining an appropriate sanction, the Commission's policy has been to take mitigating circumstances into account. See, e.g., **In the Matter of Louis L. Logan, supra; In the Matter of William G. McLean,** 1982 Ethics Commission 75. We take note of the following mitigating circumstances in this case:

(1) Mr. Rosario initially solicited bids from two companies other than QRS to do the paving work. Both paving contractors subsequently closed down due to a snowstorm. Only then did Mr. Rosario solicit from and accept the JJS proposal, albeit with the knowledge that QRS would perform the paving work.

(2) The Petitioner presented no evidence of a private gain on Mr. Rosario's part. The Respondent testified that he paid the going rate for the job, i.e. QRS did not give Mr. Rosario a discount from the market price. Likewise, no evidence of public harm was presented. Mr. Rosario in fact voted against QRS' interest at the December, 1982 meeting rather than showing favoritism.

(3) Mr. Rosario concedes that he should have disclosed the situation to the Barnstable Board of Selectmen and/or the other BDPW commissioners. Upon learning of Mr. Rosario's use of QRS, the Board of Selectmen took administrative action by issuing Mr. Rosario a public reprimand.

In light of these circumstances, we find it would be unnecessary to impose a monetary penalty in this case. Any sanction beyond the public reprimand already issued by the Board of Selectmen and this decision's finding of a violation by the State Ethics Commission would not further the purposes of Chapter 268A.

DATE: November 23, 1984

[1]/ See, e.g., **In the Matter of William L. Bagni, Sr.,** 1981 Ethics Commission 30 (state inspector violates §23(¶2)(3) by repeatedly soliciting private work from businesses over which he has official responsibility); **In the Matter of Louis L. Logan,** 1981 Ethics Commission 40 (state employee violates §23(¶2)(3) 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).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory
Docket No. 275

IN THE MATTER
OF
RITA WALSH-TOMASINI

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Rita Walsh-Tomasini (Mrs. Walsh-Tomasini) 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 September 11, 1984, the Commission initiated a preliminary inquiry into whether Mrs. Walsh-Tomasini, Boston School Committee president, violated the conflict of interest law, G.L. c. 268A. The Commission has concluded the preliminary inquiry and, on November 8, 1984, found reasonable cause to believe that Mrs. Walsh-Tomasini violated G.L. c. 268A, §19.

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

1. Mrs. Walsh-Tomasini is a member and president of the Boston School Committee. She has been a member since 1982, and president since January 1984. As such, she was and is a municipal employee within the meaning of G.L. c. 268A, §1(g).

2. Pursuant to St. 1964, c. 465, Boston School Committee members may appoint an administrative staff which is exempt from civil requirements. Each member is allotted a specific sum of money for these salaries and exercises sole discretion as to how many persons will be hired, whom they will be and their salaries.

3. On August 11, 1983, Mrs. Walsh-Tomasini appointed her son, Mark Tomasini, to her staff in the position of clerk/typist at a yearly salary of $14,199.96, effective August 15, 1983. At that time, each member's staff allotment was $40,000.

4. On December 1, 1983, Mrs. Walsh-Tomasini requested an advisory opinion under G.L. c. 268B from the Commission on the question of whether G.L. c. 268A permits school committee members to hire members of their immediate family to serve on their personal staffs. The request did not indicate that Mrs. Walsh-Tomasini had already hired her son.

5. On December 28, 1983, the Commission issued a confidential conflict of interest opinion to Mrs. Walsh-Tomasini, advising her that G.L. c. 268A, §19 prohibits her from hiring a member of her immediate family, or otherwise participating as a school committee member in any particular matter in which a member of her immediate family has a financial interest. At the time of this opinion, the Commission, relying on the information provided by Mrs. Walsh-Tomasini, was still unaware that Mark Tomasini was on her administrative staff.

6. At a Boston School Committee meeting on June 12, 1984, Mrs. Walsh-Tomasini voted for an order (which passed by an 8-5 vote) to increase the staff allocation for each member from $40,000 to $43,000.

7. On August 20, 1984, Mrs. Walsh-Tomasini signed a personnel action report to the school committee personnel office increasing Mark Tomasini's salary by $1,500 per year, retroactive to January 1, 1984.

8. On August 24, 1984, Mrs. Walsh-Tomasini authorized Mark Tomasini's lay-off, effective September 14, 1984.

9. Section 19 of G.L. c. 268A prohibits a municipal official from participating as such in a particular matter in which a member of her immediate family[1] has a financial interest. By appointing and retaining her son on her administrative staff, by voting to increase the staff salary allotment and by authorizing her son's salary increase, Mrs. Walsh-Tomasini violated G.L. c. 268A, §19.

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 conditions agreed to by Mrs. Walsh-Tomasini:

1. that she pay to the Commission the sum of $1,000.00 as a civil penalty for violating G.L. c. 268A, §19; and

2. that she 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 proceeding in which the Commission is a party.

DATE: December 20, 1984

[1] G.L. c. 268A, §1(e) defines "immediate family," as "the employee and his spouse, and their parents, children, brothers and sisters."

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory
Docket No. 276

IN THE MATTER
OF
RICHARD E. SULLIVAN, SR.

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Richard E. Sullivan, Sr. (Mr. Sullivan) 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 September 25, 1984, the Commission initiated a preliminary inquiry, pursuant to the conflict of interest law, G.L. c. 268A, involving Mr. Sullivan, the Mayor of Newburyport. The Commission has concluded that preliminary inquiry and, on November 8, 1984, found reasonable cause to believe that Mr. Sullivan violated G.L. c. 268A.

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

1. Mr. Sullivan is the Mayor of Newburyport and was the Mayor at all times relevant to the Commission's preliminary inquiry. As such, he was and is a municipal employee within the meaning of G.L. c. 268A, §1(g).

2. As the Mayor, Mr. Sullivan is the appointing authority for positions in the Newburyport Police Department.

3. On October, 1983, Mr. Sullivan appointed his son, Richard E. Sullivan, Jr., to the position of provisional communication dispatcher for the Newburyport Police Department.

4. The term of Mr. Sullivan's son's original appointment expired on December 31, 1983, at which time Mr. Sullivan reappointed his son to this position.

5. Richard E. Sullivan, Jr. resigned the position of communication dispatcher on December 7, 1984.

6. General Laws, Chapter 268A, §19(a) prohibits a municipal employee from participating in a particular matter in which an immediate family[1]/ member has a financial interest. By appointing (and reappointing) his son to this position with the Newburyport Police Department, Mr. Sullivan violated §19(a).

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 terms agreed to by Mr. Sullivan:

1. that he pay to the Commission the sum of three hundred dollars ($300.00) forthwith as a civil penalty for violating G.L. c. 268A, §19(a); and

2. 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 proceeding in which the Commission is a party.

DATE: December 20, 1984

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. Commission Adjudicatory
Docket No. 277

IN THE MATTER
OF
WILLIAM C. LANNON

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and William C. Lannon (Mr. Lannon) 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, §4(d).

On September 11, 1984, the Commission initiated a preliminary inquiry pursuant to G.L. c. 268B, §4(d), into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Lannon, former Cambridge superintendent of schools. The Commission concluded that preliminary inquiry and, on November 27, 1984, found reasonable cause to believe that Mr. Lannon had violated chapter 268A.

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

1. Mr. Lannon was superintendent of schools for the city of Cambridge from August 15, 1975 to August 15, 1984. As such, he had supervisory authority over

[1]/G.L. c. 268A, §1(e) defines "immediate family," as "the employee, and his spouse, and their parents, children, brothers and sisters."

Cambridge school personnel. As superintendent, Mr. Lannon was a municipal employee within the meaning of G.L. c. 268A, §1(g).

2. In the fall of 1978, Mr. Lannon asked a teacher subject to his supervisory authority for a loan of $3,000. The teacher agreed to loan the money to Mr. Lannon.

3. Some time later, Mr. Lannon's wife asked the same teacher for an additional $2,000 loan, and the teacher again agreed. At or about this time, a promissory note was entered into by Mr. Lannon and the teacher. The terms set out in the note stated that the $5,000 was to be repaid within five years and was subject to eight percent annual interest. The interest was to be paid annually at the end of each year.

4. On several occasions during the term of the loan, the teacher approached Mr. Lannon regarding payments of the interest due. Mr. Lannon made two partial payments totalling approximately $200, but otherwise made no payments on the interest or principal.

5. While this loan was outstanding, the teacher applied for a sabbatical leave. Following the review and approval of such an application by a staff council, the superintendent of schools must recommend to the school committee that such a leave should be granted before the school committee will do so. Mr. Lannon recommended that the teacher's application for a sabbatical be granted.

6. In July of 1984, Mr. Lannon repaid the loan and paid the interest due after the teacher filed a civil suit against him.

7. In early 1984, an employee of the Cambridge school system subject to Mr. Lannon's authority offered to loan him $3,000 to pay certain outstanding debts. Mr. Lannon accepted that offer. Mr. Lannon has not repaid that loan.

8. Both individuals who made loans to Mr. Lannon stated that they had developed a friendship with Mr. Lannon while subject to his authority.

9. Section 23(¶2)(3) prohibits a municipal employee from engaging in conduct which gives reasonable basis for the impression that anyone can improperly influence or unduly enjoy his favor in the conduct of his official duties. By entering into loan transactions with individuals subject to his authority as Cambridge school superintendent, Mr. Lannon violated §23(¶2)(3).

10. In addition, by recommending that the Cambridge school committee grant a sabbatical leave to a teacher at a time when he was substantially in debt to that teacher, Mr. Lannon gave reasonable basis for the impression that the teacher could improperly influence or unduly enjoy his favor in the performance of his official duties, in violation of §23(¶2)(3).

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 terms agreed to by Mr. Lannon:

1. that he pay to the Commission the sum of five hundred dollars ($500.00) as a civil penalty for the above described violations of G.L. c. 268A, §23(¶2)(3); and

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

DATE: December 24, 1984

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 Interests have not been summarized.)

***In the Matter of Cornelius J. Foley, Jr.**
(January 20, 1984)

A former employee of the Massachusetts House of Representatives acknowledged he violated §5 of the conflict of interest law by acting as a "legislative agent" (lobbyist) before the House less than one year after he ceased working there. In addition to separate sanctions imposed by the Secretary of State, the individual paid a civil penalty of $500 to the State Ethics Commission.

Section 5(e) of the conflict of interest law prohibits a former state employee for one year after he leaves state service from serving as a lobbyist for anyone other than the Commonwealth before that part of state government for which he formerly worked.

In the Matter of Martin V. Foley
(February 1, 1984)

A former employee of the Massachusetts Senate admitted he violated §5(e) of G.L. c. 268A by acting as a "legislative agent" (lobbyist) before the General Court less than one year after he ceased working there. By the terms of the Disposition Agreement, the individual paid a civil penalty of $1,000 to the State Ethics Commission for this violation.

***In the Matter of Lowell R. Richards, III**
(February 13, 1984)

A city collector-treasurer admitted he violated the standards of conduct set out in §23 of the conflict law when he dismissed parking tickets for the daughter of the Speaker of the House without showing cause for having done so. According to the Disposition Agreement, the collector-treasurer dismissed at least 23 tickets for which he could not provide adequate justification.

Section 23 (¶2)(3) of G.L. c. 268A prohibits a public official from giving reasonable basis for the impression that any person can improperly influence him 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. By dismissing parking tickets for the daughter of the Speaker without legitimate reasons apparent for many of them, the employee gave reasonable basis for the impression that her family connections had unduly and improperly influenced his decisions.

A civil penalty was not assessed because the collector-treasurer did not realize any personal benefit or financial gain from his actions and because his actions in this instance appeared to have been the exception rather than the rule.

***In the Matter of G. Shephard Bingham**
(February 21, 1984)

A member of a local conservation commission admitted he violated §17 of the conflict law when he appeared before that commission on behalf of a private client. During 1982 and 1983, the commissioner represented a developer in his capacity as a private attorney, and appeared on behalf of that developer, before the conservation commission on two occasions. He was compensated for his appearances.

Section 17 of G.L. c. 268A prohibits a municipal employee (and a special municipal employee, which this commissioner was) from receiving compensation or acting as attorney for a private party in connection with a particular matter within his official responsibility.

A $750 civil penalty was assessed.

***In the Matter of Eugene P. Riley**
(March 13, 1984)

The former director of a state agency which serves to attract foreign business to the Commonwealth was fined $500 in connection with his request and receipt of reimbursement from that agency for expenses to which he was not entitled as evidenced by his failure to keep records to support his requests. The Commission found that the individual billed and received about $3900 in connection with the use of his automobile for one year even though he kept no records to show for what purposes his car was used. He also billed and collected for a one-year, $900,000 air travel insurance policy, a policy not ordinarily provided to agency staff.

By seeking and receiving excessive reimbursement and by failing to keep appropriate records, the former director violated §23 (¶2)(2) which prohibits a state employee from using his official position to secure an unwarranted privilege for himself. In settling with the individual, the Commission felt that a $500 penalty was appropriate, given the fact that the former director had already reimbursed the agency $2,100 on his own initiative.

In the Matter of Robert J. Rennie
(March 16, 1984)

A former city councilor paid a $500 civil penalty in connection with his admission that he violated §§19 and 20 of the conflict of interest law. In his capacity as a city councilor, the individual participated in deliberations and votes affecting the sale of a city-owned parcel of real estate to himself. By so doing, the city councilor violated §19 of G.L. c. 268A, which prohibits a municipal employee from participating as such in a particular matter in which he knows he has a financial interest. He also violated §20, which prohibits a municipal employee from having a financial interest in a contract with the same municipality for which he serves as an employee.

***In the Matter of Robert Farley**
(May 8, 1984)

The acting supervisor of the Division of Elevator Inspections in the Department of Public Safety admitted he violated §6 of G.L. c. 268A by inspecting several hundred elevators either built or maintained by companies which were employing him privately. Section 6 of the conflict law prohibits a state employee from participating as such in particular matters in which his private employer has a financial interest. In connection with his admission, the state employee was assessed a civil penalty of $65,000.

***In the Matter of John Pigaga**
(May 8, 1984)

The chairman of a state licensing board was assessed a $2,000 civil penalty in connection with his admission that he violated §6 of the conflict law. In particular, that individual acknowledged that in the winter of 1982-1983, he took a licensing exam, the answers to which he, as a board member, had helped to establish. After completing the exam, he graded his own paper and issued himself a license. By so doing, he participated in a particular matter in which he himself had a financial interest, in violation of §6.

In the Matter of Louis J. Panakio
(May 29, 1084)

A member of a local zoning board of appeals admitted he violated §19 of G.L. c. 268A when, in his capacity as a board member, he twice participated in board action affecting the financial interests of an immediate family member. The prohibited participation consisted of motions and votes made by the board member which affected a special permit application submitted by his wife's brother. In connection with his admission, the board member signed a Disposition Agreement with the Commission, settling his case. He was assessed a $250 civil penalty.

***In the Matter of Alfred Welch**
(June 12, 1984)

The chairman of a local zoning board of appeals admitted he violated one of the standards of conduct set forth in §23 of the conflict law when he gave reasonable basis for the impression that he could be unduly influenced in the performance of official duties. In particular, while the chairman was negotiating to enter into a private contract to do flooring work for a local developer, the developer had matters scheduled to come up for board consideration. When the chairman and the developer discussed both private business and upcoming board action in the context of the same conversation, the chairman gave reasonable basis for the impression that he could be unduly influenced in his performance as chairman. For this conduct, he was assessed a civil penalty of $750.

***In the Matter of Francis J. Molloy**
(August 14, 1984)

In an Agreement between the Commission and a former town councillor, the latter admitted he violated §20 of G.L. c. 268A and agreed to pay a $250 civil penalty. According to the Agreement, the town councillor violated the law by having a prohibited financial interest in a contract to serve as a firefighter for the same town. The enforcement action was brought and a penalty assessed because the town councillor ignored a formal advisory opinion issued to him a year earlier advising him that he could not hold both positions.

***In the Matter of Thomas Joy**
(September 11, 1984)

A local chief building inspector admitted he violated G.L. c. 268A by giving his subordinate and the public reasonable basis for the impression that the subordinate might unduly enjoy his favor in his performance as chief building inspector. According to the Agreement, the chief and his subordinate entered into and later equally shared the profits of two private real estate transactions, even though the subordinate alone made the downpayments for both ventures and secured the financing for them based on his own credit worthiness. At or about the same time, the subordinate also made a no-interest loan of $2,000 to his superior. All of these financial transactions occurred at a time when, or just prior to, the chief's inspection of his subordinate's private work.

In connection with the settlement, the chief building inspector paid a civil penalty of $1,250.

***In the Matter of William G. Doherty**
(September 24, 1984)

A mediator for the State Board of Conciliation and Arbitration agreed he violated §23 of the conflict law when he accepted private arbitrations involving the Teamsters Union, an organization with which he was then involved in Board mediations. By accepting those private arbitrations at that time, the parties agreed that the mediator accepted employment which would have impaired his independence of judgment in the exercise of his official duties and that by his conduct, the mediator gave reasonable basis for the impression that the Teamsters Union could improperly influence or unduly enjoy his favor in the performance of his official duties.

***In the Matter of Donald Sommer**
(October 1, 1984)

A regional special education director for the state Department of Education acknowledged he violated §§4(c) and 23(¶2)(3) of G.L. c. 268A in connection with the establishment of a special education school. To settle the Commission's action, the individual agreed to pay a $3,000 civil penalty, dispose of any interest he may have had in the school, and refrain from becoming involved with the school either through investment or employment for five years.

According to a Disposition Agreement between the regional special education director and the Commission, the former was responsible for the oversight and regulation of private special education schools. He violated §4(c) of the conflict of interest law when, in his private capacity, he acted as agent for others in connection with the creation of the school. Section 4(c) prohibits a state employee from acting as agent for anyone other than the commonwealth in connection with a particular matter of direct and substantial interest to the commonwealth.

In addition to his admission that he violated §4(c) of G.L. c. 268A, the individual agreed he violated §23(¶2)(3) of the same chapter. He did so by engaging in private dealings with those involved with the establishment of the school, when matters concerning the school were pending before his own agency or when it was reasonably forseeable that matters concerning the school would be pending before his agency in the near future. This conduct, the Agreement states, gave reasonable basis for the impression that those involved with the School could improperly influence him or unduly enjoy his favor in his performance as regional special education director.

***In the Matter of John J. Willis, Sr.**
(November 8, 1984)

A former town counsel acknowledged he violated §20 of G.L. c. 268A and agreed to pay a $2,000 civil penalty for having a financial interest in insurance contracts made by the town. Section 20 prohibits a town employee from having a financial interest in a town contract.

According to the Disposition Agreement, the former town counsel, while he was town counsel, operated a private insurance agency. In his capacity as an insurance agent, he was a member of an agents association, which was established to advise town

officials on town insurance and provide the recommended coverage. The commissions generated from town policies were distributed among all agent members of the association. Through his receipt of such distributions, the former town counsel violated §20.

***In the Matter of Rita Walsh-Tomasini**
(December 20, 1984)

In a Disposition Agreement between the Commission and a local school committee member, the latter admitted she violated §19 of the conflict law first by appointing her son to a clerk/typist position on her own staff and again when she took action to grant him a retroactive pay raise.

In imposing a $1,000 civil penalty, the Commission considered the fact that the school committee member had received a Commission advisory opinion which generally discussed the propriety of school committee members hiring immediate family members to staff positions. Her opinion request did not indicate that she had already hired her son.

***In the Matter of Richard E. Sullivan, Sr.**
(December 20, 1984)

The mayor of a small city admitted he violated §19 of G.L. c. 268A when he appointed his son to a provisional position on the City's police department. By the terms of the Disposition Agreement, the official agreed to pay a $300 civil penalty.

***In the Matter of William C. Lannon**
(December 24, 1984)

In a Disposition Agreement between the Commission and a former superintendent of schools, both parties acknowledged that the former superintendent violated §23(¶2)(3) of G.L. c. 268A which prohibits a municipal employee from engaging in conduct which gives reasonable basis for the impression that anyone can improperly influence or unduly enjoy his favor in the conduct of his official duties. The former superintendent violated §23(¶2)(3) by borrowing money from two employees subject to his official authority. He again violated §23(¶2)(3) when he recommended that the school committee grant a sabbatical to one of the employees to whom he was then indebted.

The Commission assessed a $500 civil penalty.

CONFLICT OF INTEREST OPINION NO. EC-COI-84-2

FACTS:

You are a full-time employee in the Town Water Department. You are also interested in working after-hours as a special police officer for the Town. You state that your work as a police officer would be on a part-time, as needed basis; for example, if there were not enough regular police officers available to work details such as security for a local Mall or for road details. The Town has a population of more than 35,000.

QUESTION:

Does the conflict of interest law, G.L. c. 268A, permit you to work part-time as a special police officer for the Town while simultaneously being employed full-time in the Water Department?

ANSWER:

Yes, subject to certain conditions.

DISCUSSION:

As a full-time employee of the Town Water Department, you are a municipal employee as defined in G.L. c. 268A, §1(g). The provisions of G.L. c. 268A, the conflict of interest law, therefore apply to you. Section 20 prohibits a municipal employee from having a financial interest in another contract made by a municipal agency of the same town. Until recently, the type of dual employment arrangement you proposed violated G.L. c. 268A, §20, and you did not qualify for any exemptions. However, on November 10, 1983, the following amendment to §20 was signed into law, effective in February, 1984:

> [Section 20 does not apply] to a municipal employee if the contract is for personal services in a part-time, call, or volunteer capacity with the police, fire, rescue, or ambulance department **of a town or any city with a population of less than thirty-five thousand inhabitants;** provided, however, that the head of the contracting agency makes and files with the clerk of the city or town a written certification that no employee of said agency is available to perform such services as part of his regular duties, and the city council, board of selectmen or board of aldermen approve the exemption of his interest from this section. St. 1983 c. 481 [emphasis added].

The issue raised by your advisory opinion request is whether you qualify for this exemption, inasmuch as the Town is a town with a population greater than thirty-five thousand inhabitants. 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-83-1, and to give a workable meaning to c. 268A. **Graham v. McGrail,** 370 Mass. 133, 140 (1976). Although the language of the exemption could have been more artfully drafted, the sensible reading is that the 35,000 population ceiling applies ony to cities. Such a reading is supported by the word "any" appearing before city, which seems to separate the treatment of cities and towns under this exemption. Applying the population ceiling solely to cities is also consistent with another provision in §20 which treats towns less restrictively than cities.[1]/ The Commission therefore concludes that a narrow construction of the language "of a town or any city with a population of less than thirty-five thousand inhabitants" is in accordance with "the spirit of the act." **See Comm. v. Galvin,** 388 Mass. 326, 328 (1983). **See also** 2A C. Sands, Sutherland Statutory Construction §46.05 (4th ed. 1973). Accordingly, as of February 8, 1984, you may work as a part-time special police officer in addition to being employed in the Town Water Department without violating the conflict of interest law, provided that the Chief of the Police Department makes the requisite certification to the Town Clerk and the Board of Selectmen approves the exemption.

DATE AUTHORIZED: January 9, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-6

FACTS:

You are employed on a full-time basis in a state agency (ABC). In that capacity, you serve as liaison to the Legislature, lobby on behalf of the ABC's legislative priorities, and represent the various divisions of ABC before the General Court. You are responsible for preparing and filing legislative proposals each year and

[1]/Under the so-called teacher-selectman amendment to §20, an employee or an official of a town may also serve as a selectman, provided that he does not vote or act on any matter within the purview of his agency and that he receives compensation for only one of the positions. St. 1982, c. 107. This exemption has been narrowly construed as applying solely to the position of selectman, i.e. not to the equivalent city position of city council member or board of aldermen member. See, e.g. EC-COI-83-38.

developing support for each bill. You have minimal, if any, official responsibility for adjudication, rulemaking, policy, or ministerial matters coming before the individual divisions of ABC.

You have been asked to serve as a member of the Board of Directors of DEF (DEF), a Massachusetts Chapter 156B business corporation. DEF provides consulting services to various state agencies, as well as representing private clients as agents and/or expert consultants before various agencies and regulatory boards. The positions of President and Treasurer of this corporation are filled by two of your brothers. The legal affairs of DEf, including those regulated by ABC, are handled by a private law firm in Boston. You would not be compensated for your services as a Director, nor have any ownership or financial interest in the corporation, nor perform any services as an employee or consultant.

QUESTION:

1. Does G.L. c. 268A permit you to serve simultaneously as a state employee and as a Director of DEF?

2. Does G.L. c. 268A restrict the kinds of consulting services DEF may engage in?

ANSWER:

1. Yes, subject to the conditions discussed below.
2. No.

DISCUSSION:

As an employee of ABC, you are a state employee as defined in G.L. c. 268A, §1(q), and are therefore covered by the conflict of interest law. As such, you are prohibited by §6 from participating[1]/ as an ABC employee in any "particular matter"[2]/ in which your immediate family,[3]/ or a business organization for which you are a 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 financial interest involved 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 an ABC employee in any particular matter in which DEF has a financial interest unless you were to receive the written determination from your appointing official described above. The enactment of general legislation is specifically excluded from the definition of "particular matter" by §1(k). However, the enactment of special legislation has been interpreted by the Commission and Attorneys General to be a "particular matter."[4]/ Thus, §6 would prohibit you from making recommendations or otherwise participating in the enactment of special legislation which would affect your own, your brothers' or DEF's financial interests. See, e.g., EC-COI-80-13. You would also be prohibited under §6 from participating in such determinations as the approval of matters pending in ABC involving DEF.

Section 4 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.
>
> . . .
>
> (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.

You are already in compliance with paragraph (a), since you state that you would not be compensated as a

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[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]/"Immediate family" is defined as "the employee and his spouse, and their parents, children, brothers and sisters." G.L. c. 268A, §1(e).

[4]/See EC-COI-82-169; 82-32; 80-13; see also Attorney General Conflict Opinion Nos. 101, 451, 578. Special, as opposed to general legislation, is distinguished by the particularity of the scope and purpose of the act's provisions. See, Sands, 2 Sutherland Statutory Construction §40.01 et seq. (4th ed., 1973).

director of DEF. With respect to paragraph (c), you would be prohibited from acting as agent or attorney for any non-state party in connection with a particular matter in which the state or any state agency is a party or has a direct and substantial interest. Thus, §4(c) would prohibit you from representing one of the corporation's clients before a state agency or regulatory board, e.g., a private health care provider in a determination of need or licensing proceeding before the Department of Public Health. Acting as an agent or attorney for DEF before ABC, any of its subdivisions, or any state agency in connection with a proceeding, application, contract, etc. would also constitute a violation of §4(c). Acting as an agent for either the corporation or its clients means signing their contracts, acting as their advocates in application processes, submitting their applications, presenting supporting information on their behalf to ABC or any other state agency, or representing them in any way before a state agency. EC-COI-83-78. Your involvement as Director in the formulation of general issues of policy, however, would not be precluded under §4, inasmuch as " 'particular matter' is not intended to include general issues of policy but rather focuses on types of activity which involve making decisions and exercising judgment." EC-COI-83-18; **Graham v. McGrail,** 370 Mass. 133, 139-140 (1976).

You should also be aware that G.L. c. 268A, §23 imposes restrictions on your outside activities. In particular §23¶2(2) prohibits you from using or attempting to use your official position to secure unwarranted privileges for yourself or others. For example, you would violate this section by using your position as a means of obtaining special treatment of any DEF matters in ABC. Likewise, you should avoid giving reasonable basis, by your conduct, for the impression that any person can improperly influence or unduly enjoy your favor in the performance of your official duties (e.g., a fellow Director of DEF).

The conflict of interest law would not place restrictions on the types of consulting services in which DEF may engage due to your status as a state employee. Regardless of whether you make the position as a Director, however, you are subject to the §6 restrictions on official actions (which would affect your own or your brotners' financial interests) in your state job, as discussed above.

DATE AUTHORIZED: January 30, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-10

FACTS:

You are the Commissioner of the state Department of Commerce and Development (DCD), appointed by the governor pursuant to G.L. c. 23A, §1. In this position, you are the executive and administrative head of DCD and are required to devote full-time during normal working hours to the duties of your office.

You are also a member **ex officio** of the Massachusetts Industrial Financial Agency (MIFA) board of directors (MIFA Board), created by G.L. c. 23A, §31. That statute states that the provisions of G.L. c. 268A apply to members of the MIFA Board, except that MIFA may purchase from, sell to, borrow from, loan to, contract with or otherwise deal with any individual, firm, association, partnership, trust, corporation and other legal entities in which any MIFA Board member is in any way interested or involved. **Id.** at §31(d). The interest or involvement must be disclosed in advance to the other MIFA Board members, recorded in the minutes, and the MIFA Board member may not participate in any decision of the MIFA Board relating to the person or entity with which he or she is interested or involved.

The MIFA board must issue a favorable recommendation as a prerequisite to the issuance of bonds by an industrial development finance authority under G.L. c. 40D. Once such a favorable recommendation is made, you, as Commissioner of DCD, must promptly issue a certificate of convenience and necessity allowing the issuance of the bonds. G.L. c. 40D, §12.

You are also chairman of a bank's (Bank) board of directors (Bank Board) and own or have voting control over a majority of the outstanding shares of the Bank. The Bank currently has four non-interest bearing accounts maintained by the Leominster District Court. The Court pays the Bank a service charge of approximately $800 per year.

The Bank also has within its investment portfolio approximately $1.3 million worth of bonds issued by MIFA and the Massachusetts Health and Educational Facilities Authority (HEFA). These bonds are approximately 4.72 percent of the Bank's investment portfolio. Although the Bank currently does not hold any other bonds or instruments of indebtedness of the Commonwealth, it may desire to purchase some in the future.

HEFA issues bonds through three procedures. The first two involve a public offering by HEFA to the institutional investment market. Groups of investment banking firms submit bids for the opportunity to purchase the bonds from HEFA which those firms then resell to the investment community. The third process is used for smaller bond issues. In this method, the ultimate recipient of the bond funds attempts to locate banks or other fund sources to purchase the HEFA bonds. These bonds ordinarily are not resold by the original purchaser, but can be. HEFA publicizes the availability of this "private placement" bond program among those eligible to pursue bond funds through HEFA. The Bank has approximately $100,000 worth of HEFA bonds placed through this private placement process.

The Bank and a wholly-owned subsidiary of the Bank applied for and received preliminary approval from MIFA for the issuance of a bond to finance certain facilities. You also are involved privately with the sale of your interest in property wherein the purchaser has applied to MIFA for financing. Approval of either or both of these projects by the MIFA Board will require your issuance of a certificate of convenience and necessity, as discussed above.

Finally, the Bank has customers whose various private dealings with the Commonwealth may indirectly benefit the Bank as a lender to or depositary of those customers.

QUESTION:

In light of the facts detailed above, may you serve as Commissioner of DCD while chairman of the Bank Board and while owning or controlling a majority of the outstanding shares of the Bank?

ANSWER:

Yes, provided you comply with the guidelines described below.

DISCUSSION:

As Commissioner of the DCD, 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 the provisions of that law.

Section 4

Section 4(c) of G.L. c. 268A prohibits you from 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. You are generally prohibited by §4 from acting as an agent of the Bank in its dealings with the state. Acting as an agent has been interpreted by the Commission to include not only personal appearances before state agencies, but also signing any contracts or correspondence on behalf of a private party in matters involving the state. See EC-COI-82-69.

Section 6

Section 6 of the conflict of interest law prohibits you from participating[2]/ as a state employee in any particular matter in which, in relevant part, you or a business organization in which you are an officer or director has a financial interest. That section provides further 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 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 services.

The MIFA Board's review of the application for bond financing related to the Bank's facilities and the sale of your interest in property are particular matters covered by §6. The Bank is a business organization of which you are a director and it has a financial interest in the MIFA Board's action. You have a direct personal financial interest in the MIFA Board's approval of the financing of the private sale.

The statutory provision in G.L. c. 23A, §31(d) as applicable to MIFA Board members is similar to §6 in requiring disclosure to the MIFA Board and prohibiting participation when certain interests are involved. Unlike §6, the provision does not allow for exemption from its non-participation clause. The Commission has held previously that the provisions of §6 applicable to all state employees do not affect any supplementary restrictions imposed by the legislature on persons holding certain positions in state government. See EC-COI-81-75.

[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, . . . employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

Therefore, as MIFA Board member, you must comply with the provisions of G.L. c. 268A, §6 and G.L. c. 23A, §31.

The issuance of a certificate of convenience and necessity in connection with these bond financing determinations would also be a particular matter in which you and/or the Bank have a financial interest. Therefore, §6 applies and you will have to comply with its terms.

Section 7

Section 7 of G.L. c. 268A prohibits a state employee from having a financial interest in a contract made by a state agency. The relationship between the Bank and the Leominster District Court resulting from the Court accounts is considered a contract for purposes of §7. EC-COI-81-87. The Court is a state agency. As a shareholder in the Bank, you have a financial interest in the contracts between the Bank and the Court. Although an exemption to §7 states that the section shall not apply if the financial interest at issue consists of ownership of less than one per cent (1%) of the stock of the corporation, your ownership interest in the Bank exceeds this 1% ceiling. Therefore, the Bank must divest itself of these accounts within thirty (30) days of your receipt of this opinion or you will be in violation of §7.

The Commission has held that bonds issued by state agencies are contracts, see EC-COI-83-37, and your shareholder interest in the Bank gives you a financial interest in the MIFA and HEFA bonds which it holds.

The MIFA board statutory provision cited above permitting MIFA to "contract with or otherwise deal with" any firm, trust, corporation or other legal entity in which a MIFA Board member is "in any way interested or involved" appears to exempt your financial interest in the MIFA bonds held by the Bank from the application of §7. This provision does not apply, however, to the Bank's HEFA bonds.

An exemption to §7 provides that the section shall 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 Commission a statement making full disclosure of his interest and the interests of his immediate family in the contract.

You are not employed by HEFA. You are not employed by an agency which regulates the activities of HEFA, nor do you participate in or have official responsibility for any activities of HEFA.

Any HEFA bonds held by the Bank which were issued through that agency's competitive bid process qualify for this exemption. On the other hand, the bonds issued through the private placement procedure are not competitively bid. However, the Commission has interpreted the term "public notice" to include the solicitation of terms from various firms able to perform services under a particular contract (EC-COI-83-56) and the advertisement of a position requiring a particular professional in trade journals concerned with profession involved. These methods have been held to satisfy the requirement of openness sought to be achieved by the "public notice" requirement (EC-COI-83-97). The HEFA private placement process sufficiently satisfies that requirement. Therefore, even those HEFA bonds held by the Bank which are not competitively bid qualify for this exemption to the application of §7. You must also comply with the disclosure provisions in order to satisfy all of the requirements of the exemption. Bonds issued by other state agencies which the Bank may wish to purchase must also be examined on an individual basis in light of the provisions of §7.

Regarding the dealings of private customers of the Bank with the state which may benefit the Bank and, therefore, you as a shareholder in the Bank, those dealings are not affected by the fact that the Bank does business with these people and any benefit the Bank receives is merely coincidental. Therefore, §7 does not apply to these situations, even where contracts between Bank customers and state agencies are involved.

Section 23

Section 23 of the conflict law contains certain standards of conduct applicable to all state employees. This section prohibits a state employee from accepting employment or engaging in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority and from, in fact, improperly disclosing such materials[3]/ or using such information to further his personal interests. You must not exploit your access to MIFA information and officials to benefit your private dealings or the Bank's.

DATE AUTHORIZED: January 30, 1984

[3]/These materials are defined as "materials or data within the exemption to the definition of public records as defined by [G.L. c. 4, §7]."

CONFLICT OF INTEREST OPINION NO. EC-COI-84-12

FACTS:

You are a District Attorney. Within your office is a support enforcement unit made up of several employees, all of whose salaries are paid by the Commonwealth. The Department of Public Welfare (DPW) is about to enter into a contract with your office concerning the prosecution of cases initiated by DPW support workers. Under the contract, your office will accept referrals from the DPW office, investigate, prosecute and submit a follow-up report to DPW. Apart from this contract, the DPW intends to hire three employees as consultants under DPW contract who would be assigned to your office to assist in the investigation and prosecution of non-support cases under the supervision of one of the support unit employees. In view of the anticipated increase in the workload and responsibilites of the existing support unit to administer the DPW contract, you would like to increase their salaries to reflect these new responsibilities. You would like to use the DPW contract as the source for the increases. Under the proposal, a unit member would receive from the state Comptroller a single pay check within the District Attorney salary account. The check would reflect both the regular compensation and the supplement attributable to the DPW contract.

QUESTION:

Does G.L. c. 268A permit unit members to receive a single paycheck which is attributable to two state sources and which reflects increased responsibilities.

ANSWER:

Yes.

DISCUSSION:

The members of the support enforcement unit within the office of District Attorney are state employees within the meaning of G.L. c. 268A, §1(q). EC-COI-82-142. As state employees, they are subject to the restrictions of G.L. c. 268A, §7 which, in general, prohibits them from having a financial interest in a second contract made by a state agency. For example, absent qualification for an exemption, full-time employees in your office could not have a financial interest in a separate personal services contract with the Department of Mental Health. See, EC-COI-81-128. However, the prohibitions of §7 contemplate an additional contract over and above the employee's original contract of employment.

Section 7 does not apply to state employees who receive one paycheck which reflects funding from two or more separate sources. EC-COI-83-83. For example, in EC-COI-82-57, the Commission concluded that a municipal employee whose salary was increased to reflect expanded responsibilities and who would be receiving one paycheck from the municipality would not be in violation of §20 [the municipal counterpart to §7] merely because the municipality drew the funds for the single paycheck from more than one municipal agency. Similarly, in EC-COI-83-83 the Commission concluded that a state employee who receives one paycheck which reflects duties performed for two agencies would not violate §7 where those duties are embodied in a single employment contract. Cf. EC-COI-82-142 [state employees do not violate G.L. c. 268A, §4 by receiving a single state paycheck whose funding is attributable to municipal or federal sources.]

Accordingly, the compensation arrangement which you have proposed would not create a financial interest in a second state contract within the meaning of G.L. c. 268A, §7.[1]/

DATE AUTHORIZED: January 30, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-13

FACTS:

You are a part-time consulting physician to the Disability Determination Services branch of the Massachusetts Rehabilitation Commission (MRC). In that capacity you review applications for disability which have been referred to MRC by the United States Social Security Administration. The referrals are initially assigned to an MRC disability determination examiner who utilizes the services of a consulting physician in determining the completeness of the medical documentation. In those cases where further documentation is necessary, the consulting physician will authorize appropriate medical consultative examinations and tests. The authorization does not include specifying who will conduct the examination or the location. Following the consulting physician's authorization, the MRC Placement Department will review a standing list of physicians who are qualified to provide the appropriate medical consultative examinations and

[1]/This is not to say, however, that all such supplementary funding arrangements are permissible under G.L. c. 268A. For example, if the employee were not, in fact, performing additional services but were merely receiving supplementation from another state agency for work which the employee had already performed, issues would be raised under G.L. c. 268A, §23.

tests in the applicant's geographic area. Following the Placement Department's assignment and examination and testing of the applicant, the physician will submit a report to the original Disability Determination examiner. After review of the report, the examiner and consulting physician will determine whether the applicant has satisfied the criteria for disability and will submit their determination to the Social Security Administration.

Your wife is also a physician on the standing list of physicians qualified to perform medical consultative examinations. Until recently, she was assigned by the MRC Placement Department to serve as consultative physician on a large number of cases, and approximately eighty percent of her total income as a physician has been derived from her contracts with MRC.

You and your wife are the sole incorporators, officers, directors and shareholders of ABC. You are the majority shareholder and serve as president of ABC. Following the receipt of consultative physician contract funds from MRC, your wife deposits all of these funds into the account of ABC. ABC, in turn, uses a portion of these funds (approximately ten percent) to pay for the expenses of the office which she uses to conduct the MRC consultative examinations. You own the office with another party and also share the use of the office with your wife. Approximately twenty-five percent of the corporation's income is derived from your wife's contribution.

QUESTION:

Assuming that you remain a consulting physician to MRC, would you be in violation of G.L. c. 268A, §7 if your wife resumed her consultative physician status with MRC under the arrangement described above.

ANSWER:

Yes.

DISCUSSION:

As a consulting physician to MRC, you are a state employee for the purposes of G.L. c. 268A, §1(q). In view of your part-time status, you qualify for classification as a "special state employee" under §1(o)[1]/ and are subject to certain less restrictive provisions in G.L. c. 268A in addition to other prohibitions which you share equally with full-time state employees.

The principle section of G.L. c. 268A which would apply to your situation is §7. As a special state employee, absent a gubernatorial exemption, you are prohibited by §7 from having a financial interest in another contract made by the MRC.[2]/ On the basis of the information which you have provided, the Commission concludes that you would have a financial interest in your wife's consultative contracts with MRC if she were to resume that role under the arrangement described above.

In general, §7 does not prohibit both a husband and wife from serving as state employees, even with the same agency. While the husband obviously benefits from his wife's income, (and vice-versa) the husband does not, strictly speaking, have a financial interest in his wife's employment contract. Both the Commission and Attorney General have concluded that, absent special circumstances, the wife's financial interest in her contract with the state is not automatically imputed to the state employee husband. See, EC-COI-80-105; 80-25; 79-77; Attorney General Conflict Opinion No. 849. However, where the husband shares in the management and control of his wife's business, or when

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[1]/Section 1(o) defines special state employee, in relevant part, as a state employee:

> (2) Who is not an elected official and
>
> (a) Occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment, or
>
> (b) In fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special state employee shall be such a status on days for which he is not compensated as well as on days on which he earns compensation.

Because your consultant position involves your receipt of compensation for more than eight hundred hours during the preceding one-year period, you are not automatically a special state employee. Rather your appointing official must file a statement with the Commission pursuant to Section 1(o)(2)(a) confirming that your part-time employment arrangement permits personal or private employment during normal work hours.

[2]/Section 7 provides in relevant part as follows:

> 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 interest 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 husband has a formal ownership interest in the proceeds of the wife's contract, the financial interest of the wife will be attributed to the husband for the purposes of §7. For example, in EC-COI-83-111, the Commission concluded that a husband state employee retained a financial interest in his wife's sale to his state agency of land which until recently they had owned jointly. See, also EC-COI-83-125; 83-37. The key question in each case is whether the state employee can fairly be said to have a financial interest in his wife's contract with the commonwealth. 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). In your situation, you are the majority shareholder in a corporation (ABC) and, by virtue of that ownership interest, would violate §7 if the corporation contracted directly with MRC. Although the corporation does not directly contract with MRC, the corporation does have financial interest in your wife's contracts with MRC. This conclusion is based on the fact that your wife distributes the proceeds from her MRC contracts to the corporation, and the corporation in turn pays for the office expenses which she incurs while conducting examinations under the MRC contracts.

To avoid a violation of §7, there are three alternative courses available to you:

1. request and obtain an exemption from the governor, with approval of the executive council under §7(e);
2. restructure your wife's arrangement with ABC so that ABC does not receive, directly or indirectly, the proceeds from your wife's contracts with MRC and thereafter use those proceeds to pay for the MRC examinations[3]/; or
3. resign from your MRC consulting physician position.

DATE AUTHORIZED: January 30, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-14

FACTS:

During the period of 1972 to 1974, you were a paid deputy assessor for the Town of ABC (Town). While serving in that position, you appraised the DEF property, and made recommendations to the Town Board of Assessors regarding the fair market value of that property. Following that period, you performed no other services for the Town in relation to this property. Subsequently, there were three additions to the property: one completed in late spring of 1975 which added 25,000 square feet; a two story addition in 1976, which added 18,000 square feet; and a third small addition in 1978, along with a beautification project in 1980. These additions doubled the size of the property. The Town revalued the property for fiscal year 1982, effective as of January 1, 1981.

You were hired by the owner of the DEF in October 1982 to appraise DEF as of January 1, 1981 for fiscal year 1982 to contest the 1981 real estate assessment by the ABC Board of Assessors.

QUESTION:

Does G.L. c. 268A permit you to receive compensation from the owner of the DEF or act as his agent in relation to his challenge to the 1981 real estate assessment by the ABC Board of Assessors?

ANSWER:

Yes, subject to certain conditions.

DISCUSSION:

During the period in which you served as a deputy assessor for the Town, you were a municipal employee for the purposes of G.L. c. 268A, and, upon leaving that position, you became a former municipal employee.[1]/ As a former municipal employee, two sections of G.L. c. 268A are relevant to your situation:

1. **Section 18**

This section prohibits you from receiving compensation or acting as agent or attorney for a non-Town party in relation to any particular matter[2]/ in which you participated[3]/ while serving as a municipal employee. G.L. c. 268A, §18(a).[4]/

[3]/For example, in EC-COI-85-175, the Commission advised an MRC consulting physician that he would not violate G.L. c. 268A by leasing his office space on an occasional basis to an consultative physician where the consulting physician's lease arrangement was independent of the MRC contract with the consultative physician.

[1]/In view of the conclusions reached in this opinion, it is unnecessary to review the application of the provisions of G.L. c. 268A as they apply to you as a "special municipal employee."

[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).

The assessment determination for DEF is a particular matter under §1(k), and, by appraising that property during the period of February, 1972 to October, 1974, you participated in that determination. Therefore, you would violate §18(a) if you were paid by DEF or acted as its agent or attorney in relation to the assessment determination in which you participated while employed as a deputy assessor.

The key issue is whether the 1981 assessment determination which DEF now contests and for which you now wish to receive compensation is the same "particular matter" in which you previously participated as deputy assessor. In general, each assessment determination is regarded as a different particular matter, because the process by which the Board of Assessors makes its determination may take into account different considerations. This is particularly true with respect to the 1981 assessment of DEF in view of the substantial addition to the size and value of the property since your assessment recommendation as deputy assessor. The Commission therefore concludes that, while you may be familiar with the property, the 1981 assessment determination is a different particular matter from the earlier proceeding in which you participated. This is not to say that the Commission would regard every assessment determination as a separate particular matter. In reaching its conclusion, the Commission may consider such factors as the extent to which the particular matters involve the same facts and issues, the same or related parties and the time elapsed. For example, in EC-COI-80-108 the Commission advised a former state employee that she could not represent private clients to pursue claims integrally related if not identical to claims which she previously investigated as a state employee. See, also EC-COI-79-36; 5 C.F.R. §737.5(4).[5]/ The facts which you present are distinguishable from these precedents.

2. Section 23

Two provisions of the standards of conduct under G.L. c. 268A, §23 apply to you as a former municipal employee. These provisions prohibit a former municipal employee from accepting employment or engaging in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority and from, in fact, improperly disclosing such materials[6]/ or using such information to further his personal interests.

These restrictions affirm the principle that while serving as a municipal employee, an individual owes his loyalty to the municipality and may not take advantage of or misuse confidential information acquired in that role. This principle is particularly applicable to your situation. In the course of your working for the owner of DEF, you must refrain from disclosing confidential information which was used as the basis of your earlier recommendation.

DATE AUTHORIZED: January 30, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-16

FACTS:

You are the Commissioner of a state agency (ABC) and you are married to the Commissioner of another state agency (DEF). ABC has initiated a federally funded program. ABC is contracting with many for-profit and non-profit entities, including state and municipal agencies, to provide services connected with this program.

ABC anticipates contracting with DEF for such services. The proposed contract provides that ABC compensate DEF for these services. The contract includes a provision for the audit and inspection of DEF books, records and other data kept in connection with the contract by ABC and other state and federal agencies.

QUESTION:

Does the conflict of interest law, G.L. c. 268A, prohibit this contract between ABC and DEF or any future contracts between these two agencies because of the relationship between the two Commissioners?

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[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,...employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

[6]/Section 18(b) establishes other limitations on your activities for a one-year period following your termination of services as a municipal employee. In view of the time period which has elapsed since your deputy assessor services, this section no longer applies to you.

[5]/5 CFR §737.5(4), a federal regulation adopted pursuant to the federal counterpart to G.L. c. 268A, §18, [18 U.S. §207] provides as follows:

(4) The same particular matter must be involved. The requirement of a "particular matter involving a specific party" applies both at the time that the Government employee acts in an official capacity and at the time in question after Government service. The same particular matter may continue in another form or in part. In determining whether two particular matters are the same, the agency should consider the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest.

[6]/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]."

ANSWER:

No, as long as you both comply with the provisions of §23 as discussed below.

DISCUSSION:

As state employees, you are subject to the standards of conduct, §23, of the law. The provisions of §23 address the appearance of improprieties as well as actual wrongdoing. Pursuant to §23, a state employee is prohibited from using or attempting to use his official position to secure unwarranted privileges or exemptions for himself or others. Further, 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. These provisions will govern your actions in relation to contracts between ABC and DEF. For example, potential issues under §23 would come into play during the course of ABC's audit or monitoring of DEF's performance under the contract. If you became aware of a significant contract breach by DEF and chose to not pursue that breach on behalf of ABC because of your relationship with your wife, you would violate these provisions.[1]/

Section 23 also prohibits a state employee from improperly disclosing materials or data within the exemptions to the definition of public records as defined by G.L. c. 4, §7, and which were acquired by him in the course of his official duties and from using such information to further his personal interests. This section would apply to prohibit you and your wife from divulging certain information to each other that could affect the contractual arrangements between ABC and DEF.[2]/

DATE AUTHORIZED: January 30, 1984

[1]/In view of the hypothetical nature of your question, this opinion does not address all situations in which §23 might come into play. You should therefore renew your opinion request with the Commission if questions related to §23 arise during the implementation of the contract.

[2]/On the basis of the information which you have provided, there would appear to be no spousal financial interests which would be affected by the participation of either you or your spouse in the contract. See, G.L. c. 268A, §6.

CONFLICT OF INTEREST OPINION NO. EC-COI-84-17

FACTS:

Until December 1, 1983, you were employed as a psychiatrist by the Department of Mental Health (DMH). On December 2, 1983, you took an unpaid leave of absence from your DMH position to serve as the acting director at a private Foundation (Foundation) and have continued in that status through the month of February, 1984. While on leave of absence, you have received no conpensation, fringe benefits or retirement credit attributable to your DMH psychiatrist position. Your current compensation from the Foundation is derived from a vendor contract with DMH

QUESTION:

Does your acceptance of the DMH-derived funds from the Foundation place you in violation of G.L. c. 268A during your leave of absence from DMH?

ANSWER:

No.

DISCUSSION:

During the period prior to and including December 1, 1983 in which you were employed as a psychiatrist with DMH, you were a state employee for the purposes of G.L. c. 268A.[1]/ Similarly, when you return to that position following the completion of your acting duties with the Foundation, you will be a state employee for the purposes of G.L. c. 268A.

However, the Commission concludes that your status as a state employee does not continue during the period in which you are on unpaid leave of absence. During the period of your leave of absence, you do not, strictly speaking, hold employment with DMH and have suspended your right to receive benefits attributable to that position. Although the Commission has not previously addressed this issue,[2]/ the Attorney General

[1]/G.L. c. 268A, §1(q) defines "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.

[2]/In EC-COI-83-164, the Commission discussed the limitations which G.L. c. 268A, §19 would place on a teacher who takes a leave of absence to serve as mayor in the same community. The opinion did not reach the issue of whether the individual retained his employee status as a teacher while on leave of absence. However, if the leave of absence were from an elected office, as opposed to an appointed position, employee status would continue for the purposes of G.L. c. 268A. EC-COI-83-84.

ruled in 1966 that a state employee on leave of absence could be appointed to a position with another state agency. 1966 Op. Atty. Gen. No. 56, (August 9, 1966). The Opinion, which was not limited to the effect of G.L. c. 268A, broadly stated that no law could remotely be said to bar the proposed contract. The conclusion that state employees may work for another state agency while on leave of absence is also consistent with other Massachusetts statutes which protect the status of state employees on leave of absence to elected state positions, see G.L. c. 30, §9F; c. 30, §46; c. 31, §37.

Inasmuch as you are not currently a state employee during your leave of absence, your financial interest in the Foundation's vendor contract with DMH is not subject to the prohibitions of G.L. c. 268A, §7.[3]/ This conclusion will apply as long as you are on a **bona fide** unpaid leave of absence from your DMH position. A period of absence from your position due to vacations, holidays, personal time or illness, for example, would not insulate you from state employee status during that period because you would be receiving commonwealth benefits attributable to the leave period.

DATE AUTHORIZED: February 21, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-18

FACTS:

You are a member of the Special Commission on Hazardous Waste Liability (Special Commission). St. 1983, c. 7, §13. The seventeen member Special Commission is comprised of members of the General Court, executive branch members, and other persons appointed by the governor.[1]/ The Special Commission was established to study the adequacy of common law and statutory remedies available both to the Commonwealth to recover certain costs related to the treatment and removal of hazardous materials, and to persons who are harmed by the release of hazardous materials. Among the subjects which the Special Commission is directed to evaluate is the scope of liability under existing law and the consequences, particularly with respect to obtaining insurance. The Special Commission has been meeting on a regular basis since November, 1983 and is planning to schedule public hearings. Following the completion of its investigation, the Special Commission will file a report to the General Court indicating the results of its investigation, its recommendations and including drafts of legislation to carry out the recommendations.

You are an officer of ABC, a company which has an interest in a DEF matter which the Special Commission plans to review.

QUESTIONS:

1. As a member of the Special Commission, are you a state employee for the purposes of G.L. c. 268A?
2. Assuming you are a state employee, what limitations does G.L. c. 268A place on your activities?

ANSWERS:

1. Yes.
2. You are subject to the limitations set forth below.

DISCUSSION:

1. **Jurisdiction**

Initially, the Commission advises you that the Special Commission is a "state agency" for the purposes of G.L. c. 268A[2]/ and, as a member of the Special Commission, you are therefore a state employee.[3]/ The definition of state agency specifically includes independent state commissions such as the Special Commission. Further, in view of the statutory mandate for the creation of the Special Commission, the formality and specificity of its responsibilities and the requirement that it prepare a report and recommendations to the General Court, the Special Commission's entity status is distinguishable from the temporary, **ad hoc** advisory groups which the Commission has regarded as outside of G.L. c. 268A. Compare, EC-COI-82-157, 82-139, 82-81. Moreover, prior opinions of the Attorney General have concluded that other special commissions with enabling statutes similar to the Special Commissions are state agencies for the purposes of G.L. c. 268A. See, Attorney General Conflict Opinion Nos. 633, 843.

[3]/Section 7, in general, prohibits state employees from having a financial interest in second contracts made by state agencies.

[1]/Identifying footnote deleted.

[2]/G.L. c. 268A, §1(p) defines state agency as "any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town."

[3]/G.L. c. 268A, §1(q) 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, including members of the general court and executive council."

2. **Restrictions under G.L. c. 268A**

As a state employee, there are three sections of G.L. c. 268A which are relevant to your situation. In view of your unpaid status as a Special Commission member, you are a "special state employee" within the meaning of G.L. c. 268A, §1(o) and are subject to certain exemptions which are not otherwise available to full-time state employees.

a) **Section 4**

This section prohibits you from receiving compensation from or acting as the agent or attorney for any non-state party in relation to any particular matter[4]/ in which the commonwealth or a state agency is a party or has a direct and substantial interest and which

1. you have participated in as a state employee; or
2. you have or have had official responsibility for during the prior one-year period; or
3. is pending in your state agency.[5]/

Examples of particular matters which might come into play are findings and determinations of the Special Commission as well as the submission of special, as opposed to general, legislation.[6]/ Under §4 you would be prohibited from acting as the agent or attorney for ABC in relation to these matters before both the Special Commission and the General Court.

b) **Section 6**

This section prohibits you from participating as a Special Commission member in any particular matter in which, in relevant part, either you or ABC has a financial interest. For example, if the Special Commission were to consider the submission of special legislation addressing certain issues in the DEF matter, or were to consider making findings or determinations concerning the performance of ABC, you would be required by §6 to refrain from participating in those matters and to submit to the governor and Commission a statement disclosing the nature and circumstances of the particular matter, along with a description of your financial interest.

On the other hand, not all issues which would come before the Special Commission would constitute "particular matters" under §1(k). For example, the holding of a public hearing, the study of the scope of liability under existing law, as well as the submission of general legislation would not be particular matters which would require your disqualification from participation as a special commission member.

c) **Section 23**

This section establishes standards of conduct for all state employees and would apply to you as a Special Commission member. Inasmuch as you are the officer of a company which could be financially affected by the outcome of the Special Commission's work, you should be particularly mindful of the restrictions against your improperly disclosing confidential information which you have acquired in your Special Commission position.

DATE AUTHORIZED: February 21, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-20

FACTS:

You are an associate in a law firm (Firm). The Firm represents clients in proceedings before a state agency (ABC) and you participate in those proceedings on behalf of the Firm.

You were recently appointed as a Special Assistant Attorney General to represent the interests of the Commonwealth in two matters pending in ABC. None of the Firm's private clients are involved in these two matters. A Division (Division) of the Office of the Attorney General is involved in these matters as an intervenor on behalf of public consumers pursuant to (Citation Omitted). Your representation of the Commonwealth could last more than sixty working days. There may also be additional matters in which the Commonwealth is involved before ABC concerning a regulated company as well as the Division as an intervenor where you will represent the Commonwealth.

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[4]/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."

[5]/This third condition applies only if you work as a state employee for more than sixty days during a one-year period.

[6]/The feature which distinguishes special from general legislation is the particularity of the scope and purposes of the act's provisions. See, Sands, 2 **Sutherland Statutory Construction** §40.01 et seq. (4th ed., 1975). For example, enabling legislation providing for a new statutory remedy on a state-wide basis would be general, as opposed to special legislation, since it would apply to all cities and towns. See, **Town of Arlington v. Board of Conciliation and Arbitration**, 370 Mass. 769, 774 (1976). Similarly, enabling legislation containing a local acceptance provision would not constitute special legislation since the referendum feature of the legislation would avoid the mandatory application of the act to a particular city or town. See, EC-COI-82-153. On the other hand, legislation which practically affects a single community is regarded as special legislation, even where the act is drafted in more general terms, see, **Belin v. Secretary of the Commonwealth**, 362 Mass. 530, 534-535 (1972) or where it is inserted as a condition restricting the receipt of local aid funds by a particular community. **Mayor of Boston v. Treasurer and Receiver General, Mass. Adv. Sh.** (1981) 2351, 2355. Accordingly, you should identify each piece of legislation considered by the Special Commission and refrain from or acting as the agent or attorney for ABC with respect to the enactment of special legislation. You may contact the Commission should you need further assistance in ascertaining whether a particular bill is general or special under §1(k).

While you are serving as a Special Assistant Attorney General, you also represent or will be representing, clients in other matters before ABC and in which the Division is an intervenor or will intervene. However, you have not been, and will not be, involved as a Special Assistant Attorney General in any matter where the Firm represented a client.

QUESTIONS:

1. What restrictions does the conflict of interest law, G.L. c. 268A, place on the Firm's representation of clients before ABC during the time that you are serving as a Special Assistant Attorney General?

2. What restrictions does the conflict of interest law, G.L. c. 268A, place on you with respect to your personal involvement as a Firm associate in cases of clients before ABC while you are serving as a Special Assistant Attorney General?

ANSWERS:

1. Because you are an associate with the Firm rather than a partner, the law will not prohibit the activities of the Firm with respect to its representation of clients before ABC while you serve as a Special Assistant Attorney General.

2. The law will prohibit your involvement in cases on behalf of private parties before ABC while you are serving as a Special Assistant Attorney General if you work more than sixty days and the Division intervenes in the cases.

DISCUSSION:

The Firm

As a Special Assistant Attorney General, you are a state employee. Section 5(d) addresses the applicability of the law to the partners of present state employees. Under this section, the partner of a state employee is prohibited from acting as the agent or attorney for anyone other than the Commonwealth 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 the state employee participates[2]/ or has participated as a state employee or which is the subject of his official responsibility.[3]/ Since you indicate that you are not a partner in the Firm, this section will not restrict the activities of the Firm based on your employment status. However, the Commission does not limit the term "partner" to those who enter into formal partnership agreements. "The substance of the relationship is what counts. . .[and] if a group creates the public appearance of a partnership (for example, by using joint stationery, business cards and business listings), they will be treated as partners even though they may not in fact share profits." EC-COI-82-68; 80-43. Therefore, your actions must be in compliance with these guidelines in order to avoid the provisions of §5(d). You should also be aware of the **Canons of Ethics and Disciplinary Rules Regulating the Practice of Law,** Rule 3:07 of the Rules of the Supreme Judicial Court which may govern the activity of the Firm in this situation.

Individually

In your position with the Office of the Attorney General, you are a "special state employee" and the provisions of §4 apply to you.

Section 4(a) prohibits a state employee from receiving 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. As a "special state employee" the provisions of §4 apply less restrictively to you. A special state employee is subject to the provisions of §4 only in relation to a particular matter in which he has at anytime participated as a state employee, or which is or within one year has been the subject of his official responsibility or which is pending in his agency if he serves as a state employee more than sixty days during any one year period. Under the provisions of §4(a), you may continue your present activities with the Firm even where the Division is an intervenor as long as you comply with the requirements regarding participation and official responsibility and you do not serve as a special Assistant Attorney General for more than sixty days during a one year period.[4]/

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[1]/"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 petition of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

[2]/"Participate" is defined as participate in agency action or in a particular matter personally or 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]/"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).

[4]/To serve more than sixty days means to perform work on more than sixty days. Work on any part of a day will be considered work for one full day. You are responsible for keeping records in this regard. See, EC COI-82-49.

However, if you work more than sixty days during the year as a Special Assistant Attorney General, you may not represent the Firm's clients in matters before ABC where the Division is or becomes an intervenor because the matters will then be pending in your agency. See EC-COI-82-50.

DATE AUTHORIZED: February 21, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-22

FACTS:[1]/

You are an investigator with a state agency (ABC). You are responsible for enforcing the rules and regulations applicable to individuals licensed by ABC and assist in the conducting of examinations of license applicants.

You also hold a license in the field regulated by ABC, which you need only routinely renew. You are not required to take any examinations administered by ABC. You would like to either a) operate your own business in the field regulated by ABC, or b) work for other businesses within ABC's jurisdiction while remaining an investigator for ABC. You would only perform any such work outside the regular hours of your state employment.

QUESTION:

May you

a) operate your own business within the field regulated by ABC, or

b) be employed by other businesses within ABC's jurisdiction.

while employed by ABC as an investigator?

ANSWER:

a) Yes, and

b) yes,

provided you comply with the restrictions outlined below.

DISCUSSION:

As an investigator, you are a state employee as defined in the state conflict of interest law, G.L. c. 268A, §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 or attorney for, anyone other than the state in connection with a particular matter[2]/ in which a state agency is a party or has a direct and substantial interest. Your company, as well as any other you would work for, would be someone other than the state. Therefore, you are prohibited by §4 from acting as their agent before any state agency in connection with particular matters in which the state is a party or is directly and substantially interested. For example, applications to state agencies for permits or licenses by these businesses would be covered by §4, as would investigations by ABC of work performed.

Section 6 of G.L. c. 268A prohibits you from participating as an investigator in any particular matter in which you or any business organization in which you are an officer, director or employee, has a financial interest. Should such a matter come before you, you must disclose the nature of the matter and the financial interest in it to the Ethics Commission and your appointing official. That official must then either 1) assign the 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 you.

Because of the broad range of your responsibilities as an investigator, it is likely that the exercise of many of your duties may be affected by §6. For example, you, your business, and any such business employing you would have a financial interest in complaints about and investigations of those businesses and other firms in the area with which those business would compete. See EC-COI-82-95. Licensing determinations affecting you, your own business, your employer's business and the business of your competitors would also be covered by §6. Therefore, you will have to comply with the provisions of that section when these or other matters in which you or those businesses are financially interested come before you as investigator.

Section 23 of the conflict law provides standards of conduct which apply to all state employees. That section states that you may not use your official position to secure or attempt to secure unwarranted privileges or exemptions for yourself or others. You also are required

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[1]/Because you are both employed in the same capacity in the same agency, and the law will apply similarly to you, this opinion will be written as if requested by one person.

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 government organizations, powers, duties, finances and property." G.L. C. 268A, §1(k).

to avoid conduct which gives reasonable basis for the impression that you may be unduly influenced in the performance of your duties. Section 23 provides further that you may not accept employment or engage in any professional activity which will require you to disclose confidential information gained by reason of your official position or authority, or improperly disclose such materials[3]/ or use them to further your personal interests.

As an investigator in a regulatory agency, you have a great deal of power over practitioners and firms under ABC's jurisdiction. Therefore, in the performance of your duties, you must avoid conduct which gives reasonable basis for the impression that you may be unduly influenced by your private employment. To help avoid problems from arising under §23 you must disclose to your appointing official your intent to seek such employment.

Your access to ABC employees and information, and your authority as an investigator demand your strict compliance with the provisions of §23 regarding confidential information. No information unavailable to the general public regarding ABC's examinations or procedures may be transmitted to anyone by you or used to benefit them or your private business. You should not in any way discuss with ABC employees any complaints or investigations involving you, your business, businesses employing you, or competitors. Only with such strict complaince with the provisions of §23 will you be able to maintain your investigator position while operating a business within ABC's jurisdiction.

DATE AUTHORIZED: February 21, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-25

FACTS:

You recently resigned from your membership on a state Board to accept a position as executive director of a non-profit corporation (Foundation). The Foundation renders financial assistance to the educational progams of ABC University. The Foundation is headed by an eleven-member board of directors, five of whom are affiliated with ABC.[1]/ The six remaining directors are elected periodically by Foundation members. The principal office of the Foundation is located on the ABC campus, and the Foundation may use the name and seal of ABC. The Foundation is not established under enabling legislation by the General Court and does not receive funding from ABC; it is privately endowed and annually distributes awards and grants out of the endowment income. Some recent grants have been awarded to organizations involved with publication, theater and music activities. The Foundation does not rely on ABC for its support services, and it contracts privately for legal, accounting and printing services. As executive director, your activities will primarily involve fundraising, and your compensation will be derived solely from the Foundation's private sources.

QUESTION:

Does G.L. c. 268A limit your eligibility for appointment as Foundation executive director?

ANSWER:

No.

DISCUSSION:

As a Board member, you were a "state employee" for the purposes of G.L. c. 268A. See, G.L. c. 268A, §1(q). You are therefore subject to the restrictions of §8A which provides as follows:

> No member of a state commission or board shall be eligible for appointment or election by the members of such commission or board to any office or position under the supervision of such commission or board. No former member of such commission or board shall be so eligible until the expiration of thirty days from the termination of his services as a member of such commission or board.

On the basis of the information which you have provided, the Commission concludes that the thirty-day waiting period under §8A does not apply to you because your executive directorship with the Foundation would not be an "office or position under the supervision of the...[B]oard." The Foundation is independent from the Board with respect to its finances, operational control, and organization. Although the Foundation uses the name and premises of ABC, an institution under the jurisdiction of the Board, the Foundation is not subject to control or oversight by ABC. The Foundation utilizes its own private counsel, accounting, and printing services. Funding for Foundation programs is not derived

[3]/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]." See G.L. c. 268A, §23, ¶3(2).

[1]/These five ex-officio members are the president or other officer of ABC, a member of the ABC board of trustees, and members appointed by the alumni association, faculty and student body.

from ABC funds, and grant decisions as well as personnel decisions by the Foundation are made independent of ABC control. Compare, Attorney General Conflict Opinion No. 548 which held that the Lowell Technological Institute of the Massachusetts Research Foundation was a state agency under G.L. c. 268A where that entity was created by statute (G.L. c. 75A, §23) and subject to management and regulation by the Institute; Op. Atty. Gen. March 24, 1972, p. 105 where the same Foundation was deemed to have a sufficient nexus with the Institute so as to bring it under the umbrella of the Institute's status as an institution of higher education.

In view of the independence of the Foundation position from the supervision of the Board, the thirty-day waiting period of §8A is not applicable to you. Further, no other sections of G.L. c. 268A would appear to be raised by your situation.[2]/

DATE AUTHORIZED: February 21, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-27

FACTS:

You are the head of an administrative unit in the Judicial Department. In that capacity you are responsible for certifying vouchers for the reimbursement of expenses incurred by employees of that unit. An employee of that unit who lives in the western part of the state will be on a temporary assignment in the eastern part of the state in March or April of 1984. Instead of commuting daily, the employee proposes to use and occupy a condominium in the eastern part of the state which is owned by another employee of the unit which will be vacant during that time. You indicate that, ordinarily, the employee would stay at a hotel and eat meals at a restaurant. If the employee stays in the condominium, meals would be prepared on the premises. You propose that the occupying employee reimburse the owner employee at a rate not to exceed the ordinary hotel rate, and the cost of food purchased, which you would approve pursuant to [Citation Omitted].

QUESTION:

Is the reimbursement arrangement which you propose permissible under G.L. c. 268A?

ANSWER:

Yes, subject to the limitations set forth below.

DISCUSSION:

Employees of an administrative unit within the Judicial Department are "state employees" for the purposes of G.L. c. 268A inasmuch as they perform services for a state agency within the meaning of G.L. c. 268A, §1(p).[1]/ For the purposes of the question which you pose, the relevant sections of G.L. c. 268A are §§7 and 23.

1. Section 7

This section in general prohibits a state employee from having a direct or indirect financial interest in a contract made by a state agency. Based upon the information which you have provided, it does not appear that the granting of lodging reimbursement by the occupying employee to the owner employee would give the owner employee a financial interest in a contract made by a state agency. The lodging reimbursement, standing alone, does not create a contract subject to the §7 prohibition. Cf. EC-COI-81-142 (reimbursement of expenses is not regarded as compensation for the purposes of §4). The lodging reimbursement is analogous to other benefits which accrue to state employees by virtue of their employment status. See, G.L. c. 32 (retirement benefits); G.L. c. 32A (group insurance benefits). While the expectation of these benefits may have a contractual foundation, see, **Opinion of the Justices,** 364 Mass. 847, 856-863 (1973), the Commission does not regard such benefits as creating the kind of contract which §7 was designed to prevent. Compare, EC-COI-83-173. Inasmuch as the acceptance by an occupying employee of lodging reimbursement is not a contract under §7, the receipt by the owner employee of the same reimbursement would likewise not constitute a prohibited financial interest in a contract under §7.

2. Section 23

In your capacity as head of the administrative unit in the Judicial Department, you are subject to the standards of conduct which appear in G.L. c. 268A, §23. These standards, which apply to all public employees, are designed to avoid situations which may either result

[2]/You also indicate that, until 1980, you served as a member of the ABC board of trustees. Section 23A of G.L. c. 268A establishes a three-year limit on your eligibility for certain offices or positions with ABC. However, that three-year period has already expired, and, as discussed above, your Foundation position would not be regarded as a position with ABC.

[1]/G.L. c. 268A, §1(p) defines "state agency," as any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town.

in the misuse of a public position for unwarranted private gain or else create the perception that private interests have unduly interfered with the performance of public responsibilities.

Specifically, §23 ¶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. Section 23 ¶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 or any party or person. Based upon the information which you have provided, it appears that the single isolated use of the proposed reimbursement arrangement during a two-month period in 1984 would not violate §23.

With respect to §23 ¶2(2), the limited lodging reimbursement to the owner employee would not appear to be an unwarranted privilege. This is not to say, however, that a more frequent use of the reimbursement arrangement would satisfy §23 ¶2(2). The regular subsidization of a state employee's condominium expenses is a benefit which is not available to the general public. When used on a more-than-isolated basis, it becomes an unwarranted privilege to the owner employee. As head of the administrative unit, the restrictions of §23 ¶2(2) would come into play if you were called upon to certify vouchers which would ultimately result in the state's subsidization of an owner employee's condominium on a regular basis. Therefore, should another situation subsequently arise where a similar voucher request is made of you, you should renew your advisory opinion with the Commission. With respect to §23 ¶2(3), the Commission recently 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, 1983 Ethics Commission iv. In that case, the employee gave reasonable basis for the impression that his assignment decisions were unduly affected by the fact that the corporation employed his daughter. Similar issues would be raised if you were to regularly permit an owner employee to receive lodging reimbursements from occupying employees. In such cases, you might be creating the impression that the owner employee would unduly enjoy your favor in your assignment decisions and voucher certifications.

DATE AUTHORIZED: February 29, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-30

FACTS:

You are an associate in a law firm (Firm). The Firm represents clients in proceedings before a state agency (ABC), and you participate in those proceedings on behalf of the Firm.

You also serve as a Special Assistant Attorney General representing the interests of the Commonwealth in two matters pending in ABC. None of the Firm's private clients are involved in these two matters. A Division (Division) of the Office of the Attorney General is involved in these matters as an intervenor on behalf of public customers pursuant to (citation omitted). Your representation of the Commonwealth could last more than sixty working days.

While serving in your state capacity, you would like to continue to represent clients in other matters before ABC in which the Division is an intervenor. However, you recognize that §4 of G.L. c. 268A, the conflict of interest law, would prohibit you from representing clients before ABC where the Division is an intervenor should you work as a Special Assistant Attorney General for more than sixty days. See, EC-COI-84-20; 82-50. Therefore, you have proposed leaving the Office of the Attorney General and acting as a legal consultant to the Department of Administration and Finance (A&F) and representing the Commonwealth in proceedings before ABC.[1/]

The people that assist you in your role as a Special Assistant Attorney General in developing the cases are A&F personnel. At the present time, A&F develops the positions and makes policy decisions that you present before ABC in your representation of the Commonwealth. Your salary would be paid by A&F.

QUESTION:

Will G.L. c. 268A allow you to continue your representation of private clients in ABC proceedings where the Division has intervened if your employer is A&F and not the Office of the Attorney General?

ANSWER:

Yes, subject to the conditions discussed below.

[1/] This opinion is limited to the applicability of G.L. c. 268A to the situation you have proposed and does not address appropriateness of this activity from the perspectives of the state agencies involved.

DISCUSSION:

If you become a consultant to A&F, you will be a "special state employee," and the provisions of §4 will apply to you. Section 4(a) prohibits a state employee from receiving 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. As a "special state employee" the provisions of §4 apply less restrictively to you. A special state employee is subject to the provisions of §4 only in relation to a particular matter in which he has at any time participated[3]/ as a state employee, or which is or within one year has been the subject of his official responsibility[4]/ or which is pending in his agency if he serves as a state employee more than sixty days during any one year period. Under the provisions of §4(a), if you work for more than sixty days as a consultant to A&F, you may still represent private clients before ABC where the division intervenes because the matters will not be pending[5]/ in your agency, A&F. However, under these circumstances, you may not represent private clients before ABC in matters in which A&F is an intervenor.

As a state employee, you are also subject to the standards of conduct contained in §23. The relevant provisions of §23 prohibits you from

> accepting other employment which will impair your independence of judgment in the exercise of your official duties [§23 ¶2(1)], 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 ¶2(3)].

These provisions will prohibit you from working for A&F on any matter in which a client of your Firm will be involved. This restriction includes not only clients represented by your Firm in the same matter before ABC; it also includes clients which, although represented by a different law firm in the matter before you, have retained or deal with your Firm on other matters on a regular basis. Because of your relationship to your Firm, it may appear that you were favoring that client if you were to act in your official capacity in such an instance. Your ability to render independent advice to the state would be impaired where you were also dealing with clients of the Firm. EC-COI-83-176. If your state job required you to maintain a position adverse to a client of the Firm, you would run the risk of alienating a source of private income in the performance of your official duties and thereby be faced with a conflict between your public and private interests.

DATE AUTHORIZED: March 12, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-31

FACTS:

You were employed by state agency ABC until 1983 and were employed in a managerial capacity. While you were an ABC employee, company XYZ filed an application (Application No. 1) related to a subject area within your responsibility. The application was denied.

In 1983, the ABC promulgated revised regulations, should be affecting the criteria for evaluating subsequent applications. XYZ filed a new application (Application No. 2) containing essentially the same proposal outlined in Application No. 1.

In 1983, you began employment with the XYZ. In that capacity, you have primary responsibility for the development of new programs at XYZ, including the obtaining, when necessary, of approval from ABC for those programs.

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[2]/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.

[3]/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.

[4]/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.

[5]/Because of the control exercised by A&F over ABC's budget, there is a threshold question of whether matters pending in ABC are also pending in A&F for the purposes of G.L. c. 268A. In its prior advisory opinions, the Commission has reviewed the amount of control one agency has over the other and whether one agency is within the department or secretariat of the other to determine if there is "operational independence" between the agencies. Cf. EC-COI-83-103; 82-164; 82-50. In the instant case, ABC is not in the same department or secretariat as A&F, and A&F does not control or monitor the substantive work of ABC. On this basis, the Commission finds that A&F's control over ABC's budgetary process is not substantial enough to make the two agencies operationally dependent. Therefore, matters pending in ABC will not automatically be considered pending in A&F. See EC-COI-83-66; 81-2; 80-66.

QUESTION:

Does G.L. c. 268A permit you to receive compensation from the XYZ or act as its agent in relation to the ABC review and action on Application No. 2?

ANSWER:

No.

DISCUSSION:

1. Section 5

During the period in which you served as an employee with ABC, you were a state employee for the purposes of G.L. c. 268A, and, upon leaving that position, you became a former state employee. As such, you are prohibited by §5(a) of Chapter 268A from acting as agent or attorney for, or receiving compensation from, anyone other than the Commonwealth in connection with a "paticular matter" in which the Commonwealth or a state agency is a party or has a direct and substantial interest and in which you "participated" as a state employee. Particular matter is defined in Section 1(k) to include "any judicial or other proceeding, application, submission, request for a ruling or other determination, ... controversy ... decision, determination, finding..." Under G.L. c. 268A, participate means 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. G.L. c. 268A, §1(j).

Application No. 1 falls within the definition of "particular matter" G.L. c. 268A, §1(k). Your involvement in discussions with ABC officials concerning matters within Application No. 1 constituted participation with regard to that application. You would therefore violate §5(a) if you were paid by XYZ or acted as its agent or attorney in the appeal of the Application No. 1 determination or in any subsequent review of Application No. 1 should it be remanded by the courts.[1]/

The question remains, howevever, whether Application No. 2 constitutes the same "particular matter" as Application No. 1. While Application No. 2 technically constitutes a separate application, it involves the same controversy as the first application in which you previously participated as an ABC employee. Inflationary factors aside, it appears that ABC has resubmitted the identical application. The review process concerning the application will involve the same parties and the same issue as in the first review process. The Commission therefore concludes that you are now prohibited from having any involvement in Application No. 2 on behalf of XYZ. See EC-COI-81-28 [former state employee prohibited under §5(a) from representing private parties in a lawsuit, based on newly enacted legislation, involving the same controversy as that in a case in which he participated as a state employee]; EC-COI-80-108 [proposed activities prohibited by §5(a) because the underlying claims of her private clients were integrally related, if not identical, to the claims she previously investigated as a state employee].

The fact that Application No. 2 will be reviewed under revised ABC regulations does not change the Commission's conclusion in this case. ABC staff will still check applications to assure consistency with the objective of the process enunciated in the regulations. The factor which was central to the review of Application No. 1 will be the focus in the Application 2 review process. The review of Application No. 2 will therefore con-

[1]/G.L. c. 268A, §5(b) would further prohibit you for one year from personally appearing before any court or agency of the state as XYZ's agent or attorney in connection with Application No. 1.

cern the same particular matter as was involved in the review of Application No. 1. Accordingly, you are prohibited under §5(a) from participating in the Application No. 2 review process on behalf of XYZ.[3]/

As a former state employee, you are also subject to two provisions of the standards of conduct under G.L. c. 268A, §23. 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 or using such information to further her personal interests. Thus, any confidential information you acquired as an employee of ABC, relating specifically to the denial of Application No. 1 or more generally to the internal policies of ABC, must not be disclosed to XYZ.

DATE AUTHORIZED: March 12, 1984

[3]/This result is consistent with 5. CFR §757.5(4), a federal regulation adopted pursuant to the federal counterpart to G.L. c. 268A [18 U.S.C. §201 et seq.], which provides:

> (4) The same particular matter must be involved. The requirement of a "particular matter involving a specific party" applies both at the time that the Government employee acts in an official capacity and at the time in question after Government service. The same particular matter may continue in another form or in part. In determining whether two particular matters are the same, the agency should consider the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest.

The result is also consistent with Disciplinary Rule DR9-101(B) which addresses the "revolving door" problem by prohibiting a lawyer from accepting private employment in a matter in which he had substantial responsibility while he was a public employee. See Mass. Supreme Judicial Court Rule 3:22, American Bar Association Code of Professional Responsibility, DR9-101(B). In determining whether the same "matter" is involved, the test should focus upon the similarity of the facts involved in the prior and current representations. **General Motors Corp. v. City of New York**, 60 FRD 393, 501 F.2d 639, 650-52 (2d. Cir. 1974). Where the two suits [or applications] have a "nuclear identity," "[t]he subtleties of differential proof will not obviate 'the appearance of impropriety' to an unsophisticated public." Id. at 651. Rather than being designed for Holmes' proverbial "bad guy," the Code of Professional Responsibility was drawn for the "good guy," as a "beacon to assist him in navigating an ethical course through the sometimes murky waters of professional conduct." Id. at 649. Likewise, the Commission is not intimating that you were improperly influenced while at ABC, or that you are guilty of any actual impropriety in signing on with XYZ; but concludes solely that you are prohibited from working on Application No. 2 because it is the same "particular matter" under the conflict of interest law, G.L. c. 268A.

CONFLICT OF INTEREST OPINION NO. EC-COI-84-33

FACTS:

You are employed and compensated by a Division (Division) of the state department ABC. You are one of the Division employees assigned to work exclusively for the state Department DEF. Your primary responsibilities involve implementation of a particular DEF program (Program). You perform these duties during a normal business day.

DEF requires personnel for the Program on a 24-hour basis. Currently DEF employees are paid a flat sum per week, plus whatever overtime might be accumulated, to be on call for the program around the clock. Division employees assigned to DEF, but paid by the Division, do not participate in this system.

QUESTION:

May Division employees assigned to work for DEF, but paid by the Division, be compensated by DEF for providing Program services on a 24-hour basis?

ANSWER:

No.

DISCUSSION:

An employee of the Division is a state employee as defined in the conflict of interest law, G.L. c. 268A, §1 et seq., and, as a result, is covered by the provisions of that law.

Section 7 of the conflict law prohibits a state employee, unless eligible for an exemption contained therein, from having a financial interest in a contract made by any state agency. The purpose of this prohibition is to avoid the impression among members of the public that state employees have unfair access to state contracts. "Because it is impossible to articulate a standard by which one can distinguish between employees in a position to influence and those who are not, all [are] treated as though they have influence." Buss, **The Massachusetts Conflict of Interest Statute: An Analysis**, 45 B.U. Law. Rev. 299, 374 (1965).

Employment arrangements like that which would exist between you and DEF in connection with the

around-the-clock Program work are considered contracts for purposes of G.L. c. 268A, §7. Your receipt of compensation provided for that work would give you a financial interest in that contract.

Prior to 1983, none of the exemptions to §7 would have permitted a full-time state employee to maintain simultaneously another employment contract with the state. However, chapter 612 of the acts of 1982 (effective March 29, 1983) rewrote a portion of G.L. c. 268A, §7 in such a way as to permit a full-time state employee to maintain a second position provided several conditions are satisfied. The exception found in sub-part (b) of §7, applies to a state employee;

> a) other than a member of the General Court;
>
> b) who is not employed by the contracting agency, or an agency which regulates the activities of the contracting agency; and
>
> c) who does not participate in or have official responsibility for any of the activities of the contracting agency;
>
> d) if the contract is made after public notice or, where applicable, through competitive bidding;
>
> e) the state employee files with the Commission a full disclosure of his interest in the contract;
>
> f) the service will be performed outside his or her normal working hours;
>
> g) the services are not required as a part of his or her regular duties;
>
> h) the employee is not compensated for these services for more than 500 hours during a calendar year; and
>
> i) the head of the contracting agency makes and files with the Commission a certification that no employee of that agency is available to perform those services as part of their regular duties.

However, because you are assigned by the Division to work for DEF, and your normal duties involve the very type of Program services you would be doing, you participate in the activities of the contracting agency and the services are a part of your regular duties (see c) and g) above). Therefore, you do not qualify for this exemption and are prohibited by §7 from entering into this arrangement with DEF.[1]/

DATE AUTHORIZED: March 12, 1984

[1]/If it can be arranged in such a way that the Division would compensate you (and other Division employees) for your additional services for DEF as overtime, §7 would not apply since there would be no state contract other than your original employment arrangement which, of course, is not prohibited.

CONFLICT OF INTEREST OPINION NO. EC-COI-84-35

FACTS:

You are currently employed by a state University. Your University position requires your involvement with the counties which house University facilities. You also serve as the chairman of the board of selectmen of a Town (Town). You are now considering running for the Office of County Commissioner.

QUESTION:

Does G.L. c. 268A permit you to serve as a County Commissioner while retaining your state University position and your membership on the board of selectmen?

ANSWER:

Yes, although you may not retain your membership on the county advisory board and will be subject to several other limitations set forth below.

DISCUSSION:

1. **Restrictions on your activities as a County Commissioner**

Assuming that you are elected as a County Commissioner, you will become a county employee within the meaning of G.L. c. 268A, §1(d). As a county employee you would be prohibited by G.L. c. 268A, §11 from receiving compensation from or acting as the agent of any party other than the County in relation to any particular matter[1]/ in which the County or an agency of the County is a party or has a direct and substantial interest. Section 11 also provides that, as a county employee, you may hold elective or appointive office in a municipality and receive compensation for your municipal duties as long as you do not vote or act in your municipal capacity on any matter which is within the purview of the county agency by which you are employed or over which you have official responsibility.

As chairman of the board of selectmen, you have been designated under G.L. c. 35, §28B as the representative of the Town to the advisory board to the commissioners of the County. In that capacity, you necessarily review and make recommendations concerning County expenditures, long-range capital facilities

[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..."

development plans and capital facility budget requests for the County. Further, as an advisory board member, you possess the authority to delete or reduce certain budget plans or requests by the County Commissioners. See, G.L. c. 35, §28B ¶2. In view of these budgetary responsibilities as an advisory board member, it is clear that you must vote or act on matters within the purview of the County and over which you have official responsibility as a County commissioner. Accordingly, you are prohibited by G.L. c. 268A, §11 from maintaining your dual status as an advisory board member while you serve as a County Commissioner. Moreover, following your resignation from the advisory board, you would continue to be prohibited from acting as a selectman on matters within the purview of the County or over which you have official responsibility. For example, while it is not clear whether, as a member of the board of selectmen, you will retain any statutory authority regarding the Town's advocacy before the advisory board, you should refrain from participating in any discussions with the board of selectmen over budgetary matters pending before the advisory board, since the County has an obvious financial interest in the outcome of the advisory board's actions. See, EC-COI-81-150.[2]/

Additionally, §13 prohibits you from participating as a county employee in any particular matter in which the Town has a financial interest. As a County Commissioner, you must, therefore, refrain from participating personally and substantially in any decisions or other particular matters which affect the financial interests of the Town in a direct and immediate way. However, you would be permitted to participate in those decisions where the financial interests of the Town are shared with other communities within the County such as the determination and application of an aggregate assessment formula. See, EC-COI-81-62.

2. **Restrictions on Your Activities as a State Employee**

As a state University employee, you are a state employee for the purposes of G.L. c. 268A. Section 4 of G.L. c. 268A prohibits you from receiving compensation from or acting as agent or attorney for anyone 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. This section is relevant to your activities for both the Town and Country.

Insofar as your activities as a County Commissioner are concerned, it is not clear at this point whether you will be involved in matters of direct and substantial interest to the commonwealth or a state agency. Although it appears that most of your statutory responsibilities as Commissioner would be limited to County matters, see generally, G.L. c. 35, you should be aware that G.L. c. 268A, §4 prohibits your receiving compensation from or acting as agent or attorney for the County (someone other than the state), in relation to particular matters of direct and substantial interest to the commonwealth or a state agency. With respect to your activities as a member of the board of selectmen, you are eligible for the "municipal exemption" to §4 which permits your holding such office provided that you not vote or act as a selectman on any matter which is within the purview of the University or over which you have official responsibility as a University employee. See, St. 1980, c. 10. For example, you may not act or vote on contracts or controversies between the Town and the University.

G.L. c. 268A, §6 is also relevant to your activities as a state employee. This section prohibits your participation as a University employee in any particular matter in which a business organization (such as the Town) for which you serve as an officer has a financial interest. Should such a matter come before you, you must disclose the nature of the matter and the financial interest in it to the Ethics Commission and your appointing official. That official must then either 1) assign the 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 you.

Your disqualification from participation would come into play if you were called upon to review requests submitted by the Town. Should that occur, you are required to comply with the procedures outlined above.[3]/

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[2]/Section 11 issues will also come into play to the extent that your University activities may involve particular matters of direct and substantial interest to the County. While your conducting training and workshops would not constitute a particular matter under §1(k), specific determinations which you would make as a University employee concerning the interrelation between the University and affected counties would be subject to §11.

[3]/As a member of the board of selectmen, you are also a municipal employee for the purposes of G.L. c. 268A. In view of the previous discussion of the limitations on your selectmen's activities with respect to the County and the University, there are no additional relevant limitations which you would be subject to as a municipal employee.

3 . **Restrictions Applicable to All Positions**

As a public employee, you are also subject to the standards of conduct contained in G.L. c. 268A, §23.[4]/ These standards are designed to avoid conduct which either gives the appearance of impropriety or which raises concerns over whether an official can keep competing interests from interfering with his public responsibility. These concerns are particularly applicable to your situation because of the potential overlap of your activities in the three levels of government. You should therefore keep the provisions in mind and exercise considerable care to avoid violating these provisions when you are acting in any of these capacities.

DATE AUTHORIZED: March 12, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-38

FACTS:

You are currently employed part-time by the ABC Regional Housing Authority (ABC). In that capacity, you do not perform legal services, although you have maintained your private practice as an attorney on the side. With regards to the housing project developed for the Town Housing Authority (Town), your involvement consisted of writing the grant for the Town and ABC, working with the architects on building designs and supervising the construction. Upon the completion of some of the units, Town took over the management. Throughout this process, ABC had an attorney to perform any necessary legal work.

The Town, however, has hired you as an attorney in two instances in the past two years: to be the attorney for a specific project and to handle litigation related to a modernization grant, neither of which were obtained through your employment with ABC. In both cases the Executive Office of Communities and Development [EOCD] approved your hiring. However, EOCD recently disapproved your proposed contract with Town to provide on-going legal services on a part-time basis.

QUESTIONS:

1. Was EOCD correct in disapproving your contract on conflict of interest grounds?
2. Does G.L. c. 268A permit you, while serving as Executive Director of ABC, to
   a) have contractual relationships with the town or a property owner if the town receives a block grant from EOCD to provide homeowners with money to upgrade their properties?
   b) represent individuals before town boards or agencies?

ANSWERS:

1. Yes[1]/
2. Yes, subject to the restrictions set out below.

DISCUSSION:

Status as a County Employee

As an employee of ABC, you hold an office in a county agency under G.L. c. 268A, §1(c)[2]/ and are therefore a county employee within the meaning of G.L. c. 268A, §1(d).[3]/ ABC is a county agency because the County, rather than the state or the member towns, appears to be the "level of government to be served by the agency in question."[4]/ Buss, the **Massachusetts Conflict of Interest Statute: An Analysis,** 45 B.U.L. Rev. 299, 310 (1965); EC-COI-83-63. Because your

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[4]/In relevant part, §23 provides as follows:

No current officer or employee of a state, county or municipal agency shall:

(1) accept other employment which will impair his independence of judgment in the exercise of his official duties;

(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.

No current or former officer or employee of a state, county or municipal agency shall:

(1) 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;

(2) improperly disclose materials or data within the exemptions to the definition of public records as defined by section seven of chapter four, and were acquired by him in the course of his official duties nor use such information to further his personal interest.

[1]/This advisory opinion only addresses issues posed in connection with the conflict of interest law, G.L. c. 268A. Analysis of the correctness of EOCD's decision under other laws or statutes is beyond the Commission's jurisdiction.

[2]/"County agency," any department or office of county government and any division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder. G.L. c. 268A, §1(c).

[3]/"County employee," a person performing services for or holding an office, position, employment, or membeship 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).

[4]/Compare municipal housing authorities, which service individual towns or cities and are by statute [G.L. c. 121B, §7] created as municipal agencies for the purposes of G.L. c. 268A. ABC's enabling legislation, St. 1976, c. 419, does not specify as to whether the county or municipal sections of G.L. c. 268A should apply to it. However, the commission concludes that sufficient indicia are present to conclude that ABC is a county agency, namely: county-wide service, County Commissioner involvement in the appointment/removal of Authority members, and its ability to receive funding from the County Treasurer to defray operating expenses.

position with ABC is part-time, you are a special county employee within the meaning of G.L. c. 268A, §1(m), and therefore subject to certain less restrictive prohibitions of G.L. c. 268A.

1. **EOCD Disapproval of Contract**

Section 11 prohibits a county employee from acting as agent or attorney for, or receiving compensation from a non-county party in relation to a particular matter[5]/ in which the County or a county agency is a party or has a direct and substantial interest. In light of your status as a special county employee, these prohibitions apply to you only in relation to a particular matter (a) in which you have at any time participated as a county employee, or (b) which is or within one year has been a subject of your official responsibility, or (c) which is pending in the county agency in which you are serving. If Town did bring a claim against ABC, §11 would prohibit you from acting as attorney for, or receiving compensation from Town in relation to the suit since the suit would be a particular matter pending in your county agency (ABC). Therefore, to the extent that EOCD's decision was based on that potential conflict, and your disqualification in that event, the decision was correct.

Moreover, §23 ¶2(1) prohibits you from accepting other employment which will impair your independence of judgment in the exercise of your official duties. The Commission finds that there could be situations short of an actual lawsuit where your judgment as an employee of ABC could be influenced, knowingly or unknowingly, because of your position as a Town attorney, and vice versa. Accordingly, EOCD's ruling was correct under the conflict of interest law as enunciated in G.L. c. 268A.[6]/

2. **G.L. c. 268A Limitations on Additional Activities**

a. **Assisting Outsiders**

As discussed above, §11 prohibits you from acting as agent or attorney for, or receiving compensation from a non-county party in relation to a particular matter in which the County or a county agency is a party or has a direct and substantial interest. While housing subsidy applications, grants and decisions are particular matters of direct and substantial interest to the state in view of the state's regulatory role in this area (see, e.g., St. 1966 c. 707), that rationale cannot be applied to counties since counties do not play a regulatory role in the grant process. Compare EC-COI-81-168. Section 11 would therefore not prohibit you from contracting with the town or a property owner who was a recipient of monies from an EOCD town block grant. Likewise, §11 would only limit your representation of individuals before town boards or agencies if the county had a direct and substantial interest in the matter and it was a particular matter (a) in which you had participated as an ABC employee, or (b) which is or within one year has been a subject of your official responsibility, or (c) which is pending in ABC.

b. **Participation as a County Official**

Under §13, you may not participate[7]/ as an employee of ABC in any particular matter in which either (1) you, or (2) a member of your immediate family, or (3) a business organization in which you are serving as officer, director, trustee, partner or employee, or any person or organization with which you have an arrangement concerning future employment has a financial interest. Should such a matter come before you, you should immediately refrain from participation in that matter and should notify both your appointing official and the State Ethics Commission in writing of the nature and circumstances of the matter and make full disclosure of the financial interest. Your appointing official would 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 your services, in which case you would not violate §13 by participating in the matter. Copies of such a written determination would be forwarded to you and filed with the State Ethics Commission by the person who made the determination.

c. **Financial Interest in Other County Contracts**

Under §14, you may not have a financial interest in a second contract made by the County or an agency of the County. For instance, you would be prohibited under this section from contracting with any other county agency to perform legal services while you remain an employee of ABC.

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[5]/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).

[6]/It should be noted that even in closer cases, the Commission customarily defers to such an agency ruling, one which gives guidance to its employees and is consistent with the principles and aims of §23. See EC-COI-80-51.

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

d. **Standards of Conduct**

As a county employee, you are also subject to the standards of conduct set out in G.L. c. 268A, §23. Specifically, you are prohibited from:

> 1. accepting other employment which will impair your independence of judgment in the exercise of your official duties;
>
> 2. using or attempting to use your official position to secure unwarranted privileges or exemptions for yourself; or
>
> 3. 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 ¶2.

You should keep these standards in mind when entering into contractual relationships with a town or a property owner or representing an individual before a town board or agency.

These guidelines are necessarily general because they are based on hypotheticals. To determine whether a specific situation constitutes prohibited conduct or qualifies for a statutory exemption, you may renew your opinion request at a later time.

DATE AUTHORIZED: March 12, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-39

FACTS:

You are a City Solicitor. The position, which is part-time, includes your representing City police in tort actions arising out of their official responsibility, advising City police regarding their liability, and providing advice to the Police Chief regarding the propriety of department rules and regulations and other legal issues affecting the department.

You have been retained to represent a defendant in criminal proceedings concerning a violation of gambling statutes, see, G.L. c. 271, §17, which allegedly occurred in the City. The investigation, arrest, and complaint proceeding against the defendant were conducted by the state police, and the case will be prosecuted by the district attorney. Two or three members of the City police department accompanied the state police at the arrest at the invitation of the state police. You plan to admit to the facts at a pre-trial hearing and therefore do not intend to call witnesses. In particular, you do not intend to raise any arrest-related defenses which would involve the testimony of City police, and do not foresee City police serving as witnesses in the case if there is a trial.

QUESTION:

Does G.L. c. 268A permit you to represent the defendant while you serve as City Solicitor?

ANSWER:

Yes, given the current posture of the case. However, your representation raises concerns over other provisions of law.

DISCUSSION:

In your capacity as City Solicitor, you are a "municipal employee" for the purposes of G.L. c. 268A. EC-COI-81-173. There are two sections of G.L. c. 268A which are relevant to your situation.

1. **Section 17**

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 of the City is either a party or has a direct and substantial interest.[2]/ Your representation of a defendant in a judicial proceeding prosecuted by the district attorney would not fall within the §17 prohibition. A case prosecuted by the district attorney 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 a 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. EC-COI-83-176. Moreover, because the scope of your official authority as City Solicitor does not extend to the activities of the district attorney, your representation of a defendant in a case prosecuted by the district attorney would not pose any problems under the standard of conduct contained in G.L. c. 268A, §23. As will be seen below, the degree of official authority over the participating officer is a key factor in the application of §23.

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[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.

[2]/In view of your part-time status, you are a "special municipal employee" within the meaning of §1(n) and are therefore eligible for certain exemptions under §17 which are not available to full-time employees. For the purposes of this opinion, your status as a special municipal employee is not relevant.

2. Section 23

As a municipal employee you are subject to the standards of conduct contained in §23. Three relevant provisions prohibit you from

a) accepting other employment which will impair your independence of judgment in the exercise of your official duties [§23 ¶2(1)];

b) using or attempting to use your official position to secure unwarranted privileges or exemptions for yourself or others [§23 ¶2(2)], and

c) 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 ¶2(3)].

These provisions would come into play if you were retained to represent a defendant in a criminal proceeding prosecuted by members of the City police department. For example in EC-COI-81-73, the Commission adivsed 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. See also EC-COI-83-176. Such concerns are not raised in your situation since City police are not prosecuting the case. However, aside from G.L. c. 268A, more significant concerns might be raised by your acting as defense counsel under the Code of Professional Responsibility and recent decisions construing art. 12 of the Massachusetts Declaration of Rights. See, **Commonwealth v. Hurley,** 391 Mass. 76, 80-82 (1984); Canons of Ethics and Disciplinary Rules Regulating the Practice of Law, S.J.C. Rule 3:07, DR 5-101, DR 7-101. Since the Commission's authority does not extend beyond G.L. c. 268A and G.L. c. 268B, you should therefore seek guidance from other sources.

DATE AUTHORIZED: March 12, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-40

FACTS:

You are a member of the State Ethics Commission and are about to be sworn in as corporation counsel for the City of Boston (City). In the latter capacity you will be the head of the City law department. Your responsibilities will include furnishing opinions of law, instituting litigation on behalf of the City, appearing as counsel in all actions involving the rights or interests of the City, and defending City officers in suits relative to their official actions and duties. CBC Ord. Title 5 §450.

As a member of the Commission, your official responsibilities include the enforcement of G.L. c. 268A, the conflict of interest law, which is applicable to municipal employees, as well as to employees of the commonwealth and counties. G.L. c. 268B, §4; G.L. c. 268A, ¶¶17-21. On previous occasions, Commission members have reviewed the practice of City employees expediting the issuance of municipal lien certificates for an additional private fee, **In the Matter of the Collector-Treasurers Office of the City of Boston,** 1981 Ethics Commission 35; the Mayor's conduct regarding a birthday party planned for his wife, **In the Matter of Kevin H. White,** 1982 Ethics Commission 80; the misuse by a City employee of her official position to secure an unwarranted privilege for herself, **In the Matter of Elizabeth Buckley** 1983 Ethics Commission ____, and have issued formal advisory opinions to City officials, EC-COI-83-174.

QUESTION:

Does G.L. c. 268A permit you to continue your membership on the Commission while you serve as City corporation counsel?

ANSWER:

Yes, subject to the conditions set forth below.

DISCUSSION:

"The Commission is designed to be bipartisan. Because of its sensitive position, its members must avoid even the appearance of a conflict of interest. . . ." **Model State Conflict of Interest and Financial Disclosure Law,** National Municipal League, Commentary p. 6. Commission members are charged with the enforcement of G.L. c. 268A, and are regularly called upon to make decisions which regulate the conduct of public employees and which have a substantial impact on the finances and reputation of public employees. The credibility of these decisions requires that Commission members take steps to avoid creating the appearance of impropriety in their public and private activities relating to the Commission's work. These concerns are reflected in the Commission's enabling statute which prohibits Commission members from political activities in which other state employees may participate. G.L. c. 268B, §2(f). Commission members must also avoid creating the risk of unfair decision making due to bias or prejudgment. **Craven v. State Ethics Commission,** 390 Mass. 191, 199 (1983). Because the Commission regulates

the activities of members of the judiciary under G.L. c. 268A, the standards of integrity applicable to Commission members should be comparable to the Canons of Judicial Conduct. Commission members, like judges, should avoid impropriety and the appearance of impropriety in their activities. See, Code of Judicial Conduct, Canon 2 S.J.C. Rule 3:09. On the other hand, unlike judges, membership on the Commission is not a full-time job, and its members are free to pursue, within certain guidelines, a livelihood or calling. This opinion is intended to provide you with guidelines which will address the concerns which are inevitably raised because of the overlap of your responsibilities as Commission member and City Corporation Counsel.

1. **Jurisdiction**

As a member of the Commission, you are a "state employee" for the purposes of G.L. c. 268A. See, G.L.c. 268B, §2. Because you do not earn compensation as a state employee for an aggregate of more than eight hundred hours annually, you are a "special state employee" within the meaning of G.L. c. 268A, §1(o) and are therefore subject to certain less restrictive provisions of G.L. c. 268A in addition to those which you share with other state employees. As City Corporation Counsel, you are a municipal employee within the meaning of G.L. c. 268A, §1(g).

2. **Restriction on Your Activities As City Corporation Counsel**

Section 4 prohibits you from receiving compensation from or acting as agent or attorney for the City 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 and in which you have either participated[2]/ as a Commission member or have had official responsibility[3]/ within the prior year as a Commission member.[4]/

Examples of particular matters which fall within your official responsibility as a commission member are the initiation of a preliminary inquiry alleging a violation of G.L. c. 268A, the determination of whether the inquiry indicates reasonable cause to believe that a violation of G.L. c. 268A has occurred, the initiation of a full investigation and appropriate proceedings to determine whether there has been a violation, the determination, following a hearing, of whether there has been a violation, the establishiment of sanctions for a violation, litigation strategy with respect to the court enforcement of such determinations, and decisions related to the initiation of civil enforcement actions pursuant to G.L. c. 268A, §§9, 15 and 21. Compliance with §4 requires that you refrain from acting in your City corporation counsel capacity as the agent or attorney for the City or any City employee with respect to any of the aforementioned particular matters which fall within your official Commission responsibility.[5]/ Section 4 would not prohibit you from issuing, at the request of City employees, advisory opinions over the provisions of G.L. c. 268A, since the request would not be within the Commission's responsibility unless such a request were filed with the Commission or relates to a matter pending before the Commission. Compare, G.L. c. 268A, §22; G.L. c. 268B, §3(g).[6]/

3. **Limitations on Your Activities As a Commission Member**

a) Participation in Matters Involving Either The City or Employees of The City

Three overlapping sections of G.L. c. 268A are relevant. Section 6 prohibits your participation as a Commission member in any particular matter in which, in relevant part, the City has a financial interest. Section 17(a) prohibits your receipt of compensation as a Commission member in relation to any matter in which the City or a City agency is either a party or has a direct and substantial interest. Section 23 ¶2(3) prohibits you 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 Commission duties, or that you are unduly

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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]/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, "official responsibility," is 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.

[4]/Because you do not serve as a commission member for more than sixty days annually, you are not subject to §4 with respect to all matters "pending in the state agency in which [you][are] serving." G.L. c. 268A, §4¶7(c). However, for practical purposes your official responsibility as Commission member would be coextensive with all matters pending in the agency.

[5]/As a special state employee, the provisions of the "municipal exemption" to §4 are not applicable to you. See EC-COI-80-72.

[6]/For example, if a City employee who is under investigation by the Commission for alleged violations of G.L. c. 268A were to request from you as Corporation Counsel an advisory opinion over whether the conduct under investigation would violate G.L. c. 268A, you would be prohibited from participating in the issuance of the opinion. However, since opinions of the City Corporation Counsel, unlike Commission advisory opinions, are not a legal defense in a criminal action brought under G.L. c. 268A and are not binding on the Commission, this prohibition would not apply merely because a matter about which you opine as Corporation Counsel may come before the Commission in the future. Compare, G.L. c. 268A, §22; G.L. c. 268B, §3(g).

affected by the kinship, rank, position or influence of any party or person. Issues under these sections will inevitably arise if you are called upon to participate as a Commission member in any matter involving either the City or employees of the City, whether financial or not. To avoid violating these provisions, you must refrain from participating in any Commission action, discussion or deliberation dealing with any matter involving either the City or an employee of the City and must leave the room when the matter is being discussed. See, **Graham v. McGrail**, 370 Mass. 133, 138 (1976).[7]/

b) Access to Confidential Information

Section 23 ¶3 prohibits you from

(1) accepting employment or engaging in any business or professional activity which will require you to disclose confidential information which you have gained by reason of your official position or authority, and

(2) improperly disclosing materials or data within the exemptions to the definition of public records as defined by section seven of chapter four, and which were acquired by you in the course of your official duties or using such information to further your personal interests.

These provisions, which are largely self-explanatory, come into play when state employees misuse confidential information to which they have access as state employees. In view of your obligation as City Corporation Counsel to represent the City zealously within the bounds of law, Code of Professional Responsibility, Canon 7, the mere access to confidential information relating to City cases, even absent your participation as a Commission member, may place you in an ambiguous position with respect to your competing loyalties. Therefore, appropriate safeguards must be established to minimize your access as a Commission member to such confidential information. Accordingly, you may not

(1) examine the Commission's files or records pertaining to City matters or

(2) discuss the merits or the status of the City matters formally or informally with any member of the Commission, with any current member of the staff, or with any former member of the staff who, while employed by the Commission, had access to confidential information about the matter.

To facilitate these requirements during the distribution of materials to be considered at a Commission meeting, the Commission staff will be directed to identify and remove from distribution to you all materials relating to City matters.[8]/

DATE AUTHORIZED: March 27, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-46

FACTS:

You are the director of programs for ABC Collaborative (ABC), an educational collaborative established pursuant to G.L. c. 40, §4E by representatives of member public school systems. ABC provides special educational services which cannot be efficiently provided by individual cities or towns. During the summer, ABC offers special education services to handicapped students in state institutions. This program is funded and administered by the Bureau of Institutional Schools (BIS) of the Department of Education (DOE). You state that virtually all of the institutional students who participate in the summer program are recipients of supplemental security income (SSI), a federal financial assistance program for aged, blind, and disabled persons. Assignment to the summer program is made pursuant to an educational plan which must be approved by the student's parent or guardian, who may withdraw consent for the assignment at any time. The rates for the services provided by ABC under the contract with DOE are determined and approved by the rate setting commission.

You have customarily hired, for the summer program, BIS employees who are classified as "institutional school teachers." Institutional school teachers perform services during the traditional ten month school year and are, in effect, on vacation during the two summer months. Institutional school teachers receive the full retirement, insurance, collective bargaining and sick leave benefits which are available to state employees who are employed on a twelve-month basis, and they are not eligible for unemployment compensation during the summer.

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[7]/If the matter affects the financial interest of the City, you must comply with the disclosure provisions of §6 as well.

[8]/Your opinion request also raises the issue of whether your City position would constitute the acceptance of "other employment which will impair [your] independence of judgment in the exercise of [your] official duties" in violation of G.L. c. 268A, §23 ¶2(1). In view of the relatively few occasions in which City matters are pending before the Commission, and the safeguards which have been employed to avoid your having to exercise judgment as a Commission member in City cases, your acceptance of the City position would not violate §23 ¶2(1). However, should the number of City matters before the Commission substantially increase, then this conclusion would be subject to reexamination. See, EC-COI-81-133. Additionally, the mere fact that you function in a key management position with the City would not inherently create a bias or otherwise disqualify you from objectively carrying out your responsibilities as a Commission member.

The Commonwealth of Massachusetts
State Ethics Commission

John W. McCormack State Office Building, Room 1413
One Ashburton Place, Boston 02108
Telephone (617) 727-0060

All identifying informatio has been deleted from this opinion as required by Chapter 268B, section 3(g)

CONFLICT OF INTEREST OPINION
NO. EC-COI-84-45

FACTS:

From 1980 to 1983, you were a member of the Massachusetts Hazardous Waste Facility Site Safety Council (Council). By statute, the Council reviews proposed projects for the siting of hazardous waste facilities to determine if the projects are feasible and deserving of state assistance. G.L. c. 21D, §7. Council members also vote on whether to award technical assistance grants (TAGs) to a town which has been proposed as a site for such a facility. Each TAG is limited by statute to $15,000, and the community may petition the Council for an additional grant as the need arises. G.L. c. 21D, §4(5).

You state that you were out of the country for several months in 1981 during which time the Council discussed and found feasible a proposal by a corporation to develop a major hazardous waste facility site in a Massachusetts town. You did, however, take part in the subsequent discussions and votes to award TAGs to the town as the host community.

Since leaving the Council, you have become of counsel to a lawfirm which represents the Local Assessment Committee (LAC) for the town. Pursuant to G.L. c. 21D, §5, the LAC is the formal recipient of TAGs and represents the host community in all negotiations with the developers of proposed facilities in the community, including negotiations concerning a siting agreement.

QUESTION:

Does G.L. c. 268A permit you to assist the town's LAC in preparing for negotiations with the developer corporation?

ANSWER:

Yes, subject to the restrictions outlined below.

DISCUSSION:

While serving as a Council member, you were a state employee for the purposes of G.L. c. 268A, and, upon leaving that position, you became a former state employee. See G.L. c. 268A, §1(p) and (q). As such, you are prohibited by §5(a) of Chapter 268A from acting as agent or attorney for, or receiving compensation from, anyone other than the Commonwealth in connection with a "particular matter" in which the Commonwealth or a state agency is a party or has a direct and substantial interest and in which you "participated" as a state employee. Particular matter is defined in Section 1(k) to include "any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy... decision, determination, finding..." Under G.L. c. 268A, participate means to "participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise." G.L. c. 268A, §1(j).

Although your consulting services for the town's LAC would be connected with the same project with which you were associated as a state employee, the Commission does not generally view an entire project as a "particular matter" for §5 purposes. EC-COI-84-21. But see EC-COI-84-31. Instead, the various decisions, determinations and proceedings related to a project, and the former state employee's role in them, are examined.

While you were on the Council, that body made the determination that a proposed project for the siting of a hazardous waste facility in the town was feasible and deserving of state assistance. Because you were out of the country during this time, you did not participate in that determination. Upon your return, you did participate as a Council member in the granting of TAGs to the town. The funds from those TAGs have since been expended, and the town's LAC is currently operating with monies from TAGs awarded to it since your departure from the Council.

Therefore, even though your work for the town LAC would involve the same overall project with which you were associated as a Council member, the LAC negotiations with the developer constitute a new particular matter. These negotiation preparations will focus on the best interests of the town. They will develop provisions and conditions for a written agreement to be negotiated with the developer as to a particular site, which will protect the public health, safety and environment of the town as the host community, as well as promoting the fiscal welfare of the town through special benefits and compensation. G.L. c. 21D, §5(2). In contrast, the concerns of the Council had been on the feasibility of siting a facility in the town at all, in which discussion you did not participate; and whether or not to award state monies via TAGs to such a project. Furthermore, you state that you would be compensated from funds received through TAGs obtained from the Council subsequent to your resignation from the Council. Section 5(a) therefore does not prohibit you from being employed by the town's LAC in connection with its negotiations with the developer.1/

Section 5(b) of Chapter 268A proscribes a state employee's personal appearance before a state agency on behalf of a non-state party for one year in connection with particular matters in which the state or a state agency is a party or has a direct and substantial interest and which was within his official responsibility during the last two years of his state employment. Although you state that you would not be representing the town's LAC before any state agency or in any court of law, you should be aware that the §5(b) prohibition remains in effect for you for one year from the time you left the Council.

Section 23 outlines standards of conduct applicable to former state employees with regard to confidential information available to them by virtue of their prior state

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1/Compare EC-COI-84-31 [former state employee prohibited under §5(a) from being paid by or representing a non-state party in connection with an application which was essentially a resubmission of an application, the review of which she had participated in as a state employee]. See EC-COI-84-14 [former municipal employee may assess a piece of property for its owner that he assessed for the town in previous years because different considerations may be taken into account in the assessment determination process].

employment. These provisions prohibit a former state employee from accepting employment or engaging in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority and from, in fact, improperly disclosing such materials2/ or using such information to further his personal interests. Because of your prior role as a state employee and your access to personnel and information connected with the project, you must take great care to abide by these provisions.3/

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2/These materials are defined as "materials or data within the exemption to the definition of public records as defined by [G.L. c. 4, §7]."

3/An an attorney, you must also conform your conduct to the Code of Professional Responsibility, which addresses the "revolving door" problem by prohibiting a lawyer from accepting private employment in a matter in which he had substantial responsibility while he was a public employee. See Mass. Supreme Judicial Court Rule 3:22, ABA Code of Professional Responsibility, DR9-101(B). Any question which you may have over the application of that Disciplinary Rule to your situation, however, is beyond the Commission's jurisdiction and should be addressed to either the Massachusetts Bar Association or to the Board of Bar Overseers.

QUESTIONS:

1. Are BIS institutional school teachers state employees under G.L. c. 268A during the two month summer period?

2. Does G.L. c. 268A permit BIS institutional school teachers to be paid for summer employment with ABC under a contract with DOE?

ANSWER:

1. Yes.

2. Yes, as long as the exemption standards described below continue to be satisfied.

DISCUSSION:

1. **Jurisdiction Under G.L. c. 268A**

At the outset, BIS institutional school teachers are clearly state employees under G.L. c. 268A during the ten-month period in which they provide services for DOE, a state agency. See, G.L. c. 268A, §1(q). Further, based upon the range of benefits which continue to apply to BIS institutional school teachers during the two summer months, the Commission concludes that status as state employees under G.L. c. 268A likewise continues to apply during the two summer months. In a recent advisory opinion, EC-COI-84-17, the Commission advised a state employee that his state employee status would not continue during a period of unpaid leave of absence in which the employee received no compensation, fringe benefits or retirement credit attributable to his state position. However, the Commission cautioned the employee that "[t]his conclusion will apply as long as you are on a **bona fide** unpaid leave of absence from your DMH position. A period of absence from your position due to vacations, holidays, personal time or illness, for example, would not insulate you from state employee status during that period because you would be receiving commonwealth benefits attributable to the leave period." EC-COI-84-17 p. 2. It follows, then, from this opinion that the continuation of commonwealth benefits during the summer to BIS institutional school teachers results in a continuation of state employee status.[1/]

2. **Financial Interest in a DOE Summer Contract**

Section 7 of G.L. c. 268A prohibits a state employee from having a financial interest, directly or indirectly, in a second contract made by a state agency. The summer contract between ABC and DOE is a contract made by a state agency within the meaning of §7, and state employees who work in the ABC summer program and who are paid through this contract would have a financial interest in the contract. Although, the exemptions to §7 provide some latitude where a state employee wishes to contract with a different state agency, see, G.L. c. 268A, §7 ¶(b), (d), neither §7 ¶(b) and (d) would be available to the BIS institutional school teachers at issue because their summer contract is made by DOE, the same agency which employs them during the school year.

There is, however, one exemption to §7 for which BIS institutional school teachers at issue would currently qualify. Paragraph 4 of §7 provides as follows:

> This section shall not apply to a state employee who provides services or furnishes supplies, goods and materials to a recipient of public assistance, provided that such services or such supplies, goods and materials are provided in accordance with the schedule of charges promulgated by the department of public welfare or the rate setting commission and provided, further, that such recipient has the right under law to choose and in fact does choose the person or firm that will provide such services or furnish such supplies, goods and materials.

Because virtually all of the institutional students who receive services under the ABC summer program are recipients of public assistance, the services are provided in accordance with a schedule established by the rate setting commission, and the recipients, through their parents or guardians, select the ABC program as part of the students' educational plan, the Commission concludes that the conditions for the exemption are satisfied. However, should a smaller proportion of clients on public assistance participate in the ABC summer program, then the application of their exemptions to §7 would have to be re-examined in light of these new facts. EC-COI-83-98.[2/]

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[1/] Inasmuch as BIS institutional school teachers do not receive compensation during the summer and therefore hold a position for which no compensation is provided, they would qualify as "special state employees" under G.L. c. 268A, §1(o) during the summer. As special state employees, they would continue to be subject to G.L. c. 268A, albeit in a less restrictive way. However, in view of the Commission's conclusion under G.L. c. 268A, §7, status as a special state employee is not a relevant consideration in this case. The Commission's conclusion regarding special state employee status is limited to the facts of this case and, in any event should not be construed as authority for such status during a period shorter than two months. For example, a state employee would not be a special state employee during the weekends between his or her normal workweek.

[2/] BIS institutional school teachers should also be aware that their conduct is subject to G.L. c. 268A, §23 which, in relevant part, prohibits the use of their official state positions to secure an unwarranted privilege or exemption for themselves. Considerations under §23 would arise, for example, if they misused their insider status to gain an unwarranted advantage in the selection process. These concerns would be minimized by ABC's use of public advertising for positions in the summer program. Cf. G.L. c. 268A, §7 ¶(b).

COMMISSION ADVISORY NO. 3

Recently a number of questions have been raised concerning those provisions of chapter 268A (the conflict of interest law) which deal with "eligibility" for appointment to local positions. Specifically, §21A of G.L. c. 268A states that:

> "Except as hereinafter provided, no member of a municipal commission or board shall be eligible for appointment or election by the members of such commission or board to any office or position under the supervision of such commission or board. No former member of such commission or board shall be so eligible until the expiration of thirty days from the termination of his services as a member of such commission or board.
>
> The provisions of this section shall not apply to a member of a town commission or board, if such appointment or election has first been approved at an annual town meeting of the town."

Thus, unless there has been town meeting approval, a person already on a local board cannot be appointed by that board to a position under its supervision until thirty days after he terminates his services. (This prohibition does not apply where a person is first employed by a board and then becomes a board member.)

There is also an additional provision that applies just to selectmen. The last paragraph of §20 of G.L. c. 268A (inserted by c. 107 of the Acts of 1982) allows a selectman to hold another position in his town provided, however, that no selectman "shall be eligible for appointment to such additional position while a member [of the board of selectmen] or for six months thereafter." In other words, it is permissible for an employee of a town to become a selectman and continue in both posts. If, however, he's a selectman first, he cannot get another position while a selectman or for six months after he leaves the board.

These provisions are designed to prevent people serving in local government from having the inside track on other employment opportunities in their city or town. They "prohibit a board member from attempting to persuade his fellow members to appoint him to a salaried position or from engaging in conduct which might give the appearance of such self-dealing activity." EC-COI-80-44. In addition, by prohibiting selectmen from holding another town position or members of any other boards from holding positions under their responsibility, these laws maximize the supervision municipal appointees receive. As the Supreme Judicial Court has pointed out in dealing with the "principle of incompatibility of offices," "the personal and selfish interest [of the person in the appointed position] would prevent him from having as a member of the board . . . an eye single to the interest of the public." **Attorney General v. Henry**, 262 Mass. 127, 132 (1928).

While the purposes behind these statutes are clear, they do not specifically state what happens when there is non-compliance. In this regard, there are two issues that must be addressed:

- Who, if anybody, violates c. 268A in these cases?
- Does the appointee hold the position legally, and if not, should he or she be paid?

The Commission has jurisdiction to address only the first of these questions. However, certain observations will be made on the other.

I. Violations of Chapter 268A

Section 21A and the proviso in §20 deal with eligibility to hold another position. They do not proscribe specific conduct. Yet, the prohibitions would be meaningless if there were no consequences from their violation. There are consequences and they are basically three-fold.

First, the person to be appointed would violate §19 of G.L. c. 268A if he, before getting the position, participated as a member of the board in any discussions or in any other action concerning his own hiring. (Section 19 prohibits a municipal employee from participating in any particular matter in which he or certain other people with whom he is associated has a financial interest.) For example, in EC-COI-80-44, the Commission advised a member of a state board that it was improper for him to have written the Secretary of Administration and Finance urging the Secretary to exempt the position he sought from a hiring freeze. Second, any board member who is appointed to another position for which he is compensated and who remains a member of the board may violate §20 of G.L. c. 268A. Section 20, which prohibits a municipal employee from having a financial interest in another municipal contract, has been applied to cover multiple employment arrangements with the same municipality. A selectman who is not a special municipal employee[1]/ would clearly violate §20 if he was paid in the other position. It would not matter if he gave up his pay as selectman.[2]/ With

[1]/Only in towns with a population of under 5,000 may the selectman be designated as special municipal employees.

[2]/Chapter 107 (noted above) allows a selectman to hold another position if certain conditions are met and if he receives only one pay. However, having not complied with one of those conditions by not waiting the requisite six months, a selectman will not be able to take advantage of this exemption.

respect to members of other boards, whether they violate §20 would depend on whether the positions involved have been designated as special municipal employees and whether they secure an exemption from the board of selectmen.[3]/

Third, the members of a board who improperly appoint one of their colleagues would **themselves** violate the law, specifically, the Standards of Conduct set out in §23. Those Standards prohibit a municipal employee from "us[ing] or attempt[ing] to use his official position to secure unwarranted privileges or exemptions for himself or others" and "by his conduct giv[ing] reasonable basis for the impression that any person can. . . unduly enjoy his favor in the performance of his official duties." To appoint someone to a position for which he is not eligible would be an unwarranted privilege or exemption. Also, given their association on the board and given the clear intent of the statute, such an appointment could not but help give the impression that the person appointed is unduly enjoying the favor of his colleagues. To make the people who do the appointing liable under the law makes sense. It is their conduct that has led to an action inconsistent with the statute's requirements.

One final observation should be made concerning the statutes themselves. Their spirit, and not just their letter, should be satisfied. The statutes are not complied with if the members of a board decide to appoint one of their colleagues and simply wait thirty days or six months, as the case may be, to make it official. The statutes contemplate a "cooling off period" during which the member/applicant is away from the board before a decision is made.

II. Legal Status of Appointee

It is arguable that since the board member was not eligible for his new position, his employment contract is void and unenforceable. It is further arguable, therefore, that it is improper for the city or town to pay his salary. The case of **Lowell v. Massachusetts Bonding and Ins. Co.**, 313 Mass. 257 (1943) sheds some light on this issue. There the City of Lowell brought an action against its former treasurer and the surety on the treasurer's official bond arguing that it was improper for the treasurer to make certain payments. In that case, the Supreme Judicial Court stated that (at page 268)

> where money thus illegally paid has been expended in satisfaction of contracts which create no liability on the part of the municipality but were void, the official and his sureties are bound to make good the sums so paid, notwithstanding that full value was received through the materials and services furnished.

The Court also noted (at page 270) that to allow such payment would be to adopt a rule which

> "would. . . break down the public policy of the Commonwealth with relation to municipal finance. Such a rule would encourage public officials to enter into any kind of illegal contract on behalf of the city, secure in the knowledge that so long as the labor performed or the materials supplied were of the value of the price paid therefor, they, the officials, would not be held liable in the absence of fraud or bad faith."

Compare also **Osetek v. Chicopee,** 370 Mass. 110, 113 (1976); **Cook, v. Overseers, Public Welfare, Boston,** 303 Mass. 544, 547 (1939).

While this is a question for the courts and not the Commission to decide, it would appear that city and town treasurers should at least consult with their city solicitor or town counsel on the propriety of paying the salaries of individuals who were not eligible for appointment in the first place.

To sum up,

(1) A selectman cannot be appointed to another position in the town until six months after he's stopped serving as a selectman.

(2) A member of some other local commission or board must wait thirty days before he is eligible to be appointed by that same board to a position under its supervision.

(3) These waiting periods must be observed in good faith. It is not proper for the appointment to be decided upon and then simply be "put on hold" for six months or thirty days before making it "official."

(4) A member of a board who takes any official action about his own appointment would violate the conflict law.

(5) A member of a board who is improperly appointed to another position and remains in both positions would in most instances violate the law.

(6) The members of a board or commission who improperly appoint one of their colleagues would violate the law.

(7) Inviduals improperly appointed run the risk that they will not be paid for their services.

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[3]/In this regard however, any such approval would appear unwarranted. The selectman, in effect, would be condoning an illegal act.

CONFLICT OF INTEREST OPINION NO. EC-COI-84-47

FACTS:

You are an employee of a state agency and you participate in the approval of the rates of payment from the state to certain private businesses providing services to the state. As part of the approval process, each business submits a cost report to the agency containing the business' expense and revenue. The report is made by your agency to calculate the rate of payment to be made to the businesses.

You will be leaving state employment shortly, and you are currently negotiating future employment with a firm (the Firm) which among other things prepares the cost reports submitted by the private businesses to your agency. The Firm will customarily meet with staff members of your agency to discuss the report.

QUESTIONS:

1. While you remain an agency employee, does G.L. c. 268A permit your participation in the rate approval process for private businesses whose requests are based on the Firm's cost reports?
2. While you remain an agency employee does G.L. c. 268A permit your participation in the rate approval process for the private businesses whose requests are not based on the Firm's cost reports?

ANSWERS:

1. No.
2. Yes.

DISCUSSION:

As a state employee, you are subject to the standards of conduct contained in G.L. c. 268A, §23 which, in relevant part prohibit you 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. G.L. c. 268A, §23 ¶2(3). A major purpose of this section 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 ¶2(3) prohibitions whenever public employees have had private financial dealings with the same parties with whom they deal as public employees. See, Commission Advisory 83-1.

Issues under this section will inevitably arise if you are called upon to approve the rate for a private business which retains the Firm and for which the Firm has prepared the cost report forming the basis of your agency's rate approval. By approving the rate, or by determining whether to have a field audit of the Firm's cost report while you are negotiating or have an arrangement for future employment with the Firm, you would be creating reasonable basis for the impression that your agency decisions might be unduly affected by your private employment prospects. To avoid creating this impression, you should disqualify yourself from participating in both the agency rate approval process and any field audit determination for those businesses for which the Firm has prepared the cost report.[1]/ You should also avoid making personnel decisions or evaluations which are based on the performance of agency's employees with respect to the Firm's cost reports.[2]/

On the other hand, the fact that you are negotiating with a firm which consults to certain of the private businesses does not outright prohibit your participating as an agency employee in those rate determinations and field audit determinations which do not involve the Firm. By such participation, there is no reasonable basis created for the impression that your agency decisions with respect to these other businesses will be unduly influenced by your negotiations with the Firm. The risk of competing loyalties to which §23 is addressed would not come into play merely by your negotiating with a firm which consults to these businesses as well as other clients. Nonetheless you should keep the principles of §23 ¶2(3) in mind when making agency decisions affecting businesses other than those to which the Firm consults.[3]/

DATE AUTHORIZED: April 17, 1984

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[1]/ You indicate that the agency staff can identify in advance and keep separate at agency meetings those businesses whose cost reports have been prepared by the Firm.

[2]/ In view of the Commission's conclusions under G.L. c. 268A, §23, it is unnecessary to determine whether the Firm would have a financial interest in each cost report which is submitted by the private businesses to the agency. See, G.L. c. 268A, §6. It would appear, however, that the consultant relationship between the Firm and such private businesses would not, without more, give the Firm a financial interest in the agency rate determination process.

[3]/ You should also be aware that §23 ¶(3) prohibits your disclosure to the Firm of confidential information which you have acquired as an agency employee.

CONFLICT OF INTEREST OPINION NO. EC-COI-84-48

FACTS:

You are a private attorney and are a candidate for the office of selectman in the Town of ABC (Town), a town whose population exceeds five thousand. Your law partner currently represents a plaintiff in a lawsuit against the Town alleging that the Town improperly refused to grant a permit. Following a judgment in Superior Court in favor of the Town, the plaintiff has filed a notice of appeal in the Appeals Court, and your partner will be representing the plaintiff in the appeal. The by-laws of the Town authorize the board of selectmen to settle or defend any lawsuits brought against the Town. Pursuant to these by-laws, the board of selectmen may consult with its attorney over the lawsuit and discuss litigation strategy, settlement strategy and costs.

QUESTION:

Assuming that you are elected as a selectman, what limitations would G.L. C. 268A place on your partner with respect to the lawsuit?

ANSWER:

Upon the assumption of office as selectman, your partner will be prohibited from continuing his representation of the plaintiff in the lawsuit.

DISCUSSION:

Following your election as a member of the board of selectmen, you will be a "municipal employee" for the purposes of G.L. c. 268A. See, G.L. c. 268A, §1(g); **District Attorney for the Hampden District v. Grucci,** 1981 Mass. Adv. Sh. 2125, 2128. Status as a municipal employee will result in restrictions on the activities of both you and your law partner. In particular, under G.L. c. 268A, §18(d), a partner of a municipal employee is prohibited, in relevant part, from acting as the attorney for anyone other than the municipality in connection with any particular matter in which the municipality is a party and which is the subject of the official responsibility of the municipal employee. The lawsuit against the Town is a "particular matter" in which the Town is a party. See, G.L. c. 268A, §1(k). Therefore, the propriety of your partner's representation of the plaintiff in the lawsuit turns on whether the lawsuit would be within your official responsibility as a member of the board of selectmen. "Official responsibility" is 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). Based on the information which you have provided, the lawsuit would be a matter within the official responsibility of the board of selectmen. The Town by-laws expressly authorize the selectmen to settle or defend lawsuits such as that brought by the plaintiff. Although the merits of the lawsuit will be decided by the Appeals Court, the board of selectmen has responsibility for managing the defense of the lawsuit, including determining the litigation and settlement strategy. In view of this accountability, the lawsuit is within the official responsibility of the board of selectmen. This result will continue to apply even if you abstain from any participation as a selectman in the lawsuit, because official responsibility turns on the authority to act, and not on whether the authority is exercised. Buss, **The Massachusetts Conflict of Interest Statute: An Analysis,** 45 B.U. Law Rev. 299, 321 (1965); EC-COI-83-103; 83-37; 83-29. There are no exemptions under §18 which would apply to your situation so as to allow the partner's continued representation following your election as a selectman. Although §18 ¶5 provides an exemption in effect inviting the setting up of a separate partnership in which a municipal employee has no interest,[1]/ this exemption applies only to special municipal employees.[2]/ Braucher, **Conflict of Interest in Massachusetts in Perspectives of Law,** Essays for Austin Wakeman Scott 22 (1964). Because the population of the Town exceeds five thousand, you are not eligible for classification as a special municipal employee.

DATE AUTHORIZED: April 17, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-50

FACTS:

You were recently appointed as a member of a local Housing Authority (LHA), and also serve as the full-time executive director of ABC, a private non-profit

[1]/The exemption is ¶5 provides as follows:

If a partner of a former municipal employee or of a special municipal employee is also a member of another partnership in which the former or special employee has no interest, the activities of the latter partnership in which the former or special employee takes no part shall not thereby be subject to clause (c) and (d).

[2]/The definition of special municipal employee in G.L. c. 268A, §1(n) excludes "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 . . ."

community organization which provides services in the area. Your ABC salary is derived entirely from a federal grant to the state Office of Communities and Development (EOCD). You state that two of ABC's programs involve the LHA. The first is a program under which ABC meets with homeless individuals and assists in referring them to appropriate housing. LHA is one of the placement options, and approximately five elderly homeless individuals are referred annually by ABC to LHA for application assistance. The second is an eviction assistance program under which ABC provides information and a $400 grant for qualifying tenants who have been evicted. Approximately ten tenants in LHA housing units have received assistance under this program.

Prior to your appointment as an LHA member, you estimate that you spent approximately two hours weekly in ABC administrative functions related to these two LHA programs. Since your appointment, you have delegated all of your responsibilities related to LHA programs to the ABC director of community programs. You have also refrained from participation as a LHA member in any eviction-related matters in which ABC is involved or likely to become involved.[1]/

QUESTION:

Does G.L. c. 268A permit you to serve as a LHA member while remaining the executive director of ABC?

ANSWER:

Yes, subject to the limitations described below.

DISCUSSION:

Since your appointment as a LHA member, you have been a "municipal employee" for the purposes of G.L. c. 268A, the conflict of interest law. See, G.L. c. 121B, §7. As an LHA member, you are also a "special municipal employee," id., and are therefore subject to certain provisions of G.L. c. 268A in a less restrictive way.

1. Section 17

This section prohibits you from receiving compensation from or acting as agent for any party other than the City of DEF (City) in relation to any particular matter[2]/ in which the City or a city agency is a party or has a direct and substantial interest and in which you have either participated[3]/ or have had official responsibility as an LHA member.[4]/

With respect to both the ABC homeless assistance and eviction assistance programs you have removed from your authority as executive director any responsibility for the programs and have delegated that authority to another individual. Therefore, you will not be receiving compensation from ABC for the programs nor will you be acting as the agent or spokesperson for either ABC or individuals in their dealings with LHA under the programs.

2. Section 19

This section prohibits your participation as a LHA member in any particular matter in which, in relevant part, a business organization which employs you has a financial interest. ABC is a business organization for the purposes of this section, EC-COI-82-91, and you therefore must refrain from participating in particular matters in which ABC has a financial interest. Although the ABC homeless referral program does not affect ABC's financial interest, the eviction assistance program does. In view of your decision to refrain from participating as an LHA member in any eviction-related matters in which ABC is involved or likely to become involved, you will not be in violation of G.L. c. 268A, §19. Whenever such matters arise, the safest course would be to leave the room during the discussion and decisions related to the matters. See, **Graham V. McGrail,** 370 Mass. 133 (1976).

3. Section 20

As a municipal employee, you are also subject to the restrictions which §20 places on your having a financial interest in a contract made by the City or a city agency. Inasmuch as your ABC salary is derived entirely from a federal grant through EOCD and is not attributable to grants from the City, your employment with ABC would not place you in violation of §20.

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[1]/You state that, while individual eviction cases will not reach the LHA members, overall eviction policy might be on the agenda.

[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]/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).

[4]/It is unclear whether your LHA membership will require your service for more than sixty days annually so as to have the §17 restriction apply to any matter pending in LHA. However, for practical purposes, it is unnecessary to reach this issue because virtually all matters pending in LHA will be under your official responsibility.

However, should your funding arrangement change and your salary be attributable to City funds, then §20 issues would be raised and you should renew your opinion request with the Commission.

4. Section 23

As a municipal employee, you are also subject to the standards of conduct contained in G.L. c. 268A, §23. Under these standards a municipal employee may not

> (a) accept other employment which will impair his independence of judgment in the exercise of his official duties;
>
> (b) use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others;
>
> (c) by his conduct give reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance affected by the kinship, rank, position or influence or any party or person;
>
> (d) 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;
>
> (e) improperly disclose materials or data within the exemptions to the definition of public records as defined by section seven of chapter four, and were acquired by him in the course of his official duties nor use such information to further his personal interest.

Inasmuch as you have insulated yourself from any overlapping functions in both your LHA and ABC positions, the standards of conduct in §23 will not inherently prohibit your maintaining both positions. EC-COI-84-40. However, you should be particularly mindful of the restrictions on the use of confidential information which you have acquired as an LHA member.

DATE AUTHORIZED: April 17, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-51

FACTS:

The Massachusetts Department of Food and Agriculture (Department), is a state agency established by G.L. c. 20, §1. One of the Department's activities is preserving farmland in the Commonwealth through the purchase of the land development rights belonging to individual farmowners. These purchases are accomplished through the Agricultural Preservation Restriction Program (APR) whose activities are authorized by G.L. c. 132A, §11 and over which the Department's Commissioner has official responsibility. The APR is funded through appropriations made by the General Court, and it operates in the following manner. Farmowners who are interested in selling their development rights to the Commonwealth make application to the APR. If the APR board members deem the farmland appropriate for purchase of its development rights, an independent appraisal of the value of those rights is made. If the farmowner finds the figure derived from the appraisal acceptable, the Commonwealth acting through the APR purchases the development rights in exchange for an agreement from the farmowner that the only permissible use of the land will be agricultural. This restriction on land use is a permanent one which runs with the land. The only way it can be removed is by a two-thirds vote of the General Court. Notice of the restriction is filed with the appropriate registry of deeds.

A farmowner filed an application with the APR. Before any action, including appraisal of the property, was taken on the application, the farmowner was hired as an employee by the Department. He agreed at the time of hire that no action would be taken on his application for the duration of his employment with the Department. The APR would now like to begin processing his application.

QUESTION:

Would the Department's purchase of the development rights to its employee's farmland place him in violation of c. 268A?

ANSWER:

Yes.

DISCUSSION:

The provision of G.L. c. 268A which is applicable to the situation presented is §7. That section prohibits a state employee from having a financial interest, directly or indirectly, in a contract made by a state agency, in which the Commonwealth or a state agency is an interested party. Thus the first issue considered here is whether the purchase by the Commonwealth of the agency employee's development rights constitutes a contract within the meaning of the statute. The Commission concludes that it does. The arrangement entered into by the farmowner and the Commonwealth is a contract like any other real estate transaction would be.

Both the purchase and sale agreement and the document conveying the development rights are standard form agreements.

The second issue is whether the employee has a financial interest, direct or indirect, in the contract in question. As the direct recipient of state funds, the employee obviously has a direct financial interest in the contract.

The third and last issue is whether the Commonwealth or a state agency is an interested party in the contract in question. The Department's interest (and, by extension, the Commonwealth's interest) in the contract proposed here is clear. The Department is not only a party to the contract but the contract also serves to further one of the Department's activities. The funds to be used are the Commonwealth's.

Although there are some exceptions to the §7 prohibition, there are very few instances when an employee will be able to contract with his/her own agency. None of the exceptions applies to the employee. Likewise, the fact that the employee made application to the APR in good faith well in advance of his being hired by the Department does not alter the result. Because the contract would be entered into during the employee's tenure as a state employee, it is prohibited by §7.

The policy interests being addressed by the General Court in G.L. c. 268A, §7 are those of ensuring that state employees not use their positions to obtain contractual benefits from the state or to influence how a contract is monitored, and avoiding any public perception that state employees have an "inside track" on such opportunities.[1]/ Thus the statute in general and §7 in particular reflect a reasonable judgment on the part of the General Court that "[B]ecause it is impossible to articulate a standard by which one can distinguish between employees in a position to influence and those who are not, all will be treated as though they have influence."[2]/

DATE AUTHORIZED: April 17, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-53

FACTS:

You were recently appointed to a position in the XYZ Division of the District Court Department (Division). The Division has sittings in two towns, ABC and DEF, and you alternate your court location assignments with another Division employee. Your responsibilities include [Description of duties omitted]. Your spouse is an attorney and was recently hired as an associate with a law firm in DEF which represents clients in civil and criminal matters before both Division locations.

QUESTION:

What limitations does G.L. c. 268A place on your activities as an employee of the Division?

ANSWER:

You will be subject to the limitations set forth below.

DISCUSSION:

In your capacity as an employee of the Division, you are an employee of a state agency, EC-COI-83-128, and are therefore a state employee for the purposes of G.L. c. 268A. As a state employee you are subject to the standards of conduct contained in G.L. c. 268A, §23, which, in relevant part, prohibit you 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 court duties, or that you are unduly affected by the kinship, rank, position, or influence of any party or person. These standards are designed to avoid situations where the integrity and credibility of an employee's work may be called into question. Compliance with these standards requires safeguards to ensure that your decisions as a state employee are not clouded by personal or private loyalties. EC-COI-83-128. Application of these standards must take into account that certain court personnel are held to a high standard, in order to "ensure the integrity of the judicial system, which must not only be beyond suspicion but must appear to be so." [Citation omitted].

Bearing these principles in mind, the Commission advises you that you should refrain from participating as a division employee in any case in which your spouse has filed an appearance. When such a case comes before you, you should have another Division employee handle the matter.[1]/ Given your spousal relationship, by participating in cases in which your spouse had filed an appearance, you would be giving reasonable basis for the impression that you will unduly favor him/her in the exercise of your discretion as a Division employee.

[1]/See generally Buss, "The Massachusetts Conflict of Interest Statute: An Analysis," 45 B.U. Law Rev. 299 (1965).

[2]/Buss at p. 374.

[1]/You state that this requirement will not impose any administrative difficulty in view of the proximity of the courthouses in towns ABC and DEF.

This prohibition would not apply to those cases in which other associates or members of your spouse's law firm have filed an appearance and where you would be called upon to perform a **ministerial** act [Examples, omitted]. On the other hand, if you are called upon to perform a discretionary act in such cases, the safest course would be for you to refrain from any participation. Othewise each action you take as a Division employee with respect to these cases would have to be examined after the fact to determine whether your conduct gave reasonable basis for the impression of undue favoritism to the law firm.

You should also be aware that Section 23 ¶3 prohibits you from improperly disclosing materials or data within the exemptions to the definition of public records as defined by section seven of chapter 4, and which were acquired by you in the course of your official duties or using such information to further your personal interests. These provisions, which are largely self-explanatory, come into play when state employees misuse confidential information to which they have access as state employees. In view of your access to confidential information as a Division employee, you should keep this prohibition in mind whenever you discuss work-related matters with your spouse. EC-COI-84-16.

DATE AUTHORIZED: April 17, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-54

FACTS:

You were employed as Associate General Counsel of the State Ethics Commission (Commission) during 1981 and until March 19, 1982.[1]/ As such, you were generally responsible for overseeing the Commission's investigative functions. And, specifically, you participated in the initiation and oversight of a particular administrative investigation (Investigation) of possible conduct in violation of the conflict of interest law.

During the course of this investigation, certain evidence which could be used in a criminal proceeding was uncovered. After you had ended your active employment with the Commission, a Commission staff attorney recommended to the Commission that this evidence be referred to the Attorney General in accordance with the Commission's authority to do so set out in G.L. c. 268B, §4(a). The Commission adopted that recommendation and a referral report, summarizing and indexing evidence regarding certain individuals and transactions was transmitted to the Attorney General. You state that you did not participate in the authorization or writing of this report and were no longer acting as Associate General Counsel when it was authorized and written. The Attorney General sent a copy of that report to the United States Attorney and requested the Commission to furnish the U.S. Attorney with materials related to it.

On March 8, 1982, you commenced employment with the United States Attorney's Office (Office). In the course of that employment, you were assigned responsibility for a continuing investigation into corrupt acts allegedly committed by certain public officials; including activities of a subject of the Investigation (Subject) which were unrelated to it. You were not assigned responsibility for conducting any investigation which the Office might pursue into possible federal crimes committed by that Subject in connection with the Investigation.

The Subject was indicted by a federal grand jury charging him with several federal crimes. Included among those charges are allegations based on certain activities which were a part of the evidence included in the Commission's referral report. The allegations which you pursued as an employee of the Office were also included in that indictment.

You would like to participate fully in the prosecution of this indictment. That participation might include the preparation and presentation of witnesses and evidence relating to the Subject's activities uncovered during the Investigation.

QUESTION:

In light of your prior employment by the Commission and your role in connection with its Investigation, does G.L. c. 268A permit you to participate in the Office's prosecution of those portions of an indictment based on the Commission referral report?

ANSWER:

Yes; however, your participation may raise issues under other provisions of law.

DISCUSSION:

Upon ending your employment with the Commission, 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 attorney for, or being

[1]/Although you state that you relinquished all responsibilities on your position on March 5, 1982, you remained on the payroll until March 19 in order to receive your accrued vacation pay.

compensated by, anyone other than the Commonwealth in connection with any particular matter[2]/ 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) of G.L. c. 268A prohibits a former state employee for one year from appearing personally before any state court or agency as agent or attorney for anyone other than the state 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 during the two years prior to his departure from state employment.

The Commission's referral report is a particular matter. The state, through that agency, is a party to that particular matter and has a direct and substantial interest in actions taken as a result of it. Compare, EC-COI-79-36. By participating in the prosecution of those portions of the federal indictment related to the referral, you would be acting as attorney for, and being compensated by, someone other than the Commonwealth.

You state, however, that the authorization, drafting and completion of the referral report took place after you left the Commission, and that you did not participate in any of those actions. Therefore, §5(a) does not prohibit your prosecution of those portions of the federal indictment related to the referral report because you did not participate in its authorization or preparation.

Section 5(b) does not apply, as well, because your activities in prosecuting the indictment will not require you to appear personally before any state court or agency in connection with the referral report, and because more than one year has elapsed since you left state service.

You should also be aware that 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[3]/ or using such information to further his personal interests. You must take care not to disclose any such information which you became aware of during the Commission's investigation which was not included in the referral report or furnished to the Office in connection with it.

You should also be aware that provisions of the Code of Professional Responsibility might be implicated because of your responsibility over the Investigation as a state employee. See, e.g., **Canons of Ethics and Disciplinary Rules Regulating the Practice of Law,** S.J.C. Rule 3:07, DR 5-102, DR 9-101(b). Since the Commission's interpretive authority does not extend beyond G.L. c. 268A and G.L. c. 268B, you should contact other sources for clarification of those issues.

DATE AUTHORIZED: May 29, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-55

FACTS:

You are a member of the Statewide Health Coordinating Council (SHCC). The current SHCC was established by Massachusetts Executive Order No. 234 (the Order) to fulfill the requirements of the National Health Planning and Resources Development Act (the Act) (42 U.S.C. §300K et seq.). Any state which desires to take advantage of the funding and other resources available pursuant to the Act is required by 42 U.S.C. §300M-3 to establish an SHCC. Massachusetts has chosen to participate. The organization and functions of SHCC's are set out with specificity in 42 U.S.C. §300M-3, and the Order and the by-laws drafted by the Massachusetts SHCC essentially mirror the federal requirements. They are summarized below.

The SHCC membership is composed of health care consumers and providers of which the consumers are the majority. The SHCC is required to meet at least four times a year, and those meetings must be open to the public.[1]/ SHCC members serve without compensation but they are reimbursed for certain expenses connected with SHCC service, such as travel.

The general purpose of the SHCC is to coordinate the activities of the state's health planning agencies. The specific responsibilities of the SHCC are as follows. It must review the annual implementation plans of each of the state's health systems agencies.[2]/ It then incorporates these plans into a state health plan which delineates how the health needs of the state's population

[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]/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]/This requirement is found at 42 U.S.C. §300M-3(b)(3), and in the SHCC by-laws at Article VI, Section 6 where you have also made SHCC meetings subject to the provisions of M.G.L. c. 30A, §§11A, 11A1/2, and 11B.

[2]/A health systems agency is the public regional (as opposed to state wide) health planning body.

are to be met.[3]/ The SHCC is required to hold a public hearing on the proposed state health plan. Although the state health plan must be approved by both the Governor and the Secretary of the U.S. Department of Health and Human Services (the Secretary), neither of them may disapprove a plan or ignore a recommendation without giving a detailed statement of their reasons. The existence of an approved state health plan is a prerequisite to a state's receipt of federal money.

SHCC members are affected by two other provisions of 42 U.S.C. §300M-3. First, there is an express limitation on the individual liability of any SHCC member for payment of damages under state or federal law "if he believed he was acting within the scope of his duty, function, or activity as such a member...and acted with respect to that performance, without gross negligence or malice toward any person affected by it." (§300M-3(d)). Second, there is a conflict of interest provision which prevents any SHCC member from voting on any matter respecting "any individual or entity with which such member has (or, within the twelve months preceding the vote, had) any substantial ownership, employment, medical staff, fiduciary, contractual, creditor or consultative relationship." (§300M-3(e)). The SHCC has incorporated this provision into its own by-laws at Article IX.

QUESTIONS:

1. Are the voting members of the SHCC "state employees" within the meaning of G.L. c. 268A, 1(q)?
2. If so, are the conflict of interest provisions set forth in Article IX of the SHCC by-laws consistent with the requirements of G.L. c. 268A?

ANSWERS:

1. Yes.
2. Yes, but there are additional limitations as set out below.

DISCUSSION:

1. **Status of SHCC 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."[4]/ Among those criteria are:

> 1. the impetus for the creation of the position (whether by statute, 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 employees, or will she be expected to represent outside private viewpoints;
> 4. the formality of the person's work product, if any.

On the basis of these precedents, the Commission concludes that SHCC members perform services for a state agency.

The status of the SHCC 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 SHCC's organization, responsibilities and work product as detailed in 42 U.S.C. §300M-3, Executive Order No. 234, and the SHCC's own by-laws makes it clear that the SHCC is something more than an informal outside resource.

Examples of the SHCC's organizational formality include the requirement of a specific consumer/provider ratio for membership, the requirement that there be at least four SHCC meetings a year, and the provision for removal of SHCC members for good cause. The fact that the SHCC meetings must be open to the public pursuant to federal law (and that SHCC members have chosen to make their meetings subject to the provisions of G.L. c. 30A, §§11A, 11A1/2 and 11/B) further compels the conclusion that the SHCC is a state agency within the meaning of c. 268A.[5]/

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[3]/A state health plan must, among other things, describe with specificity the kinds of institutional and other health services needed to care for the state's population including "the number and type of resources including facilities, personnel, major medical equipment, and other resources required to meet the goals of that plan and shall state the extent to which existing health care facilities are in need of modernization, conversion to other uses, or closure and the extent to which new health care facilities need to be constructed or acquired." 42 U.S.C. §300M-3(c)(2)(A).

[4]/See EC-COI-83-30; EC-COI-83-21; EC-COI-82-81; EC-COI-80-49; EC-COI-79-12.

[5]/G.L. c. 30A, §§11A, 11A1/2 and 11B provide generally that meetings of governmental bodies be open to the public.

The fact that a majority of SHCC members must be consumers does not alter the Commission's conclusion. While it is clear from a reading of 42 U.S.C. §300M-3 that consumer and provider viewpoints are an integral part of the health planning process, it is equally clear that the SHCC performs a governmental function. Federal funding of many state health programs is predicated on the state's having an approved state health plan. This state health plan is the work product of the SHCC. Additionally, the SHCC's recommendations appear to be given great weight by the Secretary in determining who is to receive federal grant money. Finally, as you point out in your letter, there are strong links between SHCC activities and the activities of the statutorily established Massachusetts Determination of Need program (DON). Pursuant to G.L. c. 111, §25B **et seq.** major expenditures of health care facilities are subject to approval by the state Public Health Council. The Council's decisions must be consistent with the SHCC's state health plan. In essence, the SHCC exerts considerable control over the DON process.[6]/

As state employees, SHCC members are subject to the restrictions set out in G.L. c. 268A,[7]/ but because members are not compensated for the services they perform, the Commission concludes that they are special state employees within the meaning of G.L. c. 268A, §1(o).

2. **Consistency of SHCC's Conflict of Interest Provisions with G.L. c. 268A.**

Your second question is whether the conflict of interest provisions set forth in Article IX of the SHCC by-laws are consistent with the requirements of G.L. c. 268A. The provisions set forth in Article IX are most analogous to §6 and §23 of the statutes. Article IX provides in relevant part that a conflict of interest exists when the action before the SHCC concerns

> "[A]ny agency, institution, corporation, association, or partnership in which the member is or within the past twelve months was an owner, stockholder, partner, officer, employee, member of the board of directors or trustees, professional staff affiliate, serves or within the past twelve months served as a consultant or otherwise has or within the past twelve months had a significant financial interest, or...[A]ny agency, department, or subdivision thereof of state government in which the member is or within the past twelve months was employed or over which the member has or within the past twelve months had some administrative control, or...[A] local government or department or instrumentality thereof in which the member is or within the past twelve months was an elected or appointed official, employee, or paid consultant thereto..."

Section 6 prohibits participation by state employees in particular matters in which

> "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..."

Section 6 is more restrictive than Article IX in two ways. First, its prohibition extends to members of the employee's immediate family[8]/ and to prospective employers. Second, it prohibits **participation** by the employee. Participation is defined as

> "participat[ing] 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)

This means that it is improper for SHCC members with conflicts of interest to even discuss any issue related to the matter in spite of the fact that they have disclosed the existence of the conflict. To participate even "in the formulation of a matter for vote is to participate in the matter." **Graham v. McGrail,** 370 Mass. 133, 138 (1976). The Court in **Graham** goes further to say that "...the wise course for one who is disqualified from all participation in a matter is to leave the room. We do not think he can be counted in order to make up a quorum." **Id.** at 138 (citations omitted). See also EC-COI-84-40.

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[6]/The existence of the limitation of liability provision and the conflict of interest provision in 42 U.S.C. §300M-3 (and set out supra) lend further support to the Commission's conclusion. The fact that Congress felt it necessary to include the provisions indicates that the SHCC performs a public, as opposed to private, function.

[7]/Although you have not raised the question it should be noted that 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 SHCC members under the Act. The sole reference to limitations on conflict of interest activities is found at 42 U.S.C. 300M-3(e) and is set out supra. Not only does the Act lack any explicit provision pre-empting states from applying such statutes, but it also reflects an overall Congressional scheme under which the administration and implementation of the Act has been delegated to the states. EC-COI-85-30.

[8]/"Immediate family" includes the employee, his/her spouse and their parents, children, brothers and sisters (G.L. c. 268A, §1(e)).

Article IX is more restrictive than §6 in that its prohibitions extend back to the twelve months preceding the action being taken.[9]/ While an agency's own standards of conduct may not be any less restrictive than those found in c. 268A, the Commission, absent special circumstances, will not evaluate rulings or standards established by the agency itself which give guidance to its employees in the area of conflict of interest and which are consistent with the principles and aims of §23. See EC-COI-80-51.

Article IX also provides that a conflict of interest exists when an SHCC member's participation in a matter would give the appearance that a member is otherwise motivated by private gain. This is analogous to the §23 prohibition on public employees engaging in conduct which would "...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." Section 23 goes further than Article IX in its specifics, prohibiting as it does the acceptance of other employment that would impair one's independence of judgment in the exercise of official duties and the use (or attempt to use) one's official position to secure unwarranted privileges for himself or others. Section 23 also prohibits the disclosure of confidential information acquired in the course of one's official duties.

Although your request for an advisory opinion focuses on participation of SHCC members in matters before the SHCC, you should be aware of other provisions of G.L. c. 268A which will affect the conduct of SHCC members. Section 4(c) and 7 in particular are relevant. Section 4(c) prohibits an SHCC member from acting as agent or attorney, other than in the proper discharge of his official duties, for anyone other than the Commonwealth in relation to a particular matter in which he participated as a state employee or which is or within one year has been a subject of his official responsibility. Section 7 prohibits an SHCC member from having a financial interest, directly or indirectly, in a contract made by an agency whose activities he participates in or has official responsibility for. See G.L. c. 268A, §7(d). SHCC members may request guidance from the Commission over the application of these provisions to their specific situations.

DATE AUTHORIZED: April 17, 1984

[9]/This twelve month requirement is consistent with the provision at 42 U.S.C. 300M-3(e).

CONFLICT OF INTEREST OPINION NO. EC-COI-84-56

FACTS:

You are a member of the General Court and Chairman of a Committee (Committee). You are also a private attorney involved in a real estate development business. Municipality ABC has recently made available for purchase and development certain property. ABC has requested proposals from developers and has established guidelines for developer sumbmissions. The review process includes other agencies of ABC. You plan to become a member of a development team seeking designation as the purchaser and developer of the property. You are considering serving as either a part-owner or advocate on behalf of the proposal before ABC agencies and private entities. You state that the proposal would not be the subject of any proceedings before state agencies. The development team will not be seeking financial assistance from any state agency.

QUESTIONS:

1. Assuming that your involvement with the development team is limited to an ownership interest and advocacy of the team's proposal to ABC, would you be in compliance with G.L. c. 268A?
2. What restriction does G.L. c. 268A place on your activities as a member of the development team?

ANSWERS:

1. Yes.
2. You will be subject to the limitations set forth below.

DISCUSSION:

1. As a member of the General Court, you are a state employee within the meaning of G.L. c. 268A, §1(q). Section 4 of G.L. c. 268A prohibits state employees from receiving compensation from or acting as agent or attorney for non-state parties in relation to any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest. While the development team's submission to ABC would be a "particular matter" under G.L. c. 268A, §1(k), the submission would not be a matter in which a state agency is a party or had a direct and substantial interest. The review process includes only municipal, as opposed to state agencies, and would not be subject to regulation by any state agency. Compare, EC-COI-82-15 (the application for a special development permit from a city council is not a matter of direct

and substantial interest to the state; EC-COI-80-95 (local cable televison licensing decisions are of direct and substantial interest to the state). Accordingly, your receipt of compensation or acting as agent or attorney for the development team before ABC agencies would not violate §4.[1]/

You state that the team will not be seeking financial assistance from any state agency. Since the team would therefore have no financial interest in any contracts made by state agencies, your potential ownership interest with the organization would not pose any problems under G.L. c. 268A, §7. Further, there would be no state contracts or other particular matter which would require your participation as a legislator within the meaning of G.L. c. 268A, §6 or §6A.

2. As a member of the General Court and a state employee, you are also subject to G.L. c. 268A, §23 ¶2(3) which prohibits you 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 legislative duties, or that you are unduly affected by the kinship, rank, position or influence of any party or person.

The fact that you may take actions as a legislator affecting people or entities with whom you may have dealings as a member of the development team does not, in and of itself, create a problem. For example, §23 would not prohibit a member of the Insurance Committee from seeking personal insurance from an insurance company under his Committee jurisdiction, a member of the Public Safety Committee from seeking automobile vehicle registration, or a member of the Judiciary Committee from representing a private client before a state court. There are, therefore, a range of private activities which, by their nature, do not create the impression of undue official favor within the meaning of §23 ¶2(3). Nonetheless, the existence of a regulatory relationship does create certain risks and may place obligations on public employees to take steps to avoid the impression that they will be unduly influenced by their private relationship. See, **In the Matter of Kevin H. White,** 1982 Ethics Commission 80; EC-COI-83-87. Moreover, if other facts beyond the overlap of public and private dealings come into play, the impression of undue favoritism may be inescapable. See, **In the Matter of Rocco J. Antonelli,** 1982 Ethics Commission 101, EC-COI-83-176. While the Commission has previously recognized that some official activities of a legislator are distinguishable from those of executive branch employees by virtue of the collective nature of the legislative process, there are nonetheless opportunities for legislators to take determinative action with respect to particular bills. For example, in EC-COI-83-43, the Commission concluded that a member of a Ways and Means Committee would violate §23 by soliciting the purchase of financial instruments from individuals, unions and other entities over which he had significant authority in connection with legislative approval of the expenditure of state funds. More recently in EC-COI-83-102, the Commission advised a legislator that issues under §23 would be raised if he solicited merchants whose special legislation or other particular matter he is about to vote upon.

Because you have not as yet identified any particular entity with which you will deal, there is insufficient information from which the Commission can determine whether the extent of your official legislative responsibilities concerning the entity creates an inescapable impression of undue favoritism by virtue of your private dealings. Assuming that you remain interested in dealing with private entities on behalf of the group, you should renew your opinion request and notify the Commission once those entities have been identified. The Commission's subsequent conclusion under §23 will turn on whether the entity which you solicit has "a distinct and unique interest before you in the legislature" EC-COI-83-43, and on your actions as a legislator with respect to those interests.

Irrespective of whether you deal with private entities or merely serve as a part-owner, the provisions of §23 will remain in effect. For example, if you made a decision as Committee chairman which was unduly affected by the decision of a particular entity relating to your group, you would be in violation of §23. See, EC-COI-83-34; 83-48.

DATE AUTHORIZED: May 8, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-61

FACTS:

You are a member of the General Court and of a Committee (Committee) and are not a candidate for reelection. As a legislator, you participate in the debate and voting on bills which, if passed, become general or special legislation. Certain bills involving particular issues are initially reviewed by the Committee. The final recommendation that a bill should or should not pass generally comes from the Ways and Means Committee.

You wish to pursue some private business opportunities. One area which you would like to become involved with while still a member of the General Court is the marketing of "real estate/syndication/tax shelter

[1]/Because your situation does not present a violation of §4, it is unnecessary to determine the extent to which the exemptions for members of the General Court would apply to you.

arrangements." You describe these arrangements as being the result of the ability of certain parties (real estate developers, for example), to sell for immediate gain financial losses which the purchaser may use for investment purposes. Generally, the individual or entity incurring the losses sells these losses outright to a syndication house which then will resell them to a brokerage firm. The brokerage firm then markets these to interested investors. The original seller has no interest in the losses after the initial role. You would be acting on a commission basis as a representative of the syndication house in the purchase and marketing of these losses.

You would also like to market and, in some cases, participate in these tax shelter arrangements after you leave the General Court. You wish to participate as a partner in real estate development, or to act as a consultant to or agent for real estate developers. Your representation of these developers as an agent and your employment as a consultant by them could involve appearances before state agencies or legislative committees. And, the real estate developments with which you may be involved, including some of those which will be generating losses for the tax shelter arrangement, may have been funded by programs administered by state agencies like the Massachusetts Housing Finance Agency (MHFA), the Massachusetts Industrial Finance Agency (MIFA) or the Government Land Bank. Neither the Committee nor the legislature generally makes decisions regarding the implementation of the various programs run by these agencies, nor do they appropriate funds for them. (These agencies are self-sustaining through the issuance of bonds.)

Finally, you also would like to act as a business agent in Massachusetts for out-of-state corporations, partnerships or other organizations.

QUESTION:

How does the conflict of interest law, G.L. c. 268A, affect your future employment opportunities?

ANSWER:

The conflict of interest law does not prohibit you from pursuing any of the activities described above, although under certain circumstances there may be some limitations.

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 subject to the provisions of that law.

While a State Employee

Section 4 of the conflict law provides that no member of the Genral Court shall personally appear before any state agency for any compensation other than his legislative salary unless:

(1) the particular matter 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.

The activities you propose to pursue while still in the legislature do not appear to require such appearances. You should, however, keep this restriction in mind should you be approached while still in the General Court for any of the types of representative activities you intend to pursue after leaving the General Court.

Section 6 of G.L. c. 268A prohibits a state employee from participating as such in any "particular matter"[1]/ in which he, a business organization by which he is employed, or an organization with which he is negotiating or already has an arrangement for prospective employment has a financial interest. The fact that state funds might be involved in some of the real estate developments generating the tax shelter arrangements might appear to bring the provisions of §6 into play because of your role as Committee member and as a legislator in the legislation regarding the programs and agencies from which the funds originate. That legislation, however, because it focuses on programs rather than specific projects within those programs, is general legislation, which is explicitly excluded from the definition of particular matter. Therefore, your financial

[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).

interest or that of a syndication house which might employ you would not implicate the prohibition against participation contained in §6 until the end of your term.[2]/

Section 7 of the conflict law prohibits a state employee from having a financial interest in a contract made by a state agency. On the facts as you present them, you would not be considered to have a financial interest in funding agreements between state agencies and the developers with whom you will be dealing. If, however, the facts were to change (for example, you agreed with a developer at the outset of a state-funded development that you would be involved with marketing his losses) the result under this section might be different. You should feel free to seek another opinion from the commission in that event.

Section 23 prohibits a state employee from using or attempting to use his official position to secure unwarranted privileges for himself. It also proscribes conduct which gives reasonable basis for the impression that any person may improperly influence or unduly enjoy his favor in the performance of his official duties.

As a legislator and as a member of the Committee, you have authority over matters of particular interest to certain individuals. For example, certain employees of the legislature may be subject to your control, and certain individuals or entities might have a special interest in a particular piece of legislation pending in the legislature. The Commission has held in prior opinions that individuals who may be directly and significantly affected by the authority of a state employee at a given time should not be subjected to solicitations from that state employee. See EC-COI-82-64; 83-43. Their decisions might be affected by the potential impact, positive or negative, from the exercise of that authority. Therefore, §23 prohibits you from marketing these tax shelter arrangements to persons at a time when they have a specific interest in a piece of legislation before you, or to persons like legislative employees who may constantly be subject to your direct authority.

As a Former State Employee

Section 5(a) of the conflict law prohibits a former state employee from being compensated by, or acting as agent or attorney for, anyone other than the state in connection with any particular matter 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 state employee for one year from appearing personally before any state agency on behalf of a non-state party in connection with any particular matter in which the state is a party or has a direct and substantial interest and which was within his official responsibility during the last two years of his state employment.

Based on the facts you have detailed, neither of these sections would limit your activities. Your compensation in the marketing of the tax shelter arrangements would be in return for those marketing services and not in connection with any particular matters in which you participated. Although as a partner in a state-funded real estate development you might have an interest in a state contract, your only participation in this regard would be in connection with the general legislation related to the program or the funding for the program. Since general legislation is not a particular matter, §§5(a) and 5(b) will not apply. For this same reason, your appearance on behalf of developers or firms before state agencies, boards and subdivisions other than the legislature would not be in connection with particular matters.

Section 5(e) of G.L. c. 268A prohibits a former member of the General Court from acting as a legislative agent[3]/ for anyone other than the state before the governmental body with which he has been associated within one year after leaving that body. The prohibition applies to you in connection with actions as a legislative agent before both branches of the General Court. See EC-COI-81-80.

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[2]/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.

[3]/For the purposes of G.L. c. 268A, §5(e), "legislative agent" is defined as "any person who for compensation or reward does any act to promote, oppose, or influence legislation, or to promote, oppose, or influence the governor's approval or veto thereof or to influence the decision of any member of the Executive branch where such decision concerns legislation or the adoption, defeat, or postponement of a standard, rate, rule or regulation pursuant thereto. The term shall include persons who, as any part of their regular and usual employment and not simply incidental thereto, attempt to promote, oppose, or influence legislation or the governor's approval or veto thereof, whether or not any compensation in addition to the salary for such employment is received for such services."

"Legislation," is defined as "all bills, resolutions, and all proposals of every kind, character or description considered by the general court, any committee thereof, or the governor."

CONFLICT OF INTEREST OPINION NO. EC-COI-84-63

FACTS:

You are employed by a state agency (ABC). In that position, you design customized devices. Your compensation is the only remuneration you receive in connection with devices developed in your state position.

You have also, during your non-working hours and at your own expense, developed certain other devices for which you perceived a general need. You would like to pursue commercial marketing of the devices you have developed.

QUESTION:

May you commercially market, for your own benefit, devices which you designed and developed:

1. in the course of your ABC employment; and/or
2. in your non-working hours, at your own expense and upon your recognition or perception of a need for the devices.

ANSWER:

1. No.
2. Yes, provided you comply with certain conditions.

DISCUSSION:

As an ABC employee, you are a state employee as defined in the state conflict of interest law, G.L. c. 268A, §1 et seq., and, as a result, are subject to the provisions of that law.

Devices Developed During Your State Employment

Section 23 of the conflict law prohibits a state employee from using his official position to secure or attempt to secure unwarranted privileges or exemptions for himself or others. You are compensated by the state for your work designing and developing those devices during your state employ. You utilize state supplies and facilities in so doing. If you were to market these devices commercially for private gain, you would be using your position at ABC to secure an unwarranted privilege, in violation of §23. See EC-COI-82-17; 83-154. As a result, you may not market devices developed in the course of your ABC employment for private gain.

Devices Developed on Your Time and at Your Expense

Section 23 does not prohibit you from marketing those devices which you design and develop on your own time and at your own expense. However, it does prohibit you from using any state facilities or supplies for that purpose. And, you may not exploit the fact that you are employed by the state as a designer of such products to further your private efforts, nor may you attempt to market these devices to or at any ABC facility.

Section 7 of the conflict law prohibits a state employee from having a financial interest in contracts made by state agencies. If you attempt to market your devices to state agencies, or to individuals or entities which would use funds derived from state contracts to purchase those devices, this section could apply unless you qualify for one of the exemptions contained in it.

> The prohibitions in §7 do 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. . .

Sales to state agencies other than ABC, or to individuals or entities using state funds from contracts from agencies other than ABC would appear to qualify for this exemption, provided the public notice and disclosure requirements are complied with.

DATE AUTHORIZED: May 8, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-64

FACTS:

A municipal employee was indicted for misconduct in office. At the time of the indictment he was also suspended from his employment under §25 of G.L. c. 268A. The indictment subsequently was placed on file

by the court, and the employee's plea of nolo contendere and an agreement between the prosecuting and defense attorneys were accepted by the court. The agreement stipulated that the employee relinquished all claims to salary under G.L. c. 268A, §25 from the date of indictment to the date of the agreement. It also provided that the employee's plea was not an admission of guilt, and that acceptance of the plea by the court was not a finding of guilt. After the agreement was accepted by the court, the town removed the suspension and reinstated the employee.

QUESTION:

Will §25 of the conflict of interest law, G.L. c. 268A, preclude resuming payment of the salary of an indicted municipal employee whose proceedings have terminated by 1) an acceptance by the court of a plea of nolo contendere, 2) placement of the cases on file, 3) an agreement that claims to salary for the period of indictment be relinquished, and 4) agreement that acceptance of the plea of nolo contendere does not constitute findings of guilty?

ANSWER:

No, because of the agreement between the prosecuting and defense attorneys.

DISCUSSION:

The employee in question is a municipal employee for the purposes of G.L. c. 268A. See, G.L. c. 268A, §1(g). As a municipal employee he is subject to the provisions of G.L. c. 268A, §25. Section 25 provides in relevant part that

> [a]n officer or employee of a county, city, town or district...may during any period such officer or employee is under indictment for misconduct in such office or employment...be suspended by the appointing authority...Any person so suspended shall not receive any compensation or salary during the period of suspension...If the criminal proceedings against the person suspended are terminated without a finding or verdict of guilty on any of the charges on which he was indicted, this suspension shall be forthwith removed, and he shall receive all compensation or salary due him for the periods of this suspension.

It requires that the suspension of an employee who has been indicted "shall be...removed" if the proceedings following the indictment are terminated "without a finding or verdict of guilty."

The phrase "without a finding or verdict of guilty" can be construed to mean "a finding as opposed to a verdict" or "a finding of guilty or a verdict of guilty." If §25 were read "a finding as opposed to a verdict of guilty," a determination would have to be made whether the manner in which the proceedings of the [employees] were terminated was such that it constitutes a finding. There is, however, no need to reach that question if the statute is properly read "a finding of guilty or a verdict of guilty."

In construing statutory language, it is appropriate to refer to the usage of a term in other statutes. **Commonwealth v. Baker,** 368 Mass. 58 (1975). The Massachusetts statute setting forth the conditions for the admission of convictions into evidence in order to affect the credibility of a defendant, G.L. c. 233, §21, uses the phrase "finding or verdict of guilty" in a fashion that indicates that the phrase is to be read "finding of guilty or verdict of guilty." Section 21 reads, "[f]or the purpose of this paragraph, a plea of guilty or a finding or verdict of guilty shall constitute a conviction within the meaning of this section." **Id.** Case law has confirmed the reading of the phrase "finding or verdict of guilty" to be "finding of guilty or verdict of guilty." **Karesek v. Bockus,** 293 Mass. 371 (1936).

The cases in point terminated with the acceptance by the court of pleas of nolo contendere. While a plea of nolo contendere indicates that all the facts alleged in the indictment are admitted, **Commonwealth v. Marino,** 254 Mass. 533 (1926), **McHugh v. U.S.,** 230 F.2d 252 (1956), cert. denied 76 Sup. Ct. 1030, 351 U.S. 966; it means literally "I will not contest" and may be offered only with leave of court. **Blacks Law Dictionary,** 945. It may not be used against the defendant in civil actions based on the same acts, **Id.** and it may not be used to discredit a defendant in any suit based on other acts. **Okszewski v. Goldberg,** 223 Mass. 27 (1916). However, in view of the stipulation of the parties, the Commission need not reach the issue of whether the pleas of nolo contendere constitute either a finding of guilty or a verdict of guilty. The case of the municipal employee clearly did not terminate with either a finding of guilty or a verdict of guilty. The court itself confirmed that fact in accepting the agreement of the prosecuting and defense attorneys that expressly stated that the "acceptance of the plea [of nolo contendere] by the court is not a finding of guilt."

Under G.L. c. 268A, §25 suspensions of indicted employees must be removed unless there is a "finding or verdict of guilty." The commission finds that the requirement for the removal of the suspension applies.

DATE AUTHORIZED: May 8, 1984

COMMISSION ADVISORY NO. 4

The Commission has received numerous inquiries regarding the application of Chapter 268A (the conflict of interest law) to the political activities of public employees. Although the conflict law does not explicitly address political activity by public employees, certain provisions of it may be violated in the course of conducting or participating in a political campaign. The purpose of this advisory is to explain to public employees how Chapter 268A applies to their political activities.

Section 23 of the conflict of interest statute contains five standards of conduct applicable to all public employees in the Commonwealth. Two of those standards provide that 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; [or]
>
> . . . 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.

In various advisory opinions issued to state, county, and municipal employees, the Commission has discussed the specific application of these standards in connection with political activity. See, e.g. EC-COI-81-166; 82-21; 82-51; 82-112; 84-44.

The Commission has ruled consistently that the use of public resources, available by virtue of one's public employment, for the purpose of conducting or supporting a political campaign amounts to the use of official position to secure an unwarranted privilege for oneself or another. These resources include publicly-provided stationery, office supplies, utilities, telephones, office equipment (e.g. copying machines, typewriters, word processors), office space or other facilities. These are intended for the conduct of public business, not for advancing the personal, private or political interests of public employees. The taxpayers of the Commonwealth should not be forced to subsidize the political activities of those employed in government agencies.

Except in certain specific instances (for example, the State Ethics Commission and its staff) and except for certain kinds of activities (see Chapter 55), public employees are not prohibited from engaging in political activity. They should not, however, pursue those activities during their normal working hours. Their employer is the state, county or municipality, as the case may be. While being paid by the taxpayers, they are to be doing the taxpayers' work, and not politicking for themselves or individual candidates. Normal working hours will be those set by the employer through regulations or otherwise, or as designated in the applicable collective bargaining agreement. Where such hours have not been clearly defined, it will be incumbent upon an employee to resolve any ambiguity with his or her appointing official before engaging in political work.

This advisory is primarily concerned with the application of Chapter 268A to political activities of public employees. Although it is not a statute under the Commission's jurisdiction, Chapter 55 contains various provisions related to political fundraising and other activities applicable to those employees. Sections 16 and 17 of that Chapter provide a measure of protection for them, as well. These sections read as follows:

> §16 No person in the public service shall, for that reason, be under obligation to contribute to any political fund, or to render any political service, and shall not be removed or otherwise prejudiced for refusing to do so.
>
> Violation of any provision of this section shall be punished by a fine of not less than one hundred nor more than one thousand dollars.
>
> §17 No officer or employee of the commonwealth or of any county, city or town shall discharge, promote, or degrade an officer or employee or change his official rank or compensation, or promise or threaten so to do, for giving, withholding or neglecting to make a contribution of money or other valuable thing for a political purpose.
>
> Violation of any provision of this section shall be punished by a fine of not less than one hundred or more than one thousand dollars.

In addition to these laws, individual public agencies may also place limitations on the political activities of their employees. And, public employees may be subject to the Hatch Act, a federal law which limits certain types of political activity. Public employees should determine what restrictions they are subject to as a result of their employment position.

DATE AUTHORIZED: May 8, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-65

FACTS:

You presently serve as one of five trustees on the George Robert White Fund (GRW Fund). The Fund

was established as a permanent charitable trust fund pursuant to Article Fourteen of the will of George Robert White dated May 21, 1920. The purpose of the GRW Fund is to use the net income to finance projects involving "works of public utility and beauty, for the use and enjoyment of the inhabitants of the City of Boston. . . " No part of the income is to be used "for any purpose which it is the duty of the City in the ordinary course of events to provide."

Mr. White further stipulated that the GRW Fund is to be administered by five trustees: The Mayor, the President of the City Council, the City Auditor, the President of the Chamber of Commerce and the President of the Bar Association of the City of Boston. Pursuant to the direction of Mr. White, the GRW Fund has an office in City Hall where one administrative assistant keeps the books and records. The City of Boston pays the salary and provides other city benefits for the administrative position, but is reimbursed by the Fund for both the salary and benefits.

QUESTION:

Are the trustees of the GRW Fund considered municipal employees for the purposes of G.L. c. 268A?

ANSWER:

No.

DISCUSSION:

Chapter 268A defines municipal employee as "a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis. . . " G.L. c. 268A, §1(g). The issue of whether GRW Fund trustees are considered municipal employees therefore depends upon whether the GRW Fund is a municipal agency, which is defined by the conflict of interest law as "any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder." G.L. c. 268A, §1(f).

In its previous determinations concerning the public status of an entity for the purposes of Chapter 268A, the Commission has focused on the following four factors:

(1) the means by which it was created (e.g. legislative or administrative action);

(2) the entity's performance of some essentially governmental function;

(3) whether the entity receives and/or expends public funds; and

(4) the extent of control and supervision exercised by government officials or agencies over the entity.

None of these factors standing alone is dispositive; rather, the Commission has considered the conjunctive effect produced by the extent of each factor's applicability to a given entity. For example, the Commission concluded that local private industry councils are municipal agencies within the meaning of c. 268A §1(f) because of the role they play in the implementation of the Federal Job Training and Partnership Act; namely in the decision-making role they share with local elected officials in the development of job training plans, the selection of grant recipients and the expenditure of public funds. EC-COI-83-4. See also EC-COI-82-25 [regional school district is a municipal agency for c. 268A purposes because it is supported solely by public funds and it provides a service which each municipality in the Commonwealth is required by law to provide].

The establishment, funding and functions of the GRW Fund can be distinguished from those entities deemed to be public agencies by the Commission, based on the foregoing factors.

1. Creation

The GRW Fund was not created by direct legislative or administrative action,[1]/ but rather was established as a permanent charitable trust fund pursuant to an individual's will. The City of Boston clearly must have taken some type of administrative action in order to accept the bequest. However, "[a] completed gift duly accepted by the town constitutes a contract between the town and the estate of the [testator]." **City Bank Farmers Trust Co. v. Carpenter,** 319 Mass. 78, 80 (1946). Thus, the City's acceptance of Mr. White's gift for "important civic improvements" can be compared to a contract between the City and a vendor to provide goods and services to the City of Boston. The use of a City office and the transaction of the Fund's business through City departments are terms of that contract, conditions to be met in order to accept Mr. White's bequest. The establishment of a municipal agency or department cannot be unilaterally accomplished via an individual's will.

[1]/Compare other chartitable institutions which serve public functions — e.g. the Franklin Foundation, the Economic Development and Industrial Corporation, the Trustees of the Public Library of the City of Boston and the Old South Association — which were all created by special act of the legislature. The significance of some specific legislative underpinning in defining an entity as a public agency or instrumentality has been made clear by the Supreme Judicial Court. See **Opinion of the Justices,** 334 Mass. 760 (1956).

2. **Governmental Functions**

Although the GRW fund's purpose is to finance projects for the use and enjoyment of Boston residents, essentially a public function,[2]/ the will specifically states that the monies shall not be used for any kind of function that the city would ordinarily finance. With this language, Mr. White expressly excluded the use of Fund monies to finance "essentially governmental functions" from the options available to the trustees. Instead, Mr. White instructed that the monies be used for such projects as a "forum of substantial proportions for public gatherings" and other city improvements such as a zoological garden, uses which the courts have traditionally accepted as public charitable uses.[3]/ Since 1976, the GRW Fund has financed such projects as the Orient Heights Youth Recreation Center in East Boston's Noyes Park, the Community Resource Center at the Franklin Park Zoo and the South Boston Health Center, and the Children's Zoo project in Franklin Park. These functions could be either publicly or privately financed and managed, and therefore do not appear to constitute "essentially governmental functions."

3. **Public Funds**

Likewise, the GRW Fund does not receive or expend public funds: the net income from the investment of the original endowment in Mr. White's will to the Fund constitutes the expendable assets. While the day-to-day administration of the Fund is performed by a city employee, the Fund reimburses the City for the employee's salary and benefits. Furthermore, the Fund's assets are to be kept separate from other city assets. See Municipal Register p. 149 (1978-79). **Compare** EC-COI-81-77 [where the monies from private trust funds are commingled, and are by statute under the control and management of University Trustees, to be treated in effect as university funds]. The City's acceptance of Mr. White's bequest therefore did not convert the funds to City funds, but rather established a contract, the terms of which were provided for in Mr. White's will.

4. **Municipal Government Control Over the Fund**

The GRW Fund is first and last a public charitable trust fund, to be governed by the law of trusts. Because the "inhabitants of the City of Boston" are the beneficiaries of the GRW Fund, the will provides that it be administered through the regular departments of the City and that the Board of Trustees have a City office. These provisions for a public administration of the Fund appear to derive out of Mr. White's desire for accountability on the part of the Fund's managers, as evidenced by the additional provision that "all books and records of every nature relating to the management of the Fund [be] readily accessible during business hours for the reasonable inspection of citizens, so that all who so desire may have full knowledge of the conduct of the business of the Fund." Likewise, the fact that the majority of the Trustees are city officials is not dispositive. See EC-COI-83-74 [where an entity is deemed a municipal agency even though the majority of its membership is selected from representatives of the private sector, because of other factors such as the expenditure of public funds]. As with all trustees of public charitable trusts, the three city officials acting in their trustee capacities owe a duty of loyalty to the Fund: they must administer the trust solely with a view to the accomplishment of the purposes of the trust. Scott on Trusts, §379 (3rd ed. 1967). They owe their selection to the will of Mr. White and not to any action on the part of an appointing government official. As trustees, the three city officials have only such powers as are conferred upon them in specific words by the terms of the trust or are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust. Scott on Trusts, §380 (3rd ed. 1967). While Mr. White may have chosen municipal officials to fill three of the five trustee positions for the perspective they would bring to the funding determinations, the three officials are acting as individuals in their roles as trustees. Redress for any alleged breach of trust therefore lies in the law of trusts as applied to an individual's services as a trustee,[4]/ rather than in the application of the conflict of interest law due to his separate role as a municipal official.

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[2]/See **Gloucester Ice and Coal Storage Company v. Assessors**, 337 Mass. 23, 26 (1958) [where the Supreme Judicial Court concluded that an entity was not a part of the city of Gloucester, even though it was conceived to perform an essentially public function].

[3]/See, e.g., **Nickols v. Commissioners of Middlesex County**, 341 Mass. 13 (1960); **Holmes v. Welch**, 314 Mass. 106 (1943); **Pierce v. Atty.Gen.**, 254 Mass. 389 (1920).

[4]/The avenues available to enforce a charitable trust include

1. application by the trustees to the court for a bill of instructions as to the extent of their power and duties, see, e.g., **City of Boston v. Curley**, 276 Mass. 549 (1931), Scott on Trusts, §394 (3rd ed. 1967);

2. a suit by one trustee against the others to enforce the trust or to compel the redress of a breach of trust, see, e.g., **Crawford v. Nies**, 224 Mass. 474 (1916), Scott on Trusts, §391 (3rd ed. 1967); and

3. action by the Attorney General, as representative of the public interests, to protect a public charitable trust and enforce proper application of its funds. See **Davenport v. Atty. Gen.**, 361 Mass. 372 (1972). See also G.L. c. 12, §8 (as amended by St. 1979 c. 716) ["The attorney general shall enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof."]

Based on the foregoing, the Commission concludes that the GRW fund is not a municipal agency for the purposes of Chapter 268A. As a charitable trust fund established to finance "important civil improvements" aimed at benefitting the residents of Boston, the Fund may share certain attributes of a public entity. However, the Commission holds that the GRW Fund remains a private entity whose administration is subject to the law of trusts, as opposed to an agency or instrumentality of the City of Boston performing governmental functions whose employees are subject to the conflict of interest law.[5]/

DATE AUTHORIZED: May 29, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-66

FACTS:

The Administering Agency for Developmental Disabilities (AADD) is an agency within the Executive Office of Administration and Finance. The AADD administers the Developmental Disabilities Program (the Program) in Massachusetts pursuant to 42 U.S.C. §6063(b)(1)(B). The Program receives approximately $1.0 million federal funds which is distributed through a competitive process. Private non-profit organizations and public agencies submit proposals, and the AADD funds those proposals which meet their criteria and which are consistent with Program priorities. The establishment of Program priorities and the overall planning and evaluation of state efforts in connection with the Program are the functions of the Massachusetts Developmental Disabilities Council (MDCC) pursuant to 42 U.S.C. §6067.[1]/

In the past, all grant applications have been reviewed solely by AADD staff. This year, in an effort to incorporate outside views in the funding process. The AADD has proposed the establishment of a Grants Review Committee (GRC). The membership would be drawn from AADD's internal staff, knowledgeable state agency personnel, experts in the field, consumers, and MDDC members. The GRC's function would be to review grant proposals and make recommendations to the AADD as to which are appropriate for funding. In their review of proposals they would use the same evaluation criteria which the AADD staff would use in making the final decision. The GRC's recommendations would not be binding on the AADD although they would be given consideration. Assuming the GRC performed as planned, it would be made a permanent part of the funding process. GRC members would receive no compensation for their services, nor would they be reimbursed for their expenses.

QUESTIONS:

1. Would members of the GRC be considered state employees within the meaning of G.L. c. 268A?
2. If so, how would G.L. c. 268A apply to GRC members?

ANSWERS:

1. Yes.
2. GRC members are subject to the limitations set forth below.

DISCUSSION:

1. **Status of GRC 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 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 of the Commission have identified several criteria useful to an analysis of what constitutes "performing services for...a state agency." Among those criteria are

> 1. the impetus for the creation of the position (e.g. whether by statute, rule, regulation or otherwise);
> 2. the degree of formality associated with the job, its procedures, and its anticipated work product;
> 3. the entity's performance of some essentially governmental function;
> 4. the extent of control and supervision exercised by governmental officials or agencies over the entity.

[5]/In view of the Commission's conclusion, city officials who serve as GRW Fund trustees would be potentially subject to §17(c) insofar as their trustee duties might constitute acting as the agent of the GRW Fund. However, Mr. White expressly designated three city officials by job title as trustees in his will, and the City of Boston assented to such ex officio trusteeships by accepting Mr. White's bequest. The Commission therefore holds that city officials in their GRW Fund trustee capacities are acting "in the proper discharge of [their] official duties," which exempts them from the provisions of §17(c). EC-COI-83-20; 81-33; compare EC-COI-83-137.

[1]/Because of the largely consumer/provider makeup of the MDDC mandated by the statute, Congress decided to make the actual awarding of grants and contracts the responsibility of the state's administering agency (in this instance, the AADD) "in order to avoid any possibility of conflicts of interest on the part of individual council members..." 1978 United States Code Congressional and Administrative News, 7367.

In a given fact pattern some of these criteria may be given more or less weight. Each factual situation must also be viewed in light of the purpose of the conflict of interest statute. Keeping these precedents in mind the Commission concludes that members of the GRC would be performing services for a state agency within the meaning of G.L. c. 268A.

First, there is the impetus for the creation of the GRC. There is no statutory or regulatory requirement that a body like the GRC be created. 42 U.S.C. §6063 requires only that the administration of the Program be done by whatever body a state chooses to designate as its administering agency. In Massachusetts that agency is the AADD. It appears to be given wide discretion in terms of how the Program money is disposed of both substantively and procedurally. The only real limitation is that the programs or entities the AADD chooses to fund must have goals which are consistent with the plans and priorities of the MDDC. Even though there is no requirement for a GRC, the GRC would be a part of a function that is statutorily mandated. In this way it can be distinguished from the informal, **ad hoc** task forces whose status previously has been considered by the Commission.[2]/ In each of these previous opinions the task force or group in question was not providing its services in connection with any statutorily required function. In each case the subjects of its expertise were very general, e.g. general advice on the overall operation of a state agency (EC-COI-83-12), or discussions about the range of legal issues in various areas within a secretariat's jurisdiction (EC-COI-79-12).

The second criterion utilized by the Commission deals with the degree of formality associated with the job, its procedures, and its anticipated work product. The GRC would be utilizing evaluation criteria established by the AADD for its review of funding proposals. The existence of such substantive guidelines is a trait the GRC would share with those entities the Commission has found to be performing services for a state agency. See EC-COI-84-55; 83-74. Compare EC-COI-82-81. Although the final work product is a recommendation on a funding decision that is not binding on the AADD, such a work product is much more specific than, for example, commenting on proposed legislation or regulations (EC-COI-80-49) or expressing viewpoints on general topics in a purely advisory way (EC-COI-81-4; 79-12). Additionally, it is anticipated that the GRC would become a permanent part of the funding decision process. This suggests a much greater degree of formality than that found in the previously cited Commission decisions where the fact that the entity in question's role would be of limited duration was critical to the Commission's finding that its members were not state employees. See EC-COI-83-3; 79-12.

A third criterion is whether or not the entity is performing some essentially governmental function. In the case of the GRC it is clear from a reading of 42 U.S.C. §6063 that decisions regarding the awarding of grants are to be the function of the state administering agency. Indeed, up until this year the funding decisions have been handled exclusively by AADD staff. Thus, in spite of the fact that the majority of GRC members would be drawn from outside the AADD, the GRC would be performing a governmental function. This is not to say that including outside viewpoints in that function may not only be appropriate but also desirable. That decision is left to the discretion of the AADD.

The last criterion is the extent of control or supervision exercised by government officials or agencies over the entity. The GRC would be required to function totally within the guidelines established by the AADD, which in turn fashions its guidelines to be consistent with the MDDC's plan and priorities. Both the AADD and the MDDC are state agencies within the meaning of G.L. c. 268A. Furthermore, the GRC presumably would have access to AADD staff and resources in performing its work. Given this high degree of control by the AADD and the MDDC, the GRC can be distinguished from those **ad hoc**, informal advisory groups whose agendas and work product are not so narrowly prescribed.

2. Application of G.L. c. 268A to GRC Members

Because GRC members would not be compensated for their services, they would be considered special state employees as defined in G.L. c. 268A, §1(o). The statute imposes fewer restrictions on the activities of special state employees. The proposed membership of the GRC would include state agency personnel, experts, consumers, and MDDC members. The restrictions applicable to GRC members would be as follows.

Section 4 of the statute prohibits a special state employee from receiving compensation from or acting as agent or attorney for anyone other than the commonwealth or a state agency in relation to any particular matter[3]/ in which the commonwealth or a state agency is a party or has a direct and substantial interest and in which he has participated as a state employee or which is pending in the state agency in which he is serving. Generally this would prohibit a GRC member from

[2]/See e.g. EC-COI-83-21; 82-81; 81-4; 79-12.

[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 organizations, powers, duties, finances and property.

being compensated by an outside entity in connection with that entity's application for Program funds. The member would also be prohibited from acting as agent for anyone in connection with a funding application.[4]/

Section 6 of the statute prohibits a state employee from participating as an employee in a particular matter in which he or a business organization in which he serves as an officer, director or employee has a financial interest. Where the state employee's duties would require him to participate in the matter, the employee must advise his appointing authority and permit that person to decide whether the financial interest is substantial enough to require the employee to abstain from any participation in the matter. GRC members whose organizations have financial interests in AADD funding decisions would also be required to refrain from participating in discussions or votes on the funding applications of organizations or individuals who are in direct competition for the same funds. See EC-COI-83-78.

Section 7 of the statute prohibits a state employee from having a financial interest in a contract made by a state agency. Since this provision encompasses employment contracts, it is of particular significance to the members who are state agency personnel. As noted above, they, as members, are state employees. Accordingly, they would have a financial interest in their employment contract, i.e., their regular state job. However, since as members they are special state employees they would qualify for an exemption contained in §7(d) which permits them to serve as long as their work on the GRC does not require them to participate in or have official responsibility for any of the activities of the agency they are employed by, and they file an appropriate disclosure with the Commission.[5]/

Section 23 of the statute contains general standards of conduct which are applicable to all state employees. It provides in part that no state employee shall

1. use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others;

2. 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;

3. accept employment or engage in business activity which will require him to disclose confidential information he has gained in his official position, nor use such information to further his personal interests.

Under these provisions GRC members who also have connections with entities seeking or receiving Program funding would have to avoid using their membership to secure unwarranted privileges (such as extensions of deadlines for submission of proposals) for the entities they are connected with. GRC members should also avoid participating as members in funding recommendations which would involve their organizations since to do otherwise would give reasonable basis for the impression that their connection with the organization could improperly influence their recommendations.[6]/

DATE AUTHORIZED: May 29, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-67

FACTS:

You are employed part-time as a consultant to a legislative committee of the General Court. You are also engaged in the private practice of law. In this regard you share office space with a member of the General Court (X). Your association with X consists of sharing office expenses, including secretarial services, telephone, utilities, books, supplies and equipment. You have a joint checking account but the money is used solely to pay office expenses. You maintain separate practices and do not share profits or fees except as appropriate regarding individually referred cases. You each have your own stationery, and your telephone is answered "law offices."

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[4]/Acting as agent for an entity would include signing its contract for Program funding, acting as its advocate in the funding application process, completing its funding application, giving or preparing supporting information on its behalf to the AADD, or representing it in any way before the GRC. See EC-COI-83-78.

[5]/Because the MDDC is a state agency within the meaning of G.L. c. 268A, its members are state employees; however because they are not compensated for their MDDC work, they are special state employees. Since they would not be receiving compensation for their GRC work either, they have no financial interest in a contract made by a state agency, so §7 does not apply to them. On the other hand, if a GRC member who was recruited from the private sector has a financial interest in a contract made by the AADD, the only available exemption would be under §7(e) which would require approval by the governor and executive council.

[6]/All of the restrictions discussed above with the exception of §7 would be applicable to the GRC membership proposed. Because the Commission's jurisdiction is limited to G.L. c. 268A, it does not consider whether MDDC members might be prohibited by federal law from participating on the GRC. The AADD may wish to clarify that issue by contacting the office of the regional counsel for the U.S. Department of Health and Human Services. The focus of this opinion has been on the inclusion of those other than AADD staff in the GRC membership. Assuming that the participation of AADD staff on the GRC would be considered a regular part of their AADD employment, they do not appear to be subject to any restriction by §7.

You would like to accept court appointments to represent indigent criminal defendants in both state and federal court. None of the fees you earn by such representation would be shared with X except insofar as they would be used to help defray your share of the office expenses.

QUESTION:

Does G.L. c. 268A permit you to accept and be reimbursed for court appointments to represent indigent criminal defendants?

ANSWER:

Yes, subject to the limitations set forth below.

DISCUSSION:

Because your employment arrangement with the General Court permits you to engage in private employment during normal working hours, you are considered to be a "special state employee," G.L. c. 268A, §1(o).[1]/ The sections of that statute which are relevant to your situation are §4, §7, and §23. Section 4 provides in relevant part that a state employee may not act as agent or attorney for anyone in connection with any particular matter in which the Commonwealth is a party or has a direct and substantial interest. Criminal proceedings are particular matters within the meaning of the statute. However, because you are a special state employee you are only prohibited from acting as attorney for anyone in relation to a particular matter in which you participated as a state employee at anytime, or which is or within the past year has been a subject of your official responsibility, or which is pending in the state agency in which you work. In your position as consultant to the Committee you have not participated in any criminal prosecutions. Likewise no criminal prosecution has been the subject of your responsibility in the past year, nor is any criminal prosecution pending in the General Court. Therefore you would not be precluded by §4 from accepting court appointed criminal cases and being paid for such representation. You may also serve as court appointed counsel in criminal matters brought in federal court assuming the same conditions are met. See EC-COI-83-58.

Section 7 of the statute provides that no state employee may have 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. Special state employees are exempted from this provision by §7(d) as long as they do not participate[2]/ in or have official responsibility for any of the activities of the contracting agency and they file with the commission a statement making full disclosure of their interest in the contract. The issue in your case is whether as a consultant to the Committee you participate in any of the activities of the agency you would be contracting with. As reimbursement for court-appointed representation comes from the court system's budget, the courts would be the contracting agencies. The Committee may have responsibility for bills relating to the court system that are introduced in the General Court.[3]/ Its function is to hold hearings on the bills and report them out to the chamber where they originated. As an aide to the Committee your task is to advise the chairperson and Committee members as to the impact of a bill. For example, you would research to see how a proposed bill would change prior law or whether it was constitutional. Because your activity is so remote from the actual implementation of legislation that ultimately is enacted by the General Court, you do not participate in any of the activities of the Court within the meaning of G.L. c. 268A.

You should also be aware of the standards of conduct set out in §23. Section 23 ¶2(2) in particular provides that no state employee "shall. . . use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others." For example, should any bill come before the Committee which deals with the provision of legal services by Court-appointed counsel, you should avoid giving it preferential staff treatment.[4]/

You also ask whether you may now bill the commonwealth for court appointments you had taken previously but had not been paid for because of your uncertainty as to whether it was permitted by G.L. c. 268A. As long as you were a special state employee

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[1]/A special state employee, for your purposes, is one who

(a) Occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment, or

(b) In fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special state employee shall be in such a status on days for which he is not compensated as well as on days on which he earns compensation. G.L. c. 268A, §1(o).

You will note that if you are a special state employee by virtue of the first category you should file the required disclosure with the Commission.

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

[3]/(Text of footnote omitted).

[4]/Given the description of the work you perform for the Committee it does not appear that you would ever have occasion to participate in your consultant capacity in any matter in which you have a financial interest. Therefore the provisions of §6 would not apply to you. In the event such a matter were directed to the Committee (e.g., special legislation affecting the rate of payment of court-appointed counsel), you should follow the disclosure steps outlined in §6 of the statute.

when you accepted appointment and as long as you met all the requirements discussed above at the time of your representation, you may be paid for your services.

Lastly, you ask whether the fact that you share office space with an attorney who is a member of the General Court would preclude you from accepting court appointments. The answer to your question hinges on whether or not you and the person you share office space with are considered partners within the meaning of G.L. c. 268A, and on the scope of activities in which your partner participates or has official responsibility for as a state employee. The Commission has held in the past that parnership status is not limited to formal arrangements but that it also may be imputed where the association gives the public appearance of a partnership. See EC-COI-82-68; 80-43. In order to avoid having partnership status imputed, attorneys sharing office space are advised to use separate stationery and business cards, and to refrain from joining their names with others on law lists, telephone directories, or other professional notices other than to list the names of the individuals in the law office on the door of the suite. From the facts you have given, your association with X does not create the public appearance of a partnership. You have complied with the guidelines listed above, and the details of your office expense-sharing arrangement would not be something that the public would be privy to. Even assuming for the sake of argument that you and X would be considered partners, you could engage in the proposed activity. Limitations on the activities of business partners of state employees are set out in §5(d). Section 5(d) would prohibit you (as a partner) from representing any non-state party in any particular matter in which X participates, has participated in or which is the subject of his official responsibility.[5]/ As a member of the Committee, X would not participate in or have official responsibility for the court appointment of counsel to indigent criminal defendants.

DATE AUTHORIZED: May 29, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-70

FACTS:

The American Probation and Parole Association (APPA) and the New England Conference on Crime and Delinquency (NECCD) are planning to co-host a national conference on parole and probation in Boston on August 26-29, 1984. Both organizations are professional associations, and are chartered and incorporated as non-profit organizations. The mutual goals of APPA and NECCD include providing a forum for the exchange of ideas and knowledge in the area of crime and delinquency; stimulating the development of innovative services, research design and program evaluation; and encouraging public awareness activities and community involvement in the prevention of crime and delinquency. You are a member of NECCD and were elected this year as its President, a position which rotates annually and is unpaid. You are also the Commissioner of the Department of Correction.

QUESTION:

As the Commissioner of the Department of Correction, does Chapter 268A permit the use of staff and state-owned computers for the purpose of key punching registration information in connection with the APPA and NECCD conference?

ANSWER:

Yes, subject to the conditions set forth below.

DISCUSSION:

As the Commissioner of the Department of Correction, you are a state employee within the meaning of G.L. c. 268A, §1(q) and are therefore subject to the provisions of the conflict of interest law. Section 23 (¶2)(2) of Chapter 268A prohibits state employees from using their official positions to secure unwarranted privileges for themselves or others.

The §23 (¶2)(2) prohibition has been the focus of numerous prior conflict opinions. The Commission has held that a state employee's use of state offices, state supplies or state time for political activities, such as furthering his own or another's candidacy for public office, would violate that provision. See EC-COI-82-61 and 82-51. Likewise, a state employee cannot use state supplies or state time to prepare or deliver presentations under a consultant contract with a non-state group. See EC-COI-81-184. Both of these situations highlight the factor of private gain involved, which does not appear to be present in your situation.

In EC-COI-81-88, the Commission held that a state senator, who is a member of the board of directors of a non-profit energy research organization, cannot make his office space, telephone and other facilities at the State House available to that organization. The unwarranted privilege would be the organization receiving something not generally available to private interest groups. Id. Inasmuch as a state senator's function is to represent his entire constituency, such a favoring of one interest group would constitute a violation of §23 (¶2)(2).

[5]/ The enactment of general legislation is specifically excluded from the definition of a particular matter. §1(k).

You are similarly an officer of a non-profit organization who would like to make state facilities available to that private group. Unlike the state senator in EC-COI-81-88, however, your job entails work with a specific segment of the population, namely those individuals connected in some way with the corrections process. As the Commissioner of the Department of Correction, you are charged with, inter alia:

> 1. establishing and maintaining programs of research, statistics and planning, and conducting studies relating to correctional programs and responsibilities of the department;
>
> 2. utilizing, as far as practicable, the services and resources of specialized community agencies and other local community groups in the rehabilitation of offenders, development of programs, recruitment of volunteers and dissemination of information regarding the work and needs of the department; and
>
> 3. seeking to develop civic interest in the work of the department and educating the public and advising the general court as to the needs and goals of the corrections process.

See G.L. c. 124, §1(k), (l) and (n).

The conference hosted by APPA and NECCD, as described above, furthers these goals. In the Commission's view, state resources may be used for such conferences and other similar activities where such functions are:

> 1. in furtherance of the public interest in general, rather than in pursuit of private gain (either of an individual or a particular private interest group);
>
> 2. interconnected with the business of that department of state government (e.g., the exchange of ideas and knowledge, the development of programs, and public education as to the needs and goals of the corrections process are among your statutory duties as Commissioner of the Department of Correction);
>
> 3. not used toward partisan political ends; and
>
> 4. the state employee's appointing official approves the use of state resources for that purpose.[1]/

This last condition is critical. It ensures that a disinterested, accountable public official is making a judgment that there is an appropriate and not "unwarranted" use of state resources. As long as you comply with all of these conditions, the use of state computers and staff to keypunch registration information for the APPA/NECCD conference will not violate the conflict of interest law. Nothing in this opinion, however, precludes application of any other statutes or regulations dealing with the use of state facilities or supplies.

DATE AUTHORIZED: May 21, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-71

FACTS:

You are an employee in the Massachusetts Community Economic Development Assistance Corporation (CEDAC). CEDAC was created by G.L. c. 40H as a public instrumentality to provide technical assistance services to eligible non-profit organizations in economically distressed parts of the state. While CEDAC is within the Executive Office of Manpower Affairs (EOMA), it is not subject to the supervision or control of EOMA or any other department or agency of the commonwealth except as provided in chapter 40H. See G.L. c. 40H, §3.

In order to obtain technical assistance from CEDAC, an eligible organization submits a written "Request for Technical Assistance." The application must set forth the history of the organization, describe its inability to secure the requested assistance from other resources and give the details of the proposed project to be assisted. The CEDAC staff then reviews the request and the CEDAC Board of Directors evaluates the proposed project according to the appropriate selection criteria. For example, the Housing Project Selection Criteria include:

> (1) financial feasibility of the project;
>
> (2) the project's target group and ownership characteristics [CEDAC is statutorily required to aid projects which will primarily benefit the economically disadvantaged and must give preference to projects that will be owned by community organizations or by community action agencies];
>
> (3) the project's responsiveness to neighborhood needs;
>
> (4) evidence of CEDAC's critical role [i.e. the unavailability of other resources to provide the requested assistance];
>
> (5) the project's scale and impact; and
>
> (6) the ceiling level of CEDAC participation.

[1]/For the purpose of these safeguards, your appointing official is the Governor.

Once the CEDAC Board approves the request, a contract is drawn up between CEDAC and the organization. The contract outlines, **inter alia,** the scope of the services to be provided. The technical assistance CEDAC can provide includes help in planning, organizing and implementing economic activity. For example, the assistance may include long-range planning, market research, business plan development, financial packaging, management training, or any combination of these or other related activities.

You also serve as an officer and Board member of a nonprofit corporation (ABC) which qualifies under CEDAC's enabling legislation as an "eligible organization." Both of your positions at ABC are unpaid. ABC is planning to submit a "Request for Technical Assistance" to CEDAC, in connection with an upcoming housing project.

QUESTION:

What limits does G.L. c. 268A place on your rendering CEDAC technical assistance to ABC or acting on behalf of ABC?

ANSWER:

You are subject to the restrictions set forth below.

DISCUSSION:

As a full-time employee of CEDAC, you are expressly subject to the provisions of G.L. c. 268A. See G.L. c. 40H, §3(d). For the purposes of applying Chapter 268A, the conflict of interest law, you are considered a state employee. Section 4 (c) of Chapter 268A prohibits a state employee, otherwise than in the proper discharge of his official duties, from acting as agent or 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. This prohibition recognizes that an employee's loyalty to the commonwealth may be diminished when the employee acts on behalf of a private party in connection with particular matters in which the commonwealth is a party. The potential for divided loyalty is even greater when the employee's private interests are advanced before the same agency which employs him. See, **In the Matter of Louis L. Logan,** 1981 Ethics Commission (40). Section 4 therefore prohibits such conduct without regard to whether the employee is in a position to exploit his public office.

ABC's application to CEDAC for technical assistance is a particular matter as defined in G.L. c. 268A, §1(k). Accordingly, you may not act as ABC's agent in any respect concerning its application to CEDAC for technical assistance. Section 4 would prohibit you from acting as ABC's agent before any other state agency as well, although that section would not prohibit you from continuing your other activities for ABC which are not of direct and substantial interest to the state.

Section 6 of Chapter 268A prohibits a state employee from participating as such an employee in a particular matter in which a business organization in which he is serving as an officer, director, trustee, partner or employee has a financial interest.

The Commission has previously held that the term "business organization" includes non-profit organizations. **See eg.** EC-COI-82-91. The non-profit ABC will have a financial interest in any services CEDAC provides because ABC would have to pay for equivalent technical assistance from the private sector. From the facts you present, it further appears that the CEDAC services ABC will request are critical to the successful completion of the housing project.

You state that you would not be involved in any aspect of the CEDAC staff review of the ABC request or its presentation to the CEDAC Board of Directors. You should be aware that §6 prohibits your involvement in any discussions with or support work for the CEDAC staff or Board of Directors concerning the ABC application, as well as prohibiting your participation in the formal staff review or presentation before the Board.

In the event that the CEDAC Board approves the ABC application following the CEDAC staff review, a contract will be drafted to structure the relationship between CEDAC and ABC, as described above. That contract would constitute a particular matter under G.L. c. 268A, §1(k). Due to your present positions in the ABC organization, your proposed participation as a state employee in the rendering of services to ABC, pursuant to the CEDAC-ABC contract, would fall within the proscribed activities under §6. Section 6 does provide the following exemption:

> 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

[1]/ 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).

(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. Copies of such written determination shall be forwarded to the 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.

Thus, only if you follow the disclosure provisions outlined above and obtain the requisite determination from your appointing official (a copy of which must be submitted to the Commission), would your services providing technical assistance to ABC be exempted from the §6 prohibition. Your appointing official must make a good faith determination based on the specific facts of your situation. The needs of the agency and its credibility must be balanced with the purposes of the conflict law.

You are also subject to the standards of conduct set forth in §23 of the conflict law. That section provides, in pertinent part, that no employee shall:

(1) use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others, or

(2) 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.

G.L. c. 268A, §23 (¶2)(2) and (3).

You state that the Board of Directors at both ABC and CEDAC would be put on notice that you are a full-time CEDAC employee and an officer and Board member of ABC. Beyond this initial step, the loyalty ambiguities created by your multiple positions would require scrupulous adherence to the above provisions of §23. As stated previously, you would be prohibited from interjecting yourself in any way into the technical assistance application process on behalf of either ABC or CEDAC; and in the event that your appointing official exempts you from the §6 prohibition, your proposed role in the rendering of the technical services to ABC could not

(1) lead to ABC's gain of an unwarranted privilege (e.g., leniency in the enforcement of CEDAC-ABC contract terms) or

(2) give the impression that fellow ABC Board members could unduly influence you in the performance of your CEDAC duties.

Finally, G.L. c. 268A, §23 (¶3)(1) prohibits a state employee from accepting employment or engaging in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority and from, in fact, improperly disclosing such materials[2]/ or using such information to further his personal interests. In your position on the CEDAC staff, you have access to the procedures and standards used by the CEDAC staff and Board of Directors to review an organization's request for technical assistance. You must therefore take great care to abide by the provisions of G.L. c. 268A, §23 (¶3)(1) in all of your dealings with ABC.

DATE AUTHORIZED: May 29, 1984

COMMISSION ADVISORY NO. 5

The conflict of interest law, Chapter 268A of the General Laws, applies to all municipal employees, whether elected or appointed, full-time or part-time, paid or unpaid. The law does create, however, a category of employees called "special municipal employees" to whom the law in some instances will apply in a less restrictive way.

Questions have been raised as to:

- whether members and employees of agencies considered independent of the rest of municipal government are also covered by the law,
- whether such members and employees may be made "special municipal employees," and
- if so, by whom.

Typical examples of such "independent" agencies are local housing authorities and local water and fire districts. These issues take on added importance because often members and employees of such authorities or districts have contracts with or hold other appointive positions in the same agency. The propriety of their doing so will turn on whether they are covered by the conflict law and, if so, whether they may be considered "specials." It must be stressed, however, that we are not dealing here with agencies whose jurisdiction extends beyond the boundaries of a particular city or town

[2]/These materials are defined as "materials or data within the exemption to the definition of public records as defined by [G.L. c. 4, §7]."

(for example, regional districts). We are only dealing with agencies whose jurisdiction encompasses matters within a particular municipality or part of a municipality.

"Municipal employee" is defined as anyone "performing services for or holding an office, position, employment or membership in a municipal agency." See G.L. c. 268A, §1(g). "Municipal agency," in turn, 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." See §1(f). Given these broad definitions, local housing authorities and local water and fire districts would be considered municipal agencies for purposes of the conflict law and their members and employees municipal employees. They perform governmental functions at the municipal level.

The next question then is whether the members and employees of these authorities and districts may be designated as "special municipal employees." The answer with respect to local housing authorities is clear. The legislation establishing such authorities states that "each member of [a housing and redevelopment authority]...shall be considered a special municipal employee." See G.L. c. 121B, §7. In so doing, the legislature was careful to point out that the Board of Selectmen or City Council was not precluded from making other employees of such authorities "specials." Since most statutes establishing local water or fire districts are not so explicit, the applicable provisions of c. 268A must be examined.

Section 1(n) of G.L. c. 268A provides that municipal employees are classified as "specials" by the Board of Selectmen or City Council in that municipality. Thus, the law gives the appropriate Board of Selectmen or City Council the designating responsibility and makes no distinction as to which agencies might be involved. Simply put, the Board or Council has this authority and nothing turns on the degree to which the Board or Council supervises the work of the agency. Accordingly, members and employees of a local water or fire district may be designated as "specials" just as any other municipal employees. In making its decision, the Board of Selectmen or City Council will use the guidelines set out in the statute. That is,

1. the person must **either**
   a. receive no compensation,
   b. work less than 800 hours a year, or
   c. occupy a position which "permits personal or private employment during normal working hours"

and

2. the Board or Council must be consistent, i.e., treat people who hold equivalent positions in the same way.

This advisory will not attempt to explain all the provisions of the conflict law applicable to "special municipal employees." As noted above, however, whether a member or employee of an authority or district is classified as a "special" will affect his eligibility to hold, and be compensated for some other position within the supervision of that authority or district. If such an individual were not a "special," he would violate §20 of G.L. c. 268A if he held another position with his authority or district. As a special, he is eligible for an exemption from §20* as long as

1. he files with his city or town clerk a statement making full disclosure of the other employment relationship **and**
2. the City Council or Board of Selectmen give its approval to his having that position.

Here again, the Board of Selectmen or City Council has a crucial role to play. And, here again, it simply does not matter whether the Board or Council has any other role to play with respect to that authority or district.

In addition to the requirements of Chapter 268A, §4A of G.L. c. 41 comes into play where a district board is the appointing authority. Pursuant to §4A, a district board must be authorized by a vote of the district at an annual district meeting before it may appoint one of its members to another district office or position.

To sum up, if you are a member or employee of a local housing authority

- you are automatically a "special municipal employee" if a member, otherwise you will not be considered a special unless the City Council or Board of Selectmen designates your position as such,
- as a special you may hold another position with the authority provided
  - your City Council or Board of Selectmen approves, and
  - you file the required disclosure statement with your City or Town Clerk.

If you are a member or employee of a local water or fire district

- you will not be considered a special employee unless the City Council or Board of Selectmen designates your position as such
- if it does so, you may hold another position with the district provided

*Section 20 prohibits a municipal employee from having a financial interest in a contract with his city or town. Other employment contracts are included within this prohibition. The §20 exemption outlined above would also be available to members and employees who are specials and who have other kinds of contracts with their authority or district (for example, contracts to provide services, to sell equipment, etc.).

- your City Council or Board of Selectmen approves,
- you file the required disclosure statement, and
- in the case of members, the annual district meeting gives its authorization.

DATE AUTHORIZED: May 29, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-75

FACTS:

You are the Town Clerk for the Town of Bolton (Town). In that capacity, you are responsible for administering oaths of office to certain elected and appointed Town officials. G.L. c. 41, §15. Upon taking an oath to faithfully perform municipal duties, the official is deemed qualified for office. The Town held its annual election on May 15, 1984 to fill twelve elected offices; eight of the twelve successful candidates were incumbents. Additionally, you customarily administer oaths to individuals who are newly appointed to the positions of police chief, police officer, fire chief, highway superintendent, council on aging member, and advisory committee member. You estimate that approximately ten new individuals fill these positions each year. You do not administer oaths to any other municipal employees.

You have become aware of a recent amendment to G.L. c. 268A, §23, St. 1983 c. 409, eff. January 7, 1984, which requires you to furnish a copy of §23 to certain appointed and elected persons upon qualification for office.[1]/ You seek guidance over the scope of c. 409.

QUESTIONS:

1. Does c. 409 require you to provide a copy of §23 to every Town employee?
2. Does c. 409 require you to provide a copy of §23 to appointed or elected officials to whom you administer an oath of office?

ANSWERS:

1. No, although nothing in c. 409 would prohibit your furnishing such information to Town employees.
2. Yes, as to those persons first appointed or elected to such offices after the effective date of c. 409.

DISCUSSION:

At the outset, the Commission restates the principle that the five standards of conduct contained in §23 apply to all municipal employees, whether they work full or part-time, whether they are compensated or uncompensated, and whether they are elected or appointed. These standards, which supplement the substantive provisions contained in earlier sections of G.L. c. 268A, were enacted to prevent giving the appearance of conflict as much as to suppress all tendency to wrongdoing. **Board of Selectmen of Avon v. Linder,** 352 Mass. 581, 583 (1967). Irrespective of any formal notification procedure by which employees would receive copies of the text of §23, public employees are charged with notice of the statute, **Loring v. Commissioner of Public Works,** 264 Mass. 467 (1928), and their lack of awareness of the principles of §23 does not serve as a defense to proceedings alleging a violation of §23. **In the Matter of C. Joseph Doyle,** 1980 Ethics Commission 11, 13; aff'd **sub nom. Doyle v. Vorenberg,** Suffolk Superior Court Civil Action No. 43268 (Oct. 28, 1982). Voluntary educational efforts designed to make employees more aware of the prohibitions of G.L. c. 268A, including §23, are therefore appropriate and desirable.

However, separate from the scope of §23 is the issue of the breadth of the mandatory notification procedure under c. 409. The procedure, derived apparently from comparable requirements under the open meeting law, G.L. c. 39, §23B, is largely a symbolic gesture to emphasize the importance of §23 to newly elected or appointed municipal officers. By virtue of their positions as heads of their respective agencies, elected or appointed municipal officers are authorized to take appropriate administrative action as is warranted with respect to violations of §23. See, G.L. c. 268A, §23 ¶1. It is therefore appropriate that such municipal officers be made aware of §23 and of their role in enforcing those standards.

Chapter 409 does not require a notification to every municipal official. By its terms, §409 notification is required only for those elected or appointed

[1]/St. 1983, c. 409 provides as follows:

Upon qualification for office following an appointment or election to a municipal agency, such appointed or elected person shall be furnished by the city or town clerk with a copy of this section. Each such person shall sign a written acknowledgement that he has been provided with such a copy.

municipal officials who must be "qualified for office." Since you as Town Clerk are responsible for administering oaths by which such officers would be deemed qualified, you are the municipal official most likely to be aware of which officers are subject to the notification procedure under c. 409. The imposition of the notification duties on you as Town Clerk makes administrative sense because you can carry out the notification responsibility during the same occasion in which you administer the oath qualifying the individual for office. Inasmuch as you administer the oath only after the initial election or appointment and not following each subsequent reelection or reappointment as a condition of qualification for office, you would be required by c. 409 to provide notification of §23 only for the initial election or appointment. Moreover, nothing in c. 409 requires a retroactive application to town officials who were qualified for office prior to the January effective date of c. 409.[2]/

DATE AUTHORIZED: June 19, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-78

FACTS:

You are employed as an assistant town counsel for the town of ABC. You are also permitted to maintain an outside practice of law. In connection with that you share office space with two other attorneys. You maintain separate files for all of your own cases and clients, and you have your own secretary. You state that you are not formally associated with the other attorneys in any way, nor do you participate in or benefit from their fees, with the following exception. On occasion you are hired by one of the other attorneys, X, to work on certain of his cases. When that occurs, you are paid by him on an hourly basis, and any paralegal/secretarial work is performed by his secretaries. You estimate that approximately fifteen percent of your total income is derived from the work you do for X. When you perform such work the letterhead used in connection with the cases is headed "Law Offices of X, (your name) & Y," and your name and the other attorney's name are listed under X's name on the left-hand side of the stationery. On occasion X and the other attorney represent clients before various ABC boards and commissions. You state that you have no involvement at the law offices with any case involving the town of ABC, and in your employment as assistant town counsel you have no involvement with any matter in which the other two attorneys are involved. The town counsel is aware of your office sharing arrangement and assigns any matters in which parties are represented by the law offices to other assistants or to himself.

QUESTION:

What limitations does G.L. c. 268A place on you both in your capacity as assistant town counsel and in your private law practice?

ANSWER:

You are subject to the following limitations.

DISCUSSION:

As an assistant town counsel you are a municipal employee and therefore are subject to the conflict of interest law, G.L. c. 268A, and in particular §§17, 18, 19 and 23. Because many city solicitors and town counsels in the commonwealth serve part-time and also engage in the private practice of law, the substantive issues raised by your question are applicable to other municipal attorneys as well.

Section 17 provides in pertinent part that a municipal employee may not receive compensation from or act as agent or attorney for anyone other than the city in connection with any particular matter[1]/ in which the same city is a party or has a direct and substantial interest. This means that you may not be compensated by or act on behalf of any client in connection with any proceeding before any ABC municipal agency[2]/ or any proceeding in which ABC is a party or has a direct and substantial interest. This prohibition applies to matters that come to you personally as well as to matters on which you work for X. You have stated that you avoid all contact at the law offices with any matter which involves the town of ABC. You therefore would be in compliance with this provision.

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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, "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. G.L. c. 268A, §1(f).

[3]/You also ask whether you can be reimbursed for the time and materials spent in performing the duties of c. 409. Your question would be more appropriately addressed to the Division of Local Mandates within the State Auditor's Office. It would appear, however, given the relatively small number of Town officials affected annually by c. 409, that whatever expense you incur would be an "incidental local administration expense(s)." G.L. c. 29, §27C(a).

Section 18(d) prohibits the partners of a municipal employee from acting as agent or attorney for anyone other than the city in connection with any particular matter in which the same city is a party or has a direct and substantial interest, and in which the municipal employee participates or has participated as a municipal employee or which is the subject of his official responsibility. To advance the purposes of the law, the term "partner" is not restricted to those who enter formal partnership agreements. Thus the Commission has held in previous opinions that a partner is any person who joins with another, formally, or informally, in a common business venture. The substance of the relationship is what counts, not the terms the parties use to describe the relationship. Additionally, if a group creates a public appearance of a partnership (for example by linking their names on a letterhead, business cards and business listing), they may be treated as partners even though they may not, in fact, share profits. See EC-COI-82-68; 82-19; 80-43.[3]/ See also Formal Opinion 310, ABA Committee on Professional Ethics (June 20, 1963); Massachusetts Bar Association Ethical Opinion 76-19. The substance of your arrangement with X does not constitute a partnership. The occasional payment you receive on an hourly basis from X constitutes a fee for services arrangement rather than a sharing of profits.[4]/ You maintain separate files and have your own secretary. However, the fact that your names are linked in the letterhead title would create the public appearance of a partnership, thereby triggering the prohibitions of §18(d). The ability of X and the other attorney to represent clients in matters in which ABC is a party or has an interest might well be severely limited. In order to prevent this result your name should not be linked with the other two names at the top of the letterhead. The mere listing of your name under X's in the left-hand side of the stationery would not create the same public appearance of a partnership. Likewise, if you were to be listed as being "of cour ," the Commission has held in the past that such a listing is not by itself sufficient to create a public appearance of a partnership. See EC-COI-83-81.[5]/

Section 19 prohibits a municipal employee from participating as such an employee in a particular matter in which to his knowledge he or a business organization in which he is serving as an employee has a financial interest. Although the law office of X would be considered a business organization your relationship with it does not rise to the status of "employee" sufficient to invoke the participation prohibitions of §19. This conclusion is based on the comparatively small portion of your income attributable to services which you perform for the law offices. See EC-COI-83-34. However, should your situation change and a more substantial portion of your time and income be attributable to the services you provide to X, then you would be regarded as an employee for the purposes of §19. You would then be prohibited from taking any action in your capacity as assistant town counsel on any matter in which the law offices had a financial interest. Obviously you are also prohibited from acting in your municipal job on any matter in which you personally have a financial interest, such as any aspect of one of your own client's cases. Again, as you have stated that the city solicitor is aware of your office-sharing arrangement and screens you from all matters where the law offices are involved, there is no violation of this section.

Section 23 contains general standards of conduct applicable to all state, county and municipal employees. These provisions address both courses of conduct raising conflict questions as well as the appearance of conflict. Section 23 ¶2 prohibits the use or attempted use of one's official position to secure unwarranted privileges or exemptions for himself or others. It also prohibits one 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. Even though you will have no personal involvement in any overlapping matters, the appearance of your name on the law offices' letterhead in any form may put your co-workers in the town counsel's office who are actually handling the matter in an uncomfortable position. Furthermore, the public is unaware of your screening arrangement, and the appearance of your name on the letterhead in connection with overlapping matters might create a negative impression as to the public loyalty of the town counsel's office. Therefore, the wisest course for you to take to avoid problems under §23 would be to see that your name does not appear on any letterhead that is used by the law offices in connection with any matter in which ABC is a party or has a direct and substantial interst.

DATE AUTHORIZED: June 19, 1984

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[3]/These citations refer to previous Commission conflict of interest opinions including the year they were issued and their identifying numbers. Copies of these and all other advisory opinions (with identifying information deleted) are available for public inspection at the Commission office.

[4]/Your situation when you are performing work for X is analogous to that of a law firm associate which the Commission has found in several previous opinions does not trigger the application of §18(d). See EC-COI-83-92; 81-30; 79-57.

[5]/Although the appearance of your name on the letterhead either under X's or as being "of counsel" would not trigger the application of §18(d), it would create problems under §23 when the letterhead is used in connection with matters in which ABC is a party or has a direct and substantial interest. The implications of §23 are dealt with more fully in the last paragraph of the opinion.

CONFLICT OF INTEREST OPINION
NO. EC-COI-84-79

FACTS:

You are a member of the General Court and an attorney engaged in the private practice of law. A prospective client wants you to represent him for compensation in an inquiry by the Office of Campaign and Political Finance, under G.L. c. 55.

QUESTION:

Does G.L. c. 268A permit you to appear for compensation on behalf of a client before the Office of Campaign and Political Finance (OCPF)?

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.

Your appearance before the OCPF would not fall under any of the three exemptions set out in §4. Clearly, the particular matter involved, i.e., OCPF's inquiry, is not ministerial in nature. Nor is the OCPF a court of the Commonwealth. That its inquiry may possibly lead to a criminal prosecution sometime in the future is immaterial. There is no **ongoing** court case or grand jury proceeding and there may never be one. Moreover, the OCPF would not, in any event, function as the prosecutor in a criminal proceeding. To allow appearances before separate and independent investigatory agencies before the matter has even been referred to a law enforcement agency would have a widespread impact clearly not contemplated by the [language of §4 as applicable] to legislators. It would allow appearances, for example, before the State Ethics Commission, the Inspector General, the Bureau of Special Investigations, the Auditor's Office and many other state agencies that investigate potential criminal conduct.

Finally, a hearing by the director of OCPF is not a quasi-judicial proceeding as defined in G.L. c. 268A, §4(3). The director is only authorized under G.L. c. 55, §3 to:

> . . .investigate the legality, validity, completeness and accuracy of all reports and actions required to be filed and taken by candidates, treasurers, political committees and any other persons pursuant to [chapter 55] and any other laws of the commonwealth pertaining to campaign contributions and expenditures.

In the course of the investigation, the director may require testimony under oath by witnesses. Witnesses also have the right to be represented by counsel. Further, any person or committee under investigation is notified by the director of his intention to present evidence to the Attorney General. An alleged violator may request a hearing before the director for the purpose of presenting evidence to the contrary. See 970 CMR 3.00 (1978).

[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).

Accordingly, the OCPF hearing does not satisfy the three criteria set out in §4 for quasi-judicial proceedings. It is not adjudicatory in nature.[2]/ The director does not decide the rights of the alleged violator. Any evidence presented at the hearing is presented to the attorney general. See G.L. c. 55, §3. Although G.L. c. 55, §3 grants to the director "the power and authority to investigate the legality, validity, completeness and accuracy" of reports, §§28-29 specifically delegate to the Attorney General and the District Attorney the duty to make final legal determinations on these questions. 1978 Op. Atty. Gen. No. 27. Once the director completes his investigation, and refers it to the attorney general, OCPF has no jurisdiction over the matter.

Moreover, the action of the OCPF is not appealable to the courts. Again, that an alleged violator may one day be a defendant in a separate and independent criminal proceeding is immaterial. Finally, any hearing or inquiry at the OCPF is not one involving two parties represented by private counsel. This last criterion is meant to limit "quasi-judicial" proceedings to those where a state agency is adjudicating the rights of two private, i.e., non-state parties.

DATE AUTHORIZED: June 19, 1984

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[2]/G.L. c. 30A, §1(1) defines an adjudicatory proceeding as a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing." See **Arthurs v. Board of Registration in Medicine**, 383 Mass. 299, 313 (1981). **Borden, Inc. v. Commissioner of Public Health**, 448 N.E. 2d 367 (1983). Further, an adjudicatory proceeding is one in which a statutory or constitutional direction dictates an agency hearing. **Labor Relations Commission v. Fall River Educator's Association**, 382 Mass. 465, 470 (1981).

CONFLICT OF INTEREST OPINION NO. EC-COI-84-80

FACTS:

You are an employee of municipal agency ABC (ABC) which leases part of its central office building to DEF, a sandwich shop which is patronized by ABC employees. The sandwich shop intends to raise its prices, but when it does so it will offer a ten percent discount to all the employees of several neighboring public and private employers. The discount will be given when an employee from the area displays an employer identification card.

QUESTION:

Does G.L. c. 268A permit ABC employees to accept the ten percent discount from DEF?

ANSWER:

1. Those few ABC employees who are directly involved in negotiating and monitoring the ABC lease with DEF may accept the discount, subject to certain limitations.

2. Those ABC employees who are not directly involved in the negotiating and monitoring of the ABC lease with DEF may accept the discount without limitation.

DISCUSSION:

1. Whenever government employees accept discounts and other privileges from private entities over whom they have official dealings as government employees, concerns are raised under both sections 3[1]/ and 23[2]/ of G.L. c. 268A over the credibility and impartiality of their decisions as government employees. See, **In the Matter of George A. Michael,** 1981 Ethics Commission 59; **In the Matter of Victor Peters,** 1981 Ethics Commission iv; EC-COI-83-122; 82-160. The propriety of accepting the relatively modest discount from the sandwich shop must therefore be examined in light of these standards.

G.L. c. 268A does not define what constitutes "substantial value" for the purposes of §3 but rather leaves that determination for case-by-case consideration.[3]/ Prior Commission rulings have held a wide range of items to be of substantial value (from a two million dollar bank loan, **In the Matter of Rocco J. Antonelli,** 1982 Ethics Commission 101 to a $100 discount, **In the Matter of George Michael, supra,** a $290 stipend EC-COI-83-75, and a clock radio EC-COI-82-160). However, the ten percent sandwich discounts from DEF would be considered only of nominal value and therefore not encompassed within the §3 prohibition. Moreover, the discount would not be related to the performance of official duties by ABC employees who are involved in the lease with the shop. The availability of the discount to several thousand other public and private sector employees diminishes the likelihood that the discount is for or because of any official ABC act.

Although the discount receipt would not violate §3, potential problems are raised under §23 because ABC employees who have received discounts might give reasonable basis for the impression that their review and monitoring of the shop's lease and the decision to renew the lease might be unduly influenced by the discounts.

[1]/In relevant part G.L. c. 268A §3(b) prohibits public employees from accepting anything of substantial value for or because of their official acts.

[2]/Section 23 (¶2)(3) prohibits public employees from by their conduct giving reasonable basis for the impression that any person can improperly influence or unduly enjoy their favor in the performance of their official duties, or that they are unduly influenced by the kinship, rank, position or influence of any party or person.

[3]/See, Final Report of the Special Commission on Code of Ethics, 1962 House Doc. No. 3650 at 11 upon which the provisions of §3 were based. ("Significant in these subsections is the provision that the thing given must be of 'substantial value.' The Commission concluded that this was a standard to be dealt with by judicial interpretation in relation to the facts of the particular case, and that it was more desirable than the imposition of a fixed valuation formula.")

While the relatively small size of the sandwich discount would not inherently create the impression of undue favoritism so as to prohibit outright the receipt of the discount, those few ABC employees who are directly involved in the shop lease should establish reasonable safeguards to avoid creating an improper impression. Those safeguards could range from voluntarily refraining from accepting the discount or taking advantage of it only occasionally to disclosing their situation to their appointing official and receiving written permission to continue their ABC involvement with the sandwich shop. The permission could be drafted pursuant to standards contained in G.L. c. 268A, §19 in which employees may be permitted to participate where "the [financial] interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee."

2. The concerns described above arise only where the discount could potentially affect the performance of duties by ABC employees. For the remaining ABC employees whose responsibilities do not include the sandwich shop lease, the potential problems raised by §3 and §23 do not apply. While it is true that ABC employees would be receiving the discount because of their status as ABC employees, the discount would not be an "unwarranted privilege or exemption" because the same discount is being offered to a large number of private and public sector employees in the area. Compare, **In the Matter of George Michael, supra,** EC-COI-82-17.[4]/

DATE AUTHORIZED: July 17, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-81

FACTS:

You are a member of the Board of Registration in Nursing (Board). Pursuant to G.L. c. 13, §13, you were appointed by the governor to the Board to serve for six years, which term of office will expire in February, 1986. As a Board member, you receive five hundred dollars a year as compensation, as well as the necessary traveling expenses you actually incur in attending the meetings of the Board. G.L. c. 13, §15. The Board is statutorily required to hold three regular meetings a year, G.L. c. 13, §14, but in fact holds a meeting once a month. Pursuant to G.L. c. 112, §74 et seq., the Board holds examinations for the registration of nurses and the licensing of practical nurses, investigates all complaints of violations within its area of authority, and makes such rules and regulations that are consistent with law and relevant to its procedure as it deems expedient.

You were also recently elected to a three year term, to start January 1985, on Panel I of the Board of Review of Accreditation of Associate Degree Nursing Programs within the National League of Nursing (NLN). The NLN is a professional association which is the nationally recognized accrediting authority for nursing education. The individual members of NLN include nurses and other concerned individuals. The agency (school of nursing) members of NLN do not need to be accredited to join, nor do they need to join to be accredited. The entire membership of NLN elects its Board members. Thus, the accreditation program administered by NLN is a voluntary review of a school's curriculum by its peers.

Your position as a member of the NLN Review Panel for Associate Degree Programs is unpaid, although you will be reimbursed for expenses. The fifteen-member Panel meets twice a year, the length of the meeting depending on the number of schools to be reviewed at that meeting. The accreditation process you will participate in will involve evaluating the quality of the nursing education in associate degree programs and engaging those schools in continuous efforts toward improvement.

QUESTION:

Does G.L. c. 268A permit you to serve simultaneously as a member of the Board and as a member of the NLN Accreditation Review Panel for Associate Degree Programs?

ANSWER:

Yes.

DISCUSSION:

Section 1(q) of G.L. c. 268A defines "state employee" as "a person performing services for or

[4]/This result would continue to apply as long as the discount remains at ten percent and is offered uniformly to a large number of eligible public and private employers in the area. Should the facts change and a larger discount be made available solely to ABC employees, you should renew your advisory opinion request for a determination of whether the Commission's conclusion under §§3 and 23 would be different.

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." As a member of the Board of Registration in in Nursing, you are a state employee for the purposes of G.L. c. 268A and are therefore subject to that law's provisions. Your part-time status qualifies you as a special state employee,[1]/ and the conflict law will apply less restrictively to you in certain circumstances.

Section 4(c) provides that a state employee may not act as agent or attorney for anyone other than the state in connection with any particular matter[2]/ in which the commonwealth is a party or has a direct and substantial interest.[3]/ This section subjects state employees to restrictions on assisting outsiders in their dealings with the state. While your participation in any given accreditation decision will be as the agent of NLN, NLN accreditation decisions concerning Associate Degree Nursing Programs are not particular matters of direct and substantial interest to the state. The board and NLN do support the same goal, namely quality nursing education. However, NLN accreditation is not a prerequisite to Board approval of a nursing school. NLN accreditation is a voluntary curriculum review process undergone by nursing programs which choose to participate. On the other hand, Board approval of a nursing school is a statutorily defined process which involves a site survey and the evaluation of faculty qualifications, instructional and clinical facilities, safety and teacher/student ratios as well as a review of the curriculum. See G.L. c. 112 §74 and §74A, 244 CMR 6.00 et seq. Before qualifying by examination as an RN or LPN, an aspiring nurse must furnish "satisfactory proof that he is of good moral character and a graduate of a school for nurses approved by the board." G.L. c. 112, §74. Thus, graduation from a program legally approved by the Board is required of an applicant for a nursing license or registration, whereas graduation from a NLN accredited school is not. Inasmuch as NLN accreditation is voluntary and not an integral part of either board approval or nurse licensure/registration, your participation in that process in light of your Board membership will not be prohibited by §4.[4]/

Section 6 provides that a state employee shall not participate as such an employee in a particular matter in which a business organization for which he serves as an officer has a financial interest. From the facts you present, it does not appear that the §6 prohibition applies to your situation. The approval of a school of nursing pursuant to 244 CMR 6.00 et seq., in which you would participate as a Board member, is not a matter in which NLN has a financial interest.[5]/ While an agency (school of nursing) member of NLN may have a financial interest in a certain Board approval decision, NLN as an organization will not. NLN's accrediting function is not dependent upon the outcome of a Board approval decision.

As a state employee, you are also subject to the standards of conduct set forth in §23 of Chapter 268A. It does not appear that the dual Board position you propose would violate either §23 (¶2)(2) or (3), which provide that no state employee shall

> (a) use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others; or
>
> (b) 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.

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[1]/See G.L. c. 268A, §1(o)(2)(b), which provides that one automatically attains special state employee status if one is a non-elected state employee who does not in fact earn compensation as a state employee for more than eight hundred hours during the preceeding three hundred and sixty five-days.

[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, duties, finances and property. G.L. c. 268A, §1(k).

[3]/Section 4(a) prohibits a state employee from receiving compensation from anyone other than the state in connection with any particular matter in which the commonwealth is a party or has a direct and substantial interest. Inasmuch as your NLN position will be uncompensated, the §4(a) prohibition is inapplicable to your situation. The Commission has previously determined that reimbursement for expenses is not compensation. EC-COI-81-142.

[4]/Because your activities are not proscribed in the first instance by §4, it is unnecessary to address how §4 restrictions would be eased on account of your special state employee status.

[5]/Compare EC-COI-81-117, in which the Commission held that §6 prohibited an employee of the state League of Nursing from participating in the continuing education approval process (244 CMR 5.00 et seq.) which the Board had delegated to the League. That opinion reasoned that the state league had a financial interest in the decision-making process because it was an applicant for approval of its own continuing education programs and competed with other providers in seeking approval of such programs.

However, because NLN represents nurses who are subject to regulation by the Board, you should take care to abide by these §23 provisions in carrying out your Board and NLN duties.

The more apparent issue raised by §23 is contained in paragraph 3, which prohibits a state employee from improperly disclosing materials or data within the exemptions to the definition of public records as defined by section seven of chapter four, and which were acquired by her in the course of her official duties or using such information to further her personal interests. These provisions, which are largely self-explanatory, come into play when sate employees misuse confidential information to which they have access as state employees. In view of your access to confidential information as a Board member, e.g., information concerning a Mass. nursing school obtained by the Board during a site survey or a review of staff, clinical or curriculum qualifications, you should keep this provision in mind and not disclose the information to NLN.[6]/

DATE AUTHORIZED: July 17, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-86

FACTS:

You are an attorney and a psychiatrist. You have been approached by several state agencies to enter into part-time consulting arrangements with them in your areas of expertise. The arrangements include the following: (1) working fifteen hours a week for the Department of Mental Health (DMH) doing forensic evaluations; (2) working three hours a week for DMH doing psychiatric evaluations of sexually dangerous patients; (3) working two hours a week for the Massachusetts Rehabilitation Commission doing psychiatric disability determinations; (4) working approximately ten hours a week for the Brockton District Court doing legal representation at civil commitment hearings; (5) working four hours a week for the Boston Juvenile Court doing forensic evaluations. You have received an exemption pursuant to G.L. c. 268A, §7(e) which permits you to perform both consultant contracts with the Department of Mental Health.

QUESTIONS:

Does G.L. c. 268A permit you to enter into all of the arrangements described above?

ANSWER:

Yes, providing you file a disclosure with the Commission pursuant to §7(d).

DISCUSSION:

Your various arrangements with the agencies you have listed make you a state employee as that term is defined in the conflict of interest law, G.L. c. 268A.[1]/ You therefore are subject to the provisions of that law. However, because your services under any of the contracts would be performed on a part-time basis, and because you would be permitted by the terms of your contracts to engage in other employment during normal working hours, you would be considered a special state employee. G.L. c. 268A, §1(o).

The section of G.L. c. 268A which is relevant to your inquiry is §7 which prohibits a state employee from having a financial interest, directly or indirectly, in a contract made by a state agnecy in which the commonwealth or a state agency is an interested party. Ordinarily your activities would be prohibited by §7, but because you are a special state employee, two exemptions are potentially available to you. You have already availed yourself of the §7(e) exemption in connection with your two contracts with the Department of Mental Health. Section 7(e) provides that the contract prohibition will not apply to a special state employee who files with the Commission a statement making full disclosure of his interest and the interests of his immediate family in the contract if the governor, with the

[6]/This advisory opinion only considers the applicable of G.L. c. 268A provisions to the dual positions you posit. In your request, you also ask whether the positions would constitute a conflict under §7(a) of the Code of Conduct for Employees of the Division of Registration in the Executive Office of Consumer Affairs (Code). This Code was promulgated pursuant to G.L. c. 268A, §23 and explains the prohibitions of §23 as they apply to the Board. Any questions regarding this Code should be directed in the first instance to the Director of the Division of Registration or the General Counsel of the Executive Office of Consumer Affairs.

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

advice and consent of the executive council, exempts him. The second potential exemption is found at §7(d). It exempts from the prohibition 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 Commission a statement making full disclosure of his/her interest in the contract. Examining your situation in light of this provision, the only question is whether you may provide services simultaneously to the Brockton District Court and the Boston Juvenile Court.[2]/ Thus the focus of this discussion is whether by performing the services called for in one of these two contracts you would be participating in the activities of the agency which is a party to the second contract. To phrase it another way, the issue is whether the Brockton District Court and Boston Juvenile Court are considered to be the same state agency for purposes of G.L. c. 268A. The Commission concludes they are not.

In 1978 the general court passed legislation called the Court Reorganization act which effected an administrative consolidation of all the courts in the commonwealth with trial jurisdiction. The intent of the general court was to promote the orderly and effective administration of the judicial system of the commonwealth by encouraging "a broader availability of personnel and other resources for the hearing of all causes on an equitable basis by the several justices of the trial court. . . without in any way derogating from the rights of parties to all proceedings and without in any way impairing the validity of all judgments and orders of duly appointed justices in the commonwealth." c. 478 of the Acts of 1978. The resulting structure is the trial court, under the supervision of the Supreme Judicial Court, which consists of seven departments: the superior court department, the housing court department, the land court department, the probate and family court department, the Boston municipal court department, the juvenile court department, and the district court department. G.L. c. 211B, §1. Within each department are different divisions, e.g. the Brockton District Court is a division by the district court department and the Boston Juvenile Court is a division of the juvenile court department. The trial court has a chief administrative justice (CAJ), and each of the departments has an administrative justice. The CAJ is responsible for the overall administration of the trial court, and the departmental administrative justice is administrative head of his/her department, subject to the superintendence power of the CAJ. In spite of this scheme of administrative centralization, the Commission concludes that each department retains sufficient substantive autonomy to warrant finding that it is a separate agency.

First, each department has the authority to make its own personal appointments, the only requirement being that they conform with the standards established by the CAJ. Although the CAJ has the power to reject any appointments he can only exercise that power for non-compliance with the standards for appointment.

Additionally, although the trial court is financed by a single budget allocation of the legislature, its budget request is based on the estimates of the individual courts. They, in turn, cannot make expenditures for goods or services unless they have sufficient money in their own budget to do so. Assuming that a court does have sufficient money to contract for goods or services, it can decide who it wishes to contract with, and the court itself is designated in the document as the contracting party. Review of the contract at the CAJ level is limited to the review of the contract as to form.

Although with the present court structure the CAJ has superintendence power over the administration of each individual court, that power is limited to court administration and does not intrude on the substantive work of each court. The legislature does not appear to have intended the restructuring to interfere in any way with the judicial function as is evidenced by the legislature's statement of purpose set out earlier. In some ways the office of the CAJ is analogous to the Executive Office of Administration and Finance (A&F) within the executive branch. Although it has responsibility for the overall administration of all departments, divisions, boards, commissions, offices and other agencies of the executive branch, the various sub-branches of the executive branch are not considered to be within A&F even though it has that superintendence power over their administration. See G.L. c. 7, §3. The Commission has faced similar issues in slightly different contexts in previous opinions. For example, in determining whether a matter is "pending in a state agency" for purposes of G.L. c. 268A, §4, the Commission has examined the amount of control one agency has over the other and whether one agency is within the department or secretariat of the other to determine if there is "operational independence" between the agencies. See

[2]/You have already received the §7(c) exemption for the two DMH contracts, and you would not be participating in or have official responsibility for the activities of any other agency under the MRC contract.

e.g., EC-COI-84-30; 83-103; 82-164; 82-50.[3]/ The court system is unique in that, unlike divisions and departments within the various secretariats, there is substantive operational independence among the individual courts. The CAJ has no authority to intervene in the judicial process of each court. If any entity does have that authority it would be the appellate courts, and even their intervention is limited. Thus, although there is administrative centralization within the trial court system, each department maintains sufficient autonomy to warrant funding that it is a separate agency. You therefore may contract simultaneously with the Boston Juvenile Court and the Brockton District Court, following your filing of a §7(d) disclosure statement with the Commission.

DATE AUTHORIZED: July 17, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-87

FACTS:

You are a member of the state Designer Selection Board (DSB), an eleven-member body within the Executive Office of Administration and Finance. G.L. c. 7, §30C. The DSB has jurisdiction over the selection of all designers, programmers, and construction managers performing design services in connection with public building projects and capital facility projects undertaken by state agencies and certain building authorities. G.L. c. 7, §30D. The DSB also has jurisdiction over the procedures promulgated by any state agency for the selection of designers, programmers and construction managers by any housing authority. **Id.**

Your firm (Firm) would like to apply to a local housing authority (LHA) to perform certain architectural and engineering work. These services would be funded by the state Executive Office of Communities and Development (EOCD) through a contract between EOCD and the LHA. Applications from interested firms will be forwarded to a three-member selection board within EOCD. That board will select three unranked finalists from which the LHA will make its choice(s). This procedure within EOCD is subject to the jurisdiction of the DSB and has been approved by it. If your Firm is chosen by the EOCD selection board and, subsequently, by the LHA, a contract will be entered into between the Firm and the LHA.

QUESTION:

May your Firm, if selected by the LHA, enter into a contract funded by EOCD while you are a member of the DSB?

ANSWER:

No, unless you secure an exemption from the Governor, with the advice and consent of the executive council.

DISCUSSION:

As a member of the DSB, you are a state employee as defined in the state conflict of interest law, G.L. c. 268A, §1 et seq., and, as a result, are subject to the provisions of that chapter. See, EC-COI-81-75.

Section 7 of G.L. c. 268A prohibits a state employee from having a financial interest in a contract made by a state agency. The arrangement between EOCD and the LHA, through which EOCD will provide the funds for the LHA to pay for the architectural and engineering services, is a contract for the purposes of §7. Therefore, if your firm were to be compensated under that contract, you would have a financial interest in a contract made by a state agency in violation of §7.[1]/

Because you are a part-time state employee as a member of the DSB, you qualify for special state employee status under §1(o) of the conflict law thereby making available certain exemptions to you. There is an exemption from §7 available to a special state employee who neither participates[2]/ in, nor has official responsibility[3]/ for any of the activities of the state agency making the contract. See G.L. c. 268A, §7(d). Because of the broad powers of the DSB over state agency con-

[3]/These citations refer to prior Commission conflict of interest opinions including the year they were issued and their identifying numbers. Copies of these and all other advisory opinions are available (with identifying information deleted) for public inspection at the Commission offices.

[1]/The Commission assumes that your ownership interest in the Firm is greater than one percent.

[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).

[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).

struction projects generally, and the DSB's jurisdiction over the EOCD selection board procedures to be used in this case, you participate in or have official responsibility for activities of the EOCD as a member of the DSB. In particular, in EC-COI-81-75, the Commission recognized that although local housing authorities possess some flexibility in the selection process, the DSB retains effective control of the process. Therefore, you do not qualify for this exemption.[4]/

Another exemption exists for special state employees unable to satisfy the condition of non-involvement in the activities of the contracting agency. In order to qualify for this exemption, you must file a disclosure of your financial interest in the EOCD-LHA contract with the Ethics Commission and receive an exemption from the Governor, with the advice and consent of the Executive Council. See, G.L. c. 268A, §7(e). Only if you fully comply with this exemption will you be permitted to have a financial interest in the funding arrangement between EOCD and LHA.

DATE AUTHORIZED: July 17, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-89

FACTS:

You are the town counsel for the town of ABC. Your duties involve the supervision and control of the town's law department. Specifically, you have official responsibility both for the prosecution of all legal proceedings on the town's behalf and for the defense of any action brought against the town or against one of its employees for performance of his or her official duties.[1]/ Your position is part-time but you have not been designated a special municipal employee. You also are engaged in the private practice of law. In that capacity you will be sharing office space with some other attorneys. You and the other attorneys will have separate practices, including separate letterheads, secretaries, telephone lines, files and bank accounts. You have also indicated that any signs will list all attorneys separately with no representation of a firm or other association beyond sharing office space. The building in which the offices will be located is owned by a corporation, the stock of which is owned by two of the attorneys in equal shares. When you move into the building you will be come the third shareholder of the corporation, although you will own fewer shares than the other two attorneys. You have stated that the corporation will be making no profits. You also state that the reason the two other attorneys chose the corporate form for building ownership is that it will be easier to bequeath each one's interest to his spouse and children and because there will not be personal liability in connection with any claims arising from injuries that might occur on the premises. You will serve as treasurer of the corporation with responsibility for paying all of its bills. The three stockholders will share all expenses of the property in proportion to their share of stock ownership. You also state that you and the other two attorneys have agreed on a value per share for the stock so that if one of the stockholders decides to leave, he will sell his stock back to the other shareholders.

QUESTIONS:

1. Does your relationship with the other stockholder attorneys constitute a partnership for purposes of G.L. c. 268A, §§18 and 19.
2. Assuming it does not, what limitations does G.L. c. 268A place on you both in your private law practice and in your position as town counsel?

ANSWERS:

1. No.
2. You are subject to the limitations set forth below.

DISCUSSION:

1. **Your relationship with the other shareholder attorneys**

As town counsel for ABC you are a municipal employee and therefore are subject to the provisions of the conflict of interest law, G.L. c. 268A. Because the law places limitations on the activities of a municipal employee's partner(s), the first issue to be considered is whether your association with the other two attorneys as the three shareholders in a corporation separate from your individual law practices constitutes a partnership within the meaning of the statute.

Section 18(d) prohibits the partners of a municipal employee from acting as agent or attorney for anyone

[4]/There is another exemption to §7 which contains this same limitation, so that is also unavailable to you. See G.L. c. 268A, §7(b).

[1]/(Citation omitted).

[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).

other than the town in connection with any particular matter[2]/ in which the same town is a party or has a direct and substantial interest, and in which the municipal employee participates or has participated or which is the subject of his official responsibility. Section 19 prohibits a municipal employee from participating as an employee in a particular matter in which he or his partner has a financial interest. To advance the purposes of the law, the term "partner" is not restricted to those who enter formal partnership agreements. Thus the Commission has held that a partner is any person who joins with another, formally or informally, in a common business venture. The substance of the relationship is what counts, not the term the parties use to describe it. Additionally, if a group creates a public appearance of a partnership (for example by linking their names on a letterhead, business card or business listing), they may be treated as partners even though they may not, in fact, share profits. See EC-COI-84-78; 82-68; 72-19; 80-43.[3]/ See also Formal Opinion 310, ABA Committee on Professional Ethics (June 20, 1963); Massachusetts Bar Association Ethical Opinion 76-19. The Commission concludes that the substance of your office sharing arrangement with the three other attorneys will not constitute a partnership because you will all be conducting separate law practices. Nor will your arrangement create the public appearance of a partnership because you will have taken the necessary steps to avoid linking your name with the other attorneys.

Your corporate association with the other attorneys must also be examined in light of these principles because the limitations of §§18 and 19 extend even to those activities of a municipal employee's partners which have nothing to do with partnership affairs.[4]/ For example, if your corporate association were considered to be a partnership, then the two other shareholder-attorneys would be limited in the legal matters they could handle for clients in which the town or one of its agencies was a party or had a direct and substantial interest. The corporation obviously is not a partnership as that concept is traditionally defined, nor will it create a public appearance of a partnership. There is no reason why the public would know of the arrangement by which the house is owned. The remaining issue, then, is whether the substance of your corporate arrangement would trigger the §18 and §19 limitations. The Commission concludes it would not.

The reasoning behind an expansive view of the concepts of partner and partnership is to prevent those who otherwise might be covered from circumventing the conflict of interest law. This does not mean, however, that every association will or should be considered a partnership. Instead the Commission will examine each association to determine both if it was formed to avoid the limitations of the law or whether it is sufficiently like a partnership to warrant such a finding. In your case you have stated that there will be no sharing of corporate profits because no profits were intended or anticipated, and that the corporation was formed solely for the purposes of ownership of real estate for the reasons stated earlier. Additionally, the association as you have described it does not lead to the conclusion that any sort of alter ego type relationship will exist in the way one would expect with a partnership-type arrangement. For these reasons, your association will not be viewed as a partnership within the meaning of the statute and the provisions which affect the interests and activities of partners will not be applicable.

2. **Limitations on your private practice and in your position as town counsel**

Section 17 provides in pertinent part that a municipal employee may not receive compensation from or act as agent or attorney for anyone other than the town in connection with any particular matter in which the same town is a party or has a direct and substantial interest. This means that you may not be compensated by or act on behalf of any client in connection with any proceeding before any ABC municipal agency[5]/ or any proceeding in which the law department is involved. You are also prohibited from acting on behalf of the corporation in any matter in which the town is a party or has a direct and substantial interest. See EC-COI-83-48.

Section 19 in pertinent part prohibits a municipal employee from participating as such an employee in any particular matter in which he or a business organization in which he is serving as an officer has a financial interest. Obviously you are prohibited from acting in your town counsel capacity on any matter in which you personally have a financial interest, such as any aspect

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[3]/These citations refer to previous Commission conflict of interest opinions including the year they were issued and their identifying numbers. Copies of these and all other advisory opinions (with identifying information deleted) are available for public inspection at the Commission office.

[4]/See William G. Buss, "The Massachusetts Conflict of Interest Statute: An Analysis," 45 B.U. Law Rev. 299, 357 (1965).

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

of one of your own client's cases. You would also be prohibited from acting on any matter in which the corporation might have a financial interest, for example a zoning or tax matter, or any matter that might affect the value of corporate assets.

The last section of the statute relevant to your questions is §23 which contains general standards of conduct applicable to all state, county and municipal employees. Because of your association with the other attorneys both in the office-sharing context and as the three shareholders of the corporation, the principles of §23 are particularly important. Section 23 ¶2 prohibits the use or attempted use of one's official position to secure unwarranted privileges or exemptions for himself or others. It also prohibits one 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. To avoid creating even the appearance of any impropriety under this section, you should refrain from having any involvement in the law department in matters where the other two shareholder-attorneys and the third attorney in the office space represent parties in the proceedings. Involvement would include not only involvement in the substance of the proceeding but also things such as granting extensions for filing papers. Section 23 ¶3 prohibits an employee from disclosing confidential information he has gained by reason of his position or authority to further his personal interests. Because you have overall responsibility for the supervision and control of the law department, you would be privy to confidential information. It should not be used to further your personal interests, financial or otherwise.

DATE AUTHORIZED: July 17, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-90

FACTS:

You are an elected member of the town of ABC School Committee (the school committee). You are also a practicing attorney. Within the next six weeks you will be forming a professional corporation with some other attorneys. You have stated that the arrangement will be a partnership and that you and the other attorneys will be sharing profits. One of the attorneys with whom you will join in the practice represents the school committee on occasion in special education matters. When he performs these services he is paid on an hourly basis.

QUESTION:

Would your participation in a partnership in which one of your partners represents the school committee constitute a violation of G.L. c. 268A?

ANSWER:

Yes, given the arrangement you have described.

DISCUSSION:

As a member of the school committee, you are a municipal employee within the meaning of G.L. c. 268A, the conflict of interest law.[1]/ You therefore are subject to the provisions of that law. The situation you have presented raises serious problems under §20 of the law.

Section 20 provides in pertinent part that no municipal employee may have a financial interest, directly or indirectly, in a contract made by a municipal agency of the same town in which the town is an interested party. If your partner continues to provide legal services to the school committee, then any money paid to him would become an asset of the partnership. You would have an ownership interest in any asset of the partnership, and you therefore would have a financial interest, albeit an indirect one, in your partner's contract with the school committee. The town obviously is an interested party in any contract made by the school committee. Section 20 contains several exceptions to this prohibition, but as a practical matter there are very few instances when a municipal employee can have a financial interest in a contract made by his own agency. None of these exceptions applies to you.

The §20 prohibition will result as long as your association with the other attorneys continues in the form you have described. Should the situation change so that the money your colleague earns in connection with the school committee contract is kept by him and is not in any way an asset of the partnership or used to benefit the partnership, then there would be no §20 violation.

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[1]/You have not, to your knowledge, been designated a special municipal employee as that term is defined in G.L. c. 268A, §1(n). Should your status change, the result might be different in that you would be eligible to apply for the exemption contained in §20(d).

See, EC-COI-81-75. You would, however, be subject to the provisions of §19 which provide that no municipal employee may participate as such an employee in a particular matter[2]/ in which he or a partner has a financial interest. The fact that the partnership would not benefit under these circumstances is immaterial. The salient fact is that your partner would have a financial interest. See Buss, **"The Massachusetts Conflict of Interest Statute: An Analysis,"** 45 B.U. Law Rev. 299, 357 (1965). Therefore you would have to refrain from participating as a school committee member in any matter which might inure to your partner's benefit, such as decisions to retain him, and decisions to appeal special education cases which would provide further legal work for him. You would have to abstain not only from voting on such matters but also from participating in any discussion or other consideration of the matter surrounding the vote. See EC-COI-84-76; 84-55.[3]/ "[T]he wise course for one who is disqualified from all participation in a matter is to leave the room." **Graham v. McGrail,** 370 Mass. 133, 138 (1976).

Should there be no prohibition under §20, you should be aware of §23 which prohibits the use of attempted use of one's official position to secure unwarranted privileges or exemptions for himself or others. It also prohibits one 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. In this regard you should be careful, for example, that no action you take on the school committee gives the appearance of your trying to obtain benefits for your law partnership or its individual members.[4]/

DATE AUTHORIZED: July 17, 1984

[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]/These citations refer to previous Commission conflict of interest opinions including the years they were issued and their identifying numbers. Copies of these and all other advisory opinions (with identifying information deleted) are available for public inspection at the Commission office.

[4]/The Commission does not need to discuss the provisions of §18 because your partner is acting as attorney for the town and not some outside interest. You should however be aware that your partner may also be a municipal employee by virtue of his contractual arrangement with the school committee and therefore subject to the provisions of the conflict of interest law.

CONFLICT OF INTEREST OPINION
NO. EC-COI-84-92

FACTS:

You are an elected member of a municipal commission of a Town (Town). Your son is twenty-four years old and does not live at home with you. Pursuant to a Town advertisement in the spring, 1984, your son applied for and was hired in a Town department under your responsibility. The position is seasonal and covers the period of April through November. You state that you abstained as commissioner from any discussion or decision concerning your son's employment.

QUESTION:

1. Does G.L. c. 268A prohibit outright the employment of your son as a Town employee while you serve as a member of the commission?[1]/
2. If not, what limitations does G.L. c. 268A place on your activities as a commissioner?

ANSWER:

1. No.
2. You will be subject to the conditions set forth below.

DISCUSSION:

1. By virtue of your position as commissioner, you are a "municipal employee" within the meaning of G.L. c. 268A, §1(g). Nothing in G.L. c. 268A explicitly prohibits family members from working for the same municipality or municipal agencies, although, as will be seen below, G.L. c. 268A does place certain limitations on the activities of municipal employees.

[1]/You indicate that the Town Counsel orally advised you that your son's employment was prohibited by G.L. c. 268A, but no written opinion was issued. The Town Counsel has, in effect, joined in your opinion request to the Commission.

A section of G.L. c. 268A which implicitly addresses this question is §20. Under §20, a municipal employee (such as you) may not have a financial interest, directly or indirectly in a second contract made by the same municipal agency.[2]/ Although your son has a financial interest in his employment contract with the Town, that financial interest is not imputed to you because your son is emancipated and you have no legal duty to support him. Compare, EC-COI-84-11; 81-92; 80-121.[3]/

As a municipal employee you are subject to the standards of conduct contained in §23. To relevant provisions prohibit you from

> using or attempting to use your official position to secure unwarranted privileges or exemptions for yourself or others [§23(¶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(¶2)(3)].

As long as you abstained, formally or informally from any discussion or decision of the commission concerning your son's employment, these provisions would not appear to pose any barrier to your son's employment.

2. 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[4]/ in any particular matter[5]/ in which, in relevant part, a member of your immediate family[6]/ 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.

The decision to appoint an employee is a particular matter under §1(k). Because a member of your immediate family has 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 a Town employee. Section 19 also 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 to other commissioners the appointment of a family member;
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 commission, you must refrain from participating in these matters and should leave the room. See, **Graham v. McGrail, supra** at 138.

DATE AUTHORIZED: July 17, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-93

FACTS:

You are an attorney and are also employed by a consulting firm (Firm). You and your Firm currently consult to the Attorney General's office on a case before state agency ABC initiated by state agency DEF. The case involves a petition by DEF (identifying information deleted). The Attorney General is opposed to DEF's petition, and your work has been in developing evidence to support the Attorney General's position.

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[2]/In view of the Commission's conclusion, it is unnecessary to discuss whether any exemptions in §20 would apply to you.

[3]/These citations refer to prior Commission conflict of interest opinions including the year they were issued and their identifying numbers. Copies of these and all other advisory opinions are available (with identifying information deleted) for public inspection at the Commission offices.

[4]/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.

[5]/G.L. c. 268A, §1(k) defines "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 petition of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

[6]/G.L. c. 268A, §1(e) defines "immediate family," as the employee and his spouse, and their parents, children, brothers and sisters.

You are under consideration as a gubernatorial appointee to DEF.

QUESTION:

Does G.L. c. 268A permit you to serve as a DEF member while also maintaining your consultant activities for the Attorney General in opposition to DEF's petition before the ABC?

ANSWER:

No.

DISCUSSION:

The Commission has previously ruled that DEF is a state agency for the purposes of G.L. c. 268A because it is a public instrumentality of the commonwealth. (citations omitted). If you are appointed as a member of DEF, you will hold an "office, position, employment or membership in a state agency" and will therefore become a state employee within the meaning of G.L. c. 268A, §1(q).

As a state employee, you are subject to the standards of conduct contained in G.L. c. 268A, §23. Under these standards a state employee may not

(1) Accept other employment which will impair his independence of judgment in the exercise of his official duties;

(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.

(4) 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;

(5) improperly disclose materials or data within the exemptions to the definition of public records as defined by section seven of chapter four, and were acquired by him in the course of his official duties nor use such information to further his personal interests.

The maintenance of your consultant arrangement with the Attorney General in opposition to DEF's petition while also serving as a DEF member would necessarily place you in violation of these standards. In particular, your ability to carry out your powers as a DEF member will be inherently impaired by your continuing consultation on behalf of the Attorney General. As a DEF member you are a member of an entity which has taken a litigation position before the ABC. As the proceedings continue, the DEF presumably reviews the ABC proceedings and is in a position to formulate and evaluate litigation positions. Your ability to exercise independent judgment as a DEF member is necessarily undermined by your receipt of compensation for the advocacy of opposing positions in the same ABC proceedings.

Your mere absention from participation in those portions of DEF meetings at which the ABC petition is discussed would not satisfy the standards of §23. As a DEF member, you would have access to confidential commercial or financial information which would be relevant to the ABC petition. See, (citation omitted). As a consulting attorney to the Attorney General your duty to represent zealously the interests of your client would place you in an untenable position with respect to the information. Compare, EC-COI-83-176; 81-73.[2]/

[Discussion of identifying enabling legislation omitted].

DATE AUTHORIZED: July 17, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-94

FACTS:

You are an associate attorney at the law firm of Hill and Barlow and have been since 1981. In July 1983, you were appointed by Superior Court Judge Paul Garrity to serve as Deputy Special Master in **City of Quincy v. Metropolitan District Commission, et al.**, Sup. Ct. No. 138477, a case which concerns pollution of Boston Harbor and the operation of the metropolitan sewerage

[2]/The prohibitions of §23 would apply to your serving as a member of DEF while also maintaining your consulting activities for the Attorney General in opposition to DEF's petition before the ABC. The same concerns under §23 would not be raised if you were to consult to the Attorney General in proceedings which do not directly involve DEF. You would be required, however, to observe the disclosure requirements of G.L. c. 268A, §7(d).

system by the Metropolitan District Commission (MDC). The defendants in this case other than MDC include the Secretary of the Executive Office of Environmental Affairs (EOEA), the Commissioner of the Department of Environmental Quality Engineering (DEQE), the Director of the Division of Water Pollution Control (DWPC) and the Boston Water and Sewer Commission (BWSC). During July and August of 1983, your duties as Deputy Special Master were focused on assisting the Special Master, Harvard Law School Professor Charles Haar, in the preparation of a report which contained findings of fact and proposed remedies relating to plaintiff Quincy's motion for preliminary injunction.

On September 9, 1983, Judge Garrity issued a Procedural Order, which suspended any further action on the motion for preliminary injunction, based on the defendants' commitment to pursue the adoption and implementation of the remedies proposed in the Special Master's report. While the Special Master's appointment was continued under this Order to monitor the defendants' implementation of these remedies, your own appointment was not (although you state you participated to a minor degree in the monitoring upon request). As of May 18, 1984, however, you became one of the experts designated in a contract between the MDC and the Special Master to assist the latter in carrying out his monitoring duties. While the funding of the contract comes from the MDC, you state that your role is solely to serve as counsel to the Special Master.

QUESTION:

1. Are you considered a state employee for the purposes of G.L. c. 268A, and if so, do you qualify for special state employee status?

2. What restrictions does Chapter 268A place on your work as a private attorney and the work of the partners and associates at Hill and Barlow?

ANSWER:

1. Yes, you are the state employee inasmuch as you perform services for the Special Master, and through him a Superior Court Judge. You qualify for special state employee status under §1(o)(2)(b).

2. You and other Hill and Barlow attorneys are subject to the restrictions discussed below.

DISCUSSION:

1. Status as a State Employee

Whether or not you are subject to the restrictions of G.L. c. 268A, the conflict of interest law, depends in the first instance on your classification as a state employee. Section 1(q) of Chapter 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, including members of the general court and executive council." [emphasis added]. State agency is defined as **"any department of a state government including** the executive, legislative or **judicial,** and all councils thereof and thereunder, **and any** division, board, bureau, commission, institution, tribunal or other **instrumentality within such department** and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town." G.L. c. 268A, §1(p) [emphasis added].

In previous opinions, the Commission has held that trial court employees are "state employees" for Chapter 268A purposes. See, e.g., EC-COI-84-28; 84-27; 80-15. The Commission's rationale was that these judges and clerks fell within the statutory definition because they were performing services for, hired and paid by a state agency, namely the trial court.

Your original appointment as Deputy Special Master by Judge Garrity in the **Quincy v. MDC** case has expired. However, you are specifically named in the current contract between the MDC and the Special Master as an expert to be retained by the Special Master, who serves as an appointee of Judge Garrity. Your duties as counsel to the Special Master are spelled out in the contract: to assist the Special Master in his monitoring responsibilities under the Procedural Order and to undertake an investigation regarding the legal issues associated with the reduction and removal of inflow/infiltration. Likewise, your rate and method of compensation are detailed in the contract: the monies for your salary are to be paid by MDC via the Special Master. By contract, the special Master is to keep all the work under his personal control. Based on the foregoing, the Commission concludes that you are not an employee of MDC. While MDC pays your salary, you

are not performing services for MDC. Nor is the Superior Court itself the state agency for which you are performing services. Rather, you are a state employee by virtue of your employment arrangement with the Special Master and through him Judge Garrity. These individuals are at once "instrumentalities" of a department of state government (the trial court) and free from the administrative control of that court. Judges within the trial court have a degree of independence unique to that state agency, which distinguishes the trial court from other state agencies. The separateness of the judges is further underscored when a judge appoints a Special Master to a case. With the uniqueness of the court system in mind, the Commission finds that you are a state employee of "instrumentalities" of the trial court, namely the Special Master and the Superior Court judge.

Similarly, your employment relationship is structured and formal enough for you to be considered a consultant for the purposes of the state employee definition. Compare EC-COI-82-54. The Commission has in the past excluded from the broad definition of state employee those individuals who merely render informal, temporary and general advice to state officials (EC-COI-79-12) or present the views of individuals or groups affected by some state action (EC-COI-80-49). The reasoning was that people in government should be free to solicit information from, and opinions of, individuals in the private sector without the result being that those individuals who are willing to help are made subject to Chapter 268A. However, as someone in the private sector who is performing services for state government under a contract and "actually performing services and functions [monitoring] that might ordinarily be expected of government employees [judges]," you will be deemed a state employee. Compare EC-COI-82-54; 80-49. Because you are not an elected official and you state that you have not earned compensation as a state employee for more than eight hundred hours during the proceeding three hundred and sixty-five days, you are automatically a special state employee pursuant to G.L. c. 268A, §1(o)(2)(b).

2. Restriction under G.L. c. 268A, §4 on your work as a private attorney

Sections 4(a) and (c) provide that no state employee shall act as agent or attorney for, or receive compensation from anyone other than 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, paragraph 7 of §4 states that as a special state employee you are subect to these prohibitions

> "...only in relation to a particular matter (a) in which [you have] at any time participated as a state employee, or (b) which is or within one year has been a subject of [your] official responsibility, or (c) which is pending in the state agency in which [you are] 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.

Therefore, if you serve as a state employee for less than sixty days, §4 will basically prohibit you only from representing or being paid by a non-state party in relation to the **Quincy v. MDC** case, the particular matter you have participated in as a state employee. You will also be prohibited from representing a non-state party with respect to any special (as opposed to general)[2]/ legislation in which you participated or attacking the validity of any regulations the enactment of which you particpated[3]/ in (EC-COI-81-34). Your monitoring and advising role for the Special Master concerning proposed regulations by the MDC or other Commonwealth defendants would constitute "participation" in the promulgation of those regulations. Because such promulgation is a "particular matter," you would be precluded under §4 from representing Hill and Barlow clients with respect to the promulgation of such regulations or in attacking the validity of those regulations. The same analysis would apply to the enactment of special legislation. However, the §4 prohibition would not extend to your representation of a client in proceedings pursuant to such regulations once they are in place. EC-COI-81-34.

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[1]/G.L. c. 268A, 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. G.L. c. 268A, §1(k). It should be noted that while general legislation is excluded from the definition of particular matter, special legislation is not. See, e.g., EC-COI-82-21. Likewise, while regulations in and of themselves are not particular matters, the process by which they are adopted and the determination that was initially made as to their validity will be considered particular matters. EC-COI-81-34.

[2]/Special Laws are those directed at a specific situation, individual, or entity: for example, a law exempting a specifically identified real estate developer from certain regulations promulgated by MDC. General laws, in contrast, usually establish a rule of future conduct applicable on a wider scale.

[3]/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)

If you serve as a state employee for more than sixty days,[4]/ the §4 prohibition will extend to all matters pending before the Special Master or Judge Garrity, the state "instrumentalities" for which you are providing services.[5]/ In other words, you will be prohibited from representing anyone other than the commonwealth or a state agency in a case before the Special Master or Judge Garrity once your service as a state employee exceeds the 60 day limit. This section is clearly designated to avoid the potential for divided loyalties inherent where a state employee works for outside private interests in their dealings with the state, particularly before the very state instrumentality for which the state employee performs services.

3. Application of G.L. c. 268A, §5 to your activities and those of partners and associates at Hill and Barlow

Section 5 of Chapter 268A extends many of §4's prohibitions against assisting outsiders to former state employees and partners of both present and former state employees. As to your own activities, §5 would only come into play subsequent to the term of the contract. Once you become a former state employee, your special state employee status becomes irrelevant. As a former state employee, you would be permanently prohibited from acting as agent or attorney for, or receiving compensation from anyone other than the commonwealth or a state agency in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest and in which you participated as a state employee. G.L. c. 268A, §5(a). For example, you will be forever barred from representing an individual, company, municipal agency, town or city in connection with the **Quincy v. MDC** case. When you leave state service, you will also be under a one year prohibition against appearing personally before any court or agency of the commonwealth in connection with any particular matter as previously described, which was under your official responsibility[6]/ during the last two years of your state employment. G.L. c. 268A, §5(b). Official responsibility turns on the authority to act, not on whether you actually participated and exercised that authority. Buss, **Massachusetts Conflict of Interest Statute: An Analysis**, 45 B.U.L. Rev. 299, 321 (1965). EC-COI-84-48. By the terms of the contract, the Special Master is to keep all the work under his personal control, i.e. within his official responsibility. From the facts you present, it does not appear that your official responsibility in the **Quincy v. MDC** case would extend beyond what you actually particpate in on behalf of the Special Master.

Section 5(d) prohibits a partner of a state employee from acting as the agent or attorney for anyone other than the commonwealth in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest and in which the state employee participates or has participated as a state employee or which is the subject of his official responsibility. The Commission concludes that as an associate of the firm Hill and Barlow, you are not a "partner" of that firm for Chapter 268A, purposes and consequently §5(d) does not presently apply to the firm partners. EC-COI-84-20. You should be aware, however, that previous Commission opinions have not restricted the term "partner" solely to those who enter partnership agreements but rather have focused on the substance of the relationship. In addition, if a group creates a public appearance of a partnership, they may be treated as partners even though they may not, in fact, share profits. See EC-COI-82-68; 82-19.

If you become a partner of the firm during the term of the contract, your fellow partners will be subject to the provisions of §5(d). For example, they would be prohibited from representing a non-state party in connection with the **Quincy v. MDC** case or attacking the promulgation of regulations you participated in. If you become a partner of the firm within one year subsequent to the term of the contract, your fellow partners would be subject to the provisions of §5(c). That section prohibits a partner of a former state employee for one year following the termination of your state service from engaging in any activity proscribed for you under §5(a). The major restriction would again be against representing a non-state party in connection with the **Quincy v. MDC** case.

4. The Standards of Conduct contained in §23

Section 23 of the statute contains general standards of conduct which are applicable to all state employees. That section provides in part that no state employee shall

> 1. use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others;

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[4]/ As stated in EC-COI-80-31, you are correct in understanding the words "to serve more than 60 days" to mean actually working more than 60 days. Your assumption that work on any part of a day will be considered work for a full day is also accurate.

[5]/ Because the Commission has concluded that you are not an MDC employee, it is unnecessary to address how Chapter 268A would apply to you as a state employee of that agency.

[6]/ 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).

2. 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;

3. accept employment or engage in business activity which will require him to disclose confidential information he has gained in his official position, nor use such information to further his personal interest.

These provisions underscore the §4 prohibition against you representing a non-state party before the State Master or Judge Garrity on other matters during the pendency of your service. But more importantly, §23 sets the parameters for any dealings you may have with the MDC outside of your state monitoring role for the Special Master. While §23 does not specifically require it, the safest course would obviously be to avoid representing any clients before MDC during the term of the contract. If you do appear before the MDC on behalf of a private client, e.g. to obtain a sewer connection or extension permit, you will have to take great care to abide by the §23 provisions. You must not identify yourself in such MDC dealings as the monitor in the **Quincy v. MDC** case or do anything to exploit your governmental position. Moreover, you must avoid giving the impression that your recommendations to the Special Master concerning MDC activities could be improperly influenced based on MDC's handling of your clients' applications. Your representation of either MDC or its opponent in a court case during the term of your monitoring contract could likewise raise significant §23 issues. If you become involved in any MDC court case during your state service, you should take any and all steps necessary to avoid giving the impression that you can be improperly influenced in your monitoring duties. Finally, you must not divulge confidential information concerning MDC procedures or standards to your clients, or use such information to further your clients' or your own personal interests.

DATE AUTHORIZED: July 25, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-96

FACTS:

You are a member of the Town of ABC's Planning Board (Board). The Town has a zoning by-law which would allow the building of a Planned Residential Community development ("development") upon the granting of a special permit by the Board. An application for a special permit has recently been submitted by a developer for the building of such a development. You own a piece of property which abuts the proposed development. You state that by virtue of the location of your property you are a "party in interest" as that term is defined in G.L. c. 40A, and thus entitled to notice of the public hearing on the permit and decision of the Board.

QUESTION:

Does G.L. c. 268A permit you to participate as a Board member in a decision on the issuance of a special permit where you own land which abuts the proposed development?

ANSWER:

No.

DISCUSSION:

As a member of the Board you are a municipal employee and therefore subject to G.L. c. 268A. The provision of that law which is relevant to the question you have raised is §19.

Section 19(a) provides in pertinent part that a municipal employee may not participate[1]/ as such an employee in a particular matter[2]/ in which he or a member of his immediate family has a financial interest. A decision by the Board to issue or deny a special permit is a particular matter in which you ordinarily would particpate. The critical issue, then, is whether because you own land abutting the land to be developed, you have a financial interest in the decision. The commission concludes that you do.

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[1]/For the purposes of G.L. c. 268A, §1(j) "participate" is defined as to participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. To participate "even in the formulation of a matter for vote is to participate in the matter. . .[t]he wise course for one who is disqualified from all participation in a matter is to leave the room." **Graham v. McGrail**, 370 Mass. 133, 138 (1976). The Court goes further to say that "[W]e do not think [such a person] can be counted in order to make up a quorum." **Id.** at 138 (citations omitted).

[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).

The principal object of zoning is to protect the property of others.[3]/ Whenever a change is contemplated, either by way of a variance or a special permit, the property rights of owners in the area of the proposed change are implicated, and certain rights to due process attach. In Massachusetts this takes the form of notice of the proposed change, the holding of a public hearing, and notice of the decision. With respect to those property owners whose rights will be most significantly affected by the issuance of a special permit, G.L. c. 40A, §11 provides that they be given individual notices of the hearing and the decison. These so-called "parties in interest" are defined in §11 in pertinent part as ". . . abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner. . ." It requires no great leap to find that where one's property rights stand to be signifiantly affected the value of those rights also stands to be affected. Thus, one's financial interest is implicated. This certainly is true where the person in question is considered a "party in interest" as that is defined in §11. There is no requirement in G.L. c. 268A, §19 that the financial interest prohibiting participation be a substantial one,[4]/ nor is there any requirement that it be a financial interest that is realized. Such interests would include, but are not limited to, increases or decreases in the value of the property, or upward or downward revisions in property tax assessment. In the case of a Board member voting on the issuance of a special permit, a vote either way affects a financial interest since an affirmative vote may result in the issuance of the permit with its concomitant effect on property rights, and a negative vote may result in a permit denial and thus a manintenance of the status quo.[5]/

Section 19(b) contains exemptions to the §19(a) prohibition, but the Commission concludes that neither of the two relevant ones is available to you. The first provides that a municipal employee may participate in the matter if his appointing official first determines 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 exemption is not available to elected officials because they do not have appointing officials.[6]/ The second exemption applies to those particular matters which involve determinations of general policy, and the interest of the municipal employee or members of his immediate family is shared with a substantial segment of the population of the municipality. It may be true that the majority of the citizens of ABC including yourself would be affected by the granting of a special permit because taxes might be lowered or the character of the town might change. However, your interest, by virtue of the location of your property, is distinct from theirs. Again, G.L. c. 40A, §11 makes the distinctiveness of your interest clear.

You have stated that both by-law and G.L. c. 40A, §9 require an affirmative vote of four members of a five member permit granting authority such as the board. Therefore if you do not participate in the matter, a unanimous vote of the four eligible members would be required. Although a rule of necessity has been recognized by the Massachusetts courts in several cases, "[T]hat rule is not brought into play by the mere absence of a member or members, however." **Graham v. McGrail, supra** at 138. Moreover, the rule is "inapplicable when a way can be found to provide a qualified tribunal, as by excluding from the tribunal the disqualified. . . member [or] by counting only the votes of members who are qualified." 2K Davis, Adm. Law 12.04 (1958) (citations omitted). The rule should only be utilized where so many members of a tribunal are disqualified that the body is incapable of acting because an insufficient number remain to constitute a quorum. In the situation you describe, the four remaining Board members are not unable to act because of an insufficient number. Consequently you would only be able to participate if another member were disqualified from participation and not merely absent from the Board meeting at which the matter is considered. The fact that there may be not unanimous agreement among the four remaining members as required by G.L. c. 40A, §9 is not a reason to invoke the rule of necessity. See, EC-COI-82-10.

DATE AUTHORIZED: August 14, 1984

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[3]/See e.g. **Hammond v. Board of Appeal of Springfield**, 257 Mass. 446, 448 (1926); see also J.A. McCarty, "Zoning and Property Rights," 48 Mass. L.Q. (1963) at 473.

[4]/Quite the contrary, it is quite clear that the General Court meant the term to encompass even those interest that are minimal. See e.g. W. Buss, "The Massachusetts Conflict of Interest Law," 45 B.U.L. Rev. 299, 361 (1965); R. Braucher, **Conflict of Interest in Massachusetts in Perspective of Law, Essays for Austin Wakeman Scott**, (1964), at p. 25.

[5]/Even if you were not a statutorily defined "party in interest" but owned property in close proximity to the proposed development, your participation would raise serious questions under G.L. c. 268A, §19 and and §23(¶2)(2) and (3).

[6]/See **District Attorney for the Hampden District v. Grucci**, (1981) Mass. Adv. Sh. 2125, 2128, n. 3. In 1982, the General Court considered comprehensive legislation filed by the Commission which, in part, would have provided an exempting avenue for elected municipal officials under §19. See, 1982 House Doc. No. 1235, §16. This particular proposal was not approved.

CONFLICT OF INTEREST OPINION NO. EC-COI-84-98

FACTS:

You are an elected member of the ABC School Committee (Committee) and its chairman. Your daughter is an elementary school teacher in the ABC school system. Two other members of your seven member committee also have relatives in the system; one has a mother who is a teacher, and the other has a husband who teaches and is a department head.

QUESTION:

To what extent does G.L. c. 268A restrict the participation of these members in teacher-related matters which come before the school committee?

ANSWER:

School committee members who have immediate family members teaching in the school system are subject to the following restrictions.

DISCUSSION:

As elected members of the school committee you are municipal employees and therefore are subject to the provisions of G.L. c. 268A, the conflict of interest law. The sections of that law which are relevant to your questions are §§19 and 23. Section 19(a) provides in pertinent part that no municipal employee may participate as such an employee in any particular matter[1]/ in which he or a member of his immediate family[2]/ has a financial interest. The objective of this provision is to eliminate in advance the pressure that otherwise might be brought to bear on public employees when faced with situations where there are competing public and private considerations.[3]/ Because the term "financial interest" is not defined in the statute, the Commission has the responsibility for interpreting it, and in doing so is required to give it a workable meaning. See **Graham v. McGrail,** 370 Mass. 133, 140 (1976); EC-COI-83-114; 83-107.[4]/ Bearing in mind this requirement, the Commission reaches the following conclusions. Because there is no language in §19(a) modifying the term, "financial interest" is not limited to those interests which are significant or substantial. This conclusion is bolstered by §19(b) which exempts from the §19(a) prohibition a municipal employee who discloses in advance to his or her appointing official the existence of a financial interest if the appointing official makes a determination 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."[5]/ It is not for the employee to make a judgment as to the substantiality of his or her financial interest. All that is necessary to trigger §19(a) is the existence of any financial interest. The responsibility for evaluating it falls to the appointing official.[6]

Further support for this interpretation of "financial interest" is found in §20 where a municipal employee is prohibited from having a financial interest, directly or indirectly, in a contract made by a municipal agency of the same town, in which the town is an interested party. That section excludes from its coverage financial interests which consist of "the ownership of less than one percent of stock of a corporation." By implication, all other financial interests, no matter how insubstantial or insignificant, are covered by the prohibition.

A second issue involving the interpretation of the term "financial interest" is whether it embraces those interests which might be affected at some future time, as well as those interests which actually exist at the time of the public employee's action. This is an issue separate from the substantiality question. Prior to 1963, the

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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]/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).

[3]/See W. Buss, **"The Massachusetts Conflict of Interest Statute; an Analysis,"** 45 B.U.L. Rev. 299, 301 (1965).

[4]/These latter two citations refer to previous Commission conflicts of interest opinions including the years they were issued and their identifying numbers. Copies of these and all other advisory opinions (with identifying information deleted) are available for public inspection at the Commission office.

[5]/It should be noted that this exemption is not available to elected officials as they do not have appointing officials. See **District Attorney for the Hampden District v. Grucci,** 1981 Mass. Adv. Sh. 2125, 2128, n. 3. In 1982, the General Court considered comprehensive legislation filed by the Commission which, in part, would have provided an exempting avenue from elected municipal officials under §19. See, 1982 House Doc. No. 1235, §16. This particular proposal was not approved.

[6]/See also R. Braucher, **Conflict of Interest in Massachusetts in Perspective of Law, Essays for Austin Wakeman Scott,** (1964) at p. 25; W. Buss, **"The Massachusetts Conflict of Interest Law: An Analysis,"** 45 B.U.L. Rev. 299, 361 (1965).

federal courterpart to §19 used the words "direct or indirect" to modify financial interest.[7]/ In a 1961 Supreme Court case involving the existence of a financial interest, the court found a violation of the law where a government consultant who was also a director and shareholder of an investment banking firm helped to negotiate a contract between the Atomic Energy Commission and a utility company. Subsequent to the signing of that contract the utility company employed the consultant's investment banking firm to handle the public financing required for the utility project. The Court found a violation of the federal statute because the consultant's investment banking firm had an indirect financial interest in the contract between the Atomic Energy Commission and the utility company. The Court's opinion was based on the fact that because his investment banking firm had a reputation in the area of power financing, the consultant should have known that his firm "might be offered the work of arranging the financing of the project when and if a contract for the project should be made."[8]/ When the federal statue was amended shortly thereafter, the word "indirect" was omitted, leading to speculation that only present financial interests were contemplated.[9]/ There is some authority for the application of this narrower interpretation of the Massachusetts statute. In **Graham v. McGrail,** the court concluded that "...both the language and the policy of §19(a) forbid a school committee member to participate in [a budget decision] when his child's private right is directly and immediately concerned..." 370 Mass. at 140. Previous Commission opinions are consistent with this holding.[10]/

The limiting of prohibited financial interests to those that are of a more direct and immediate nature is reasonable given the fact that an important element of a violation of §19 is knowledge. There obviously can be no concern that a public employee's official actions will be influenced by private interests where he or she is not aware of the existence of those interests. However, where there is knowledge of the existence of private interests, and where it is obvious or reasonably foreseeable that one's private interests will be affected by one's official actions, then the provisions of §19 are applicable.

To summarize up to this point, any financial interest, no matter how small, is enough to trigger §19(a). However, that financial interest must be direct and immediate, or at least reasonably foreseeable. In terms of the practical application of these principles to your situation, the decision in **Graham v. McGrail** is a good starting point. School committee members may not participate in any way in the formulation, adoption or revision of any aspect of the budget or a collective bargaining strategy or position which may relate to the wages, hours or conditions of employment of any member of his or her immediate family employed by the school department.[11]/ This principle must be followed both if the family member will be directly and immediately affected or if it is reasonably foreseeable that the family member's interest will be affected. Not every issue relating to wages, hours or condition of employment will automatically affect, or foreseeably affect, a family member's financial interest. For example, if a "reduction in force" provision were under consideration, the three Committee members would only have to refrain from participation if it were obvious or reasonably foreseeable that their family members were vulnerable to layoff or demotion to a lower position because of their seniority level. Likewise with the team teaching format, Committee members need only refrain if their family member is a team teacher, has applied, or has a definite plan to apply to become a team teacher. With provisions dealing with early retirement or payment to retiring teachers for accumulated sick time, members need only refrain from participating if their family member is retiring or has specific plans to retire, or if the provision at issue will result in the vesting of some right in the family member. For example, if the provision were the availability of post-retirement insurance benefits for employees with at least fifteen years of service, any Committee member whose family member had fifteen or more years of service would have to refrain from participating.

Finally, all Committee members should be aware of the provisions of §23 which contains general standards of conduct applicable to all public employees. It prohibits public employees from

> accepting other employment which will impair their independence of judgment in the exercise of their official duties [§23(¶2)(1)];

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[7]/18 U.S.C. §434.

[8]/See **United States v. Mississippi Valley Generating Co.**, 364 U.S. 520, 557 (1961).

[9]/See R.B. Perkins, "The New Federal Conflict of Interest Law," 76 Harv. L. Rev. 1113, 1134 (1963). See also Buss, supra. at 356 (speculating that for the same reason the intent was to limit the Massachusetts statute to financial interests that are clearly in existence at the controlling time.

[10]/See e.g. EC-COI-83-174 (School committee member may not participate in hiring of his child to be his administrative assistant); EC-COI-83-164 (teacher on leave of absence to serve as mayor and school committee member has financial interest in 1) issues affecting his teacher's compensation and 2) determinations related to the retention of his position); EC-COI-82-34 (state employee who is a plaintiff in a class action suit has a financial interest in that suit where there is a possibility that money damages will be awarded).

[11]/370 Mass. at 140.

using or attempting to use their official positions to secure unwarranted privileges or exemptions for themselves or others [§23 (¶2)(2)];

by their conduct giving reasonable basis for the impression that any person can improperly influence or unduly enjoy their favor in the performance of their official duties, or that they are unduly affected by the kinship, rank, position or influence of any party or person. [§23(¶2)(3)]; and

accepting employment or engaging in any business or professional activity which will require them to disclose confidential information which they gained by reasons of their official position or authority and from using that information to further their personal interests. [§23(¶2)(1) and (2)].

Section 23 focuses not only on actual conflicts of interest but also on appearances of conflicts. Thus all members should be careful that any action they take is impartial and that there is no basis for any perception that is is not. Additionally, the three affected members of the Committee should be sure that no pressure is put on the other four members to act in a way that would be beneficial to their family members in particular.

Although the filtering process the affected Committee members must go through may seem burdensome and time consuming, it is necessary to protect the integrity of the school committee's actions and to maintain the public's confidence in those actions.

DATE AUTHORIZED: August 14, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-101

FACTS:

You are the director of a non-profit agency which has a partnership agreement with the Department of Mental Health (DMH). Under the terms of this agreement, several DMH employees are assigned to your agency. The agency's board of directors would like to give incentive awards to employees to perform beyond expected levels. These awards would be one-time cash awards, not to exceed three hundred dollars, and the recipients of the awards would be determined by a committee of their peers. The money for the awards would not come from state funds.

QUESTION:

Does G.L. c. 268A permit state employees to be recipients of these cash incentive awards?

ANSWER:

No.

DISCUSSION:

DMH employees assigned to your agency are state employees, and therefore are subject to the provisions of G.L. c. 268A, the conflict of interest law. The section of that law relevant to your question is §3. It prohibits a person from directly or indirectly giving a state employee anything of substantial value for or because of any official act performed or to be performed by the employee. G.L. c. 268A, §3(a). It also prohibits a state employee from soliciting or receiving anything of substantial value from any person for or because of any official act performed or to be performed by him or her. G.L. c. 268A, §3(b).

The purpose of §3 is to prevent the giving or receiving of items of value to public employees in addition to their salaries for performing their official duties.[1/] The Commission addressed this purpose at some length in **In the Matter of George A. Michael**, 1981 Ethics Commission, 59, 68:

> 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 the nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited. To allow otherwise would subject public employees to a host of temptations which would undermine the impartial performance of their duties, and permit multiple remuneration for doing what employees are already obliged to do — a good job. Sound public policy necessitates a flat prohibition since the alternative would present unworkable burdens of proof. It would be nearly impossible to prove the loss of an employee's

[1/] No influence or intent to influence those duties is required. Compare G.L. c. 268A, §2.

objectivity or to assign a motivation of his exercise of discretion. If public credibility in government institutions is to be fostered, constraints which are conductive to reasoned, impartial performance of public functions are necessary, and it is in this context that Section 3 operates.

It is clear that the incentive award which you have proposed is something of substantial value under §3. Compare **Commonwealth v. Famigletti,** 4 Mass App. 584 (1976) ($50 is something of substantial value under §3(b)). Further, the award would be given to the state employee "for or because of" his or her official acts as a state employee, i.e. performance of his or her normal duties. The fact that the recipient would be chosen by his or her peers does not alter this. Accordingly, it would be a violation of §3 for you to offer and for a state employee to acept such an award. This result is consistent with previous Commission opinions.[2]/

The desire to recognize high quality employee performance can be satisfied in a number of ways that would not violate §3. For example, the Commission has concluded that receipt by a state employee of a "man of the year award" and accompanying plaque is permissible. EC-COI-81-9. It has also concluded that a state employee's request that a stipend intended for him be donated to a non-profit organization designated by him does not violate §3. EC-COI-83-75.

On the basis of the foregoing, your proposed incentive award, insofar as it involves state employees, is not permissible under G.L. c. 268A, §§3(a) and (b).

DATE AUTHORIZED: September 11, 1984

CONFLICT OF INTEREST OPINION NO. CO-OI-84-104

FACTS:

You are employed as an engineer by a corporation. You are also a member of the board of trustees of the Worcester State Hospital (Board). Recently the Commonwealth, pursuant to St. 1980, c. 579, determined that certain land located on the hospital grounds was surplus, and it made plans to transfer that land to the Worcester Business Development Corporation (WBDC).[1]/ The WBDC in turn plans to develop the land consistent with its corporate purpose of promoting the economic growth and development of the Worcester area. The proposed transfer of land has generated considerable controversy and has divided the Board members into factions. One faction filed suit against the Governor, various other state officials, and the WBDC in an effort to halt the transfer. The other faction, of which you are a member, now controls the Board and is seeking to have the suit dismissed. You recently discovered that both your employer's chairman of the board and one of its former employees are elected members, although not officers, of the WBDC.

QUESTION:

Does G.L. c. 268A permit you to participate as a hospital trustee in matters regarding the land transfer even though your employer's board chairman and one of its former employees are members of the WBDC?

ANSWER:

Yes.

DISCUSSION:

As a trustee of the Worcester State Hospital, you are a state employee and therefore are subject to the provisions of the conflict of interest law. The sections of that law which are relevant to your question are §6 and §23. Section 6 provides in pertinent part that a state employee may not participate as such an employee in a particular matter in which to his knowledge he or a business organization in which he is an employee has a financial interest. You personally do not have a financial interest in the land transfer, nor, according to you, does your employer stand to benefit financially from the transfer. The fact that your employer's board chairman and one of its former employees are WBDC members is too remote a connection to call into play the §6 prohibition.

[2]/See e.g. EC-COI-82-97 (the giving of a monetary commission by a DMH vendor to a DMH employee in recognition of his job performance would violate §3); EC-COI-81-120, fn. 3 (a proposed supplementary incentive in the form of a contract finder's fee would violate §3 if the incentive were given to state employees for performing their normal duties). These two citations refer to previous Commission conflict of interest opinion, including the year they were published and their identifying number. These and all other Commission advisory opinions are available for inspection, with identifying information deleted, at the Commission office.

[1]/The WBDC is a non-profit corporation established by St. 1956 c. 600 for the purpose of promoting the economic growth and development of the Worcester area. It is governed by a board of directors who in turn are elected by the WBDC membership which consists of members of the Worcester area business community.

You should, however, be aware of §23 of the law which provides in pertinent part that a state employee shall not

> by his conduct give reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is unduly affected by the kinship, rank, position or influence or any party or person[2]/ nor

Concerns under this provision could arise in your case since the chairman of the board of your employer is associated with a party of interest. Accordingly, he may be perceived to have some leverage over you. That relationship standing alone will not be sufficient to give reasonable basis for the impression that you could be improperly influenced. Such an impression could be created, however, if any decisions you make as a trustee with regard to the land transfer are without basis, if positions you may take are inexplicably inconsistent, or if the chairman of your employer's board or any of your superiors try to convince you to take a particular position on the matter. These examples are not meant to be all-inclusive. If you have any concerns about any specific course of condut you intend to take, you should renew your opinion request.[3]/

DATE AUTHORIZED: September 11, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-107

FACTS:

You are an attorney participating in the Bar Advocate Program in ABC and DEF Counties. Under this program you periodically represent indigent defendants in two District Courts within these counties. The DEF County District Attorney prosecutes the defendants whom you represent in DEF and ABC Counties.

You also wish to work part-time for the DEF County District Attorney's Office on a one-year program prosecuting child support cases. You expect to be assigned six days per month in the district courts of ABC and DEF Counties.

QUESTION:

What restrictions does G.L. c. 268A place on your employment with the DEF County District Attorney's Office?

ANSWER:

You may not represent indigent defendants in DEF and ABC Counties if you serve as a Special Assistant District Attorney for more than sixty days in any one-year period. Your dual roles are also subject to the limitations of §23 and the Code of Professional Responsibility.

DISCUSSION:

The DEF County District Attorney's Office is considered a state agency for the purposes of G.L. c. 268A and you will therefore be a state employee under G.L. c. 268A. As a Special Assistant District Attorney, you will be permitted to engage in outside business activities during normal working hours and will therefore be a "special state employee" as that term is defined in §1(o)(2)(a).

Two sections of G.L. c. 268A are relevant to your situation. Section 4, paragraph 7, clauses (a) and (b) prohibits you from receiving compensation from, or acting as agent or attorney for, anyone other than the commonwealth in relation to any particular matter[1]/ in which you have participated[2]/ as a state employee or which is or within one year has been the subject of your official responsibility.[3]/ Since your representation of indigent defendants in criminal matters for the Bar Advocate Program is not related to your prosecuting child support cases as a Special Assistant District Attorney, clauses (a) and (b) do not prohibit your child support prosecution activities.

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[2]/Section 23 also prohibits a state employee from improperly disclosing confidential material gained by reason of his official postion, or use such confidential information to further his personal interests.

[3]/This conclusion is based on your representation that your employer itself has no interest in the WBDC development project. Should the situation change, this result might be different, and you should contact the Commission for further guidance. Any advice rendered herein is prospective only and cannot address the propriety of conduct that has already occurred.

[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, county or municipal 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, "official responsibility" is defined as the direct administrative or opertating 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).

However, clause (c) of §4, paragraph 7, prohibits you from receiving compensation or acting as agent or attorney for anyone other than the commonwealth in relation to a particular matter which is pending in the agency you are serving if you serve more than sixty days during any three hundred sixty five day period. Criminal prosecutions in DEF county are the responsibility of the District Attorney 's Office in that county. Thus, your participation in the Bar Advocate Program would necessarily involve matters pending in the agency you would be serving as Special Assistant District Attorney.

As long as you work as a Special Assistant District Attorney on no more than sixty days during any three hundred sixty five day period, the restriction of clause (c) will not apply to you. To serve more than sixty days means to perform work on more than sixty days, and work on any part of a day will be considered work for one full day. You are responsible for keeping accurate records in this regard. See, EC-COI-80-31. If you serve for more than sixty days during any three hundred sixty five day period as a Special Assistant District Attorney, you will have to cease representing clients in the Bar Advocate Program.[4]/

As a state employee, you are also subject to the standards of conduct contained in §23. The relevant provisions of §23 prohibit you from

> accepting other employment which will impair your independence of judgment in the exercise of your official duties [§23(¶2)(1)],
>
> 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(¶2)(3)], and
>
> accepting employment or engaging in any business or professional activity which will require you to disclose confidential information which you have gained by reason of your official position or authority [§23 (¶3)(1)].

These provisions will inevitably come into play whenever there is an overlap between your official duties as child support case prosecutor and your representation of indigent defendants. For example, you must avoid prosecuting individuals whom you have previously represented in the Bar Advocate Program. You must also refrain from disclosing to defense attorneys in the Bar Advocate Program confidential information which you have access to which relates to the prosecution of a case.

You should be aware your dual advocacy may present more substantial questions under the Code of Professional Responsibility. Specifically, your ability to represent indigent defendants might be affected by your simultaneous representation of the prosecution in other cases. See, Massachusetts Bar Association, Committee on Professional Ethics, Opinion No. 80-1 [law student may not simultaneously represent indigent defendants in a clinical law school program while also representing the commonwealth as a prosecutor in a different county]. Because the Commission's jurisdiction does not extend to construing the Code of Professional Responsibility, you should seek further guidance from other sources.

DATE AUTHORIZED: September 11, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-108

FACTS:

You are a member of the General Court and an attorney. You would like to serve on a medical malpractice tribunal established pursuant to G.L. c. 231, §60B. Each tribunal consists of three members; a single justice of the superior court, a physician, and an attorney. Both the physician and the attorney are selected by the single justice from lists submitted by the Massachusetts Medical Society and the Massachusetts Bar Association respectively. The physician and the attorney are compensated for their services in the amount of $50.00. The purpose of the tribunal is to review all medical malpractice claims prior to trial and to determine whether or not they raise legitimate questions of liability. If the tribunal makes a finding for the defendant, the plaintiff may not proceed to trial unless he or she files a bond sufficient to cover the defendant's costs and attorneys' fees should the plaintiff not prevail.

QUESTION:

Does G.L. c. 268A permit a member of the General Court to serve on a medical malpractice tribunal?

[4]/ In view of the Commission's conclusion under §4, it is not necessary to review additionally the application of G.L. c. 268A, §7 to your situation.

ANSWER:

Yes, provided he is not compensated for his services on the tribunal.

DISCUSSION:

As a member of the General Court you are a state employee and therefore are subject to the provisions of the conflict of interest law, G.L. c. 268A. A threshold issue is whether, as a member of a medical malpractice tribunal, you would be performing services for a state agency. A state agency is defined in §1(p) as "any department of state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department..." [emphasis added]. In its previous determinations concerning the public status of an entity for purposes of G.L. c. 268A, the Commission has focused on the following four factors;

1. the impetus for the entity's creation (whether by statute, rule, regulation or otherwise);
2. the entity's performance of some essentially governmental function;
3. whether the entity receives and/or expends public funds; and
4. the extent of supervision and control exercised by government officials or agencies over the entity.

The medical malpractice tribunals are established by statute, G.L. c. 231, §60B. They perform as a pretrial screening mechanism within the court system, weeding out malpractice claims which lack merit. They have, in fact, been referred to as "adjunct[s] of the state superior court." **Feinstein v. Massachusetts General Hospital,** 643 F.2d 880, 888 (1st Cir. 1981). According to §60B the tribunals receive, subject to appropriation, monies from the state treasury sufficient to compensate non-judicial tribunal members for their services. Lastly, they function under the supervision of the judiciary. Selection of the attorney and physician members is done by a superior court justice, and complaints relative to the decision of the tribunal are heard by the court. Based on the foregoing, the Commission concludes that as a member of a medical malpractice tribunal you would be performing services for a state agency.[1]/

The section of the statute relevant to the questions you have raised is §7. It prohibits a state employee from having a financial interest, directly or indirectly, in a contract made by a state agency, in which the commonwealth or a state agency is an interested party. As a compensated member of a tribunal, you would have a direct financial interest in an employment arrangement with a state agency. Because you are a state employee by virtue of your membership in the General Court, this direct financial interest would be prohibited by §7. Section 7 contains several exemptions to the prohibition, but none is applicable to your situation.[2]/ If, however, you were to serve on the tribunal and refuse compensation for your services, you would have no financial interest in a contract made by a state agency. In that case there would be no violation of §7.

DATE AUTHORIZED: September 25, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-109

FACTS:

You are a member of the judiciary. A number of years ago, you acquired title jointly with your spouse in land and buildings at Lot A. You both subsequently conveyed your entire interest to relatives, who assumed the mortgage on the property. Recently, due to the relatives' apparent lack of interest in continuing their joint ownership, and the fact that you and your spouse own the adjacent parcel of property, you two would like to reacquire the property. One of the five rental units at Lot A, however, presently receives Section 8 Housing

[1]/The status of tribunal members as performing services within the judicial system is analogous to that of one who is hired to assist a special master appointed by the court in a piece of major litigation. See EC-COI-84-94. (This citation refers to a previous Commission advisory opinion including the year it was issued and its identifying number. This and all other advisory opinions are available for public inspection, with identifying information deleted, at the Commission offices).

[2]/G.L. c. 268A, §7(c) exempts

"...the interest of a member of the general court in a contract made by an agency other than the general court or either branch thereof, if his direct and indirect interests and those of his immediate family in the corporation or other commercial entity with which the contract is made do not in the aggregate amount to ten percent of the total proprietary interest therein, and the contract is made through competitive bidding and he files with the state ethics commission a statement making full disclosure of his interest and interests of his immediate family..."

This exemption does not cover personal service arrangements such as the one you have described. Additionally, your propriety interest exceeds ten percent.

Assistance Payments from the federal government[1]/ and another unit is subsidized under the Chapter 707 Rental Assistance Program.[2]/ Both programs are operated and administered by the Town Housing Authority (THA).

QUESTION:

Would your financial interests in these subsidized units violate the state conflict of interest law, G.L. c. 268A?

ANSWER:

Your financial interest in the Chapter 707 subsidized unit constitutes a conflict of interest, whereas your interest in the Section 8 subsidized unit does not.

DISCUSSION:

As a member of the judiciary, you are a state employee as that term is defined in G.L. c. 268A, §1(q). State employees are prohibited by §7 from having "a financial interest, directly or indirectly, in a contract made by a state agency in which the commonwealth or a state agency is an interested party. . ." Any restrictions you will be subject to as a state employee will therefore depend on the degree of state involvement in the contracts and funding process of the subsidy progams.

1. Section 8 Program

The Section 8 subsidy program is administered in your area under a contract between THA and the U.S. Department of Housing and Urban Development (HUD). The subsidy is funded by the federal government and paid directly to THA, which in turn pays the landlord. While the State Executive Office of Communities and Development (EOCD) periodically reviews and signs-off on such contribution contracts, EOCD is neither a funding source for the subsidy nor a party to the contract for §7 purposes. Thus, your financial interest in the Section 8 subsidy program contract (i.e. the monies THA will pay you from its contract with HUD to subsidize your tenant's rent) will not violate §7 inasmuch as you will have a financial interest in a contract made by a municipal rather than a state agency.[3]/ See EC-COI-81-189.[4]/

You should be aware, however, that you are subject to the standards of conduct set forth in §23. Section 23 (¶2)(2) and (3) prohibit you from using or attempting to use your official position to secure unwarranted privileges or exemptions for yourself or others, or from giving reasonable basis by your conduct for the impression that one can improperly influence or unduly enjoy your favor in the performance of your official duties. You should keep these guidelines in mind should you have any official dealings with EOCD.

2. Chapter 707 Program

The Chapter 707 Rental Assistance Program pays rent subsidies to landlords with qualifying tenants in your area under a contract between the Department of Community Affairs (DCA) and THA. See generally G.L. c. 121B, §42-44. DCA annually allocates a certain amount of state funds to the THA for tenant rental assistance. This sum is determined by DCA by considering the number of eligible units assigned to THA and the maximum amount each unit can be rented for, within DCA's fair market rent schedule. See G.L. c. 121B, §43. The Commission concludes that your receipt of Chapter 707 rental subsidies would constitute a financial interest in a contract made by DCA, a state agency. Moreover, DCA is an "interested party" in the contract within the meaning of §7, in view of the use of state funds and DCA's substantial involvement in the administration of theChapter 707 Program. None of the exemptions in §7 apply to you. In particular, the §7(b) exemption[5]/ is inapplicable since the process under which DCA designates eligible units does not constitute competitive bidding or offer comparable protections.

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[1]/See 42 U.S.C. 1437(f).

[2]/See St. 1966, c. 707.

[3]/Local housing authorities are municipal agencies for the purposes of G.L. c. 268A. See G.L. c. 121B, §7

[4]/These citations refer to prior Commission conflict of interest opinions including the year they were issued and their identifying numbers. Copies of these and all other advisory opinions are available (with identifying information deleted) for public inspection at the Commission offices.

[5]/G.L. c. 268A, §7 provides that §7 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 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.

Similarly, you are ineligible for the welfare exemption[6]/ inasmuch as the rental subsidies are set in accordance with the DCA schedule, not a schedule promulgated by DPW or the Rate Setting Commission.

Accordingly, the Commission advises you that the Section 8 subsidy will not present a Chapter 268A problem, whereas your receipt of Chapter 707 monies will place you in violation of §7 of the conflict law.[7]/

DATE AUTHORIZED: September 25, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-113

FACTS:

You are an employee of state agency ABC. Until recently, you were also the Director of an ABC computerized information system (ABC's system), which you helped develop. Clients of the ABC system either submit data to the system to be analyzed or access the system to do their own analyses.

During the past year, you formed your own consulting corporation. The services your corporation will provide could overlap those of ABC's system.

QUESTION:

Does G.L. c. 268A prohibit you, as a former Director of ABC's system and a current ABC employee, from pursuing related activities in your private capacity?

ANSWER:

Section 4 prohibits you from being compensated by non-state parties in relation to matters submitted to ABC's system, but does not outright prohibit the development of your own system.

DISCUSSION:

1. ABC's System

As an employee of the state agency ABC, you are a state employee for the purposes of G.L. c. 268A, and are therefore subject to the provisions of that law. The Commission has previously determined that ABC employees are "special state employees" pursuant to G.L. c. 268A, §1(o)(2), which means that the conflict law applies less restrictively to you under certain circumstances.[1]/

Section 4 of the conflict of interest law prohibits a state employee from acting as agent or attorney for, or receiving compensation from, anyone other than the commonwealth in relation to any particular matter in which the state is a party or has a direct and substantial interest. As a special state employee, you are only subject to these prohibitions in relation to particular matters (a) in which you have at any time participated as a state employee; or (b) which are or within one year have been a subject of your official responsibility; or (c) which are pending in your state agency, since you work as a state employee more than 60 days in a 365 day period.

A "particular matter" is defined in the conflict law as "any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding..." G.L. c. 268A, §1(k). In prior conflict opinions, the Commission has interpreted this term literally. For example, an entire project is not considered a particular matter (EC-COI-84-21); but rather each application, submission, request for a determination, or decision made within that project constitutes a separate and distinct particular matter. See EC-COI-84-45; 84-43; 84-14; 80-108. The ABC system itself is therefore not the particular matter for the purposes of the §4 prohibition.

The particular matters are the submissions or requests for analyses that clients phone in or send to the ABC system to access information or to have their submissions coded and/or processed. Once such submissions are made to the ABC system, the state becomes a party to these particular matters for §4 purposes. ABC also has a direct and substantial interest in such submissions, since its computerized system processes the submissions and the revenues generated by the submissions finance the maintenance and expansion of that system. Inasmuch as any such submissions are particular matters pending in your state agency (ABC), §4 prohibits

[6]/This exemption to §7 provides

This section shall not apply to a state employee who provides services or furnishes supplies, goods and materials to a recipient of public assistance, provided that such services or such supplies, goods and materials are provided in accordance with a schedule of charges promulgated by the department of public welfare or the rate setting commission and provided, further, that such recipient has the right under law to choose and in fact does choose the person or firm that will provide such services or furnish such supplies, goods and materials.

[7]/To avoid any undue hardship on the tenants presently in the unit subsidized under the Chapter 707 program, the prohibitions of §7 will become effective following the conclusion of the tenants' residency. Upon your reacquiring the property, you may not enter into lease agreements with new tenants under the Chapter 707 program.

[1]/[Citations omitted].

you as a special state employee[2]/ (an ABC employee) from acting as agent for, or receiving compensation from, anyone other than the commonwealth (e.g., private clients) in relation to those particular matters.

In essence, §4 prohibits you in your private capacity[3]/ from any involvement with the ABC system for private gain. You would violate this section by being privately paid to code clients' submissions or to develop modified programs for clients to use in the ABC system. You would likewise violate this section if you or your corporation made submissions to the ABC system, if you were in fact hired by non-state clients to code and submit those requests. Nor could you be paid by, or act as agent for your corporation in relation to that corporation's own submissions to the ABC system. Finally, §4 would prohibit you from marketing any software, such as a computerized rapid coding system specific to the ABC system, to any non-state parties. As long as you remain a special state employee at ABC, §4 prohibits you from being paid by or representing these non-state parties in connection with the submissions pending before the ABC system.

2. **Your Own Computerized Information System**

Alternatively, you propose the development of a new and somewhat different computerized information system, e.g., a system for use on a microcomputer, for your corporation or other clients. The conflict law does not prohibit an individual from using the expertise he gained while in the state's employ. See Guide to the Conflict of Interest Law Chapter 268A, p. 14 (1983). Moreover, as discussed **supra**, the ABC system as a project does not constitute a particular matter for §4 purposes. The Commission therefore concludes that your receipt of compensation from your corporation or other non-state clients for the development of a new system would not relate to a particular matter pending before ABC (e.g. a submission or request) in which ABC has a direct and substantial interest, and so does not violate §4.[4]/

However, because of your intimate association with the development of the system at ABC, and your current status as an ABC employee, you must take great care to abide by the standards of conduct of §23 in developing your own system. Specifically, G.L. c. 268A, §23 ¶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. For example, when potential clients contact you at ABC because of your past association with the ABC system, you should forward the call to the present Director and not use the opportunity to advertise your own system. Section 23 ¶3 prohibits a state employee from accepting employment or engaging in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position of authority, or using such information to further his personal interests. It appears that the actual information in the ABC system is taken from public sources, and so is not confidential but rather in the public domain. Section 23 ¶3 would prohibit you, however, from using any confidential client list of the ABC system to further in any way your own interests in the development of a new computerized information system.[5]/

DATE AUTHORIZED: September 25, 1984

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[2]/If you were not currently a state employee, the §4 prohibition would not apply to you. Rather, you would only be subject to the §5 limitations, in light of your former position as Director of the ABC system. Section 5 prohibits a former state employee from acting as agent or attorney for or receiving compensation from anyone other than the commonwealth only in connection with a particular matter in which the commonwealth is a party or has a direct and substantial interest and in which he participated as a state employee (i.e. submissions you worked on). Section 5 also prohibits a former state employee for one year from appearing personally before any court or agency or the commonwealth as agent or attorney for anyone other than the commonwealth in connection with any particular matter as previously described which was within his official responsibility any time during his last two years of state employment.

[3]/Section 4 does not limit your use of the ABC system in your official capacity as an ABC employee. By definition, you cannot be your own agent. Moreover, as a salaried ABC employee, you would not be receiving compensation from a non-state party. In any interaction with the ABC system, however, you must strictly abide by the standards of conduct set forth in §23, as described infra.

[4]/**Compare, In the Matter of Donald S. Pottle,** 1983 Ethics Commission 134. In that Disposition Agreement, the Commission concluded that a state employee violated §4 by privately conducting training programs similar to a program offered by the state in course content, format and materials and targeting the same pool of clients. However, in that case, the training was to prepare individuals for a state examination which qualifies workers in an area uniquely within the state's domain. The present case is distinguishable in that there is no statutory state interest in the analyses which the ABC system performs, and providing such services is not uniquely a state function.

[5]/This opinion deals only with the application of Chapter 268A to the questions you posed. You should also consult with the appropriate officials at ABC regarding the applicability of any internal policies to your situation. [Citation and description of policy deleted].

COMMISSION ADVISORY NO. 6

The Commission has received several recent inquiries relating to the representation of municipal employees in lawsuits alleging civil rights violations. In cases where the municipality is also named as a party-defendant, it is common for the city solicitor or town counsel to represent both the municipality and the municipal employee. The purpose of this Advisory is to explain how the provisions of G.L. c. 268A apply to attorneys who are called upon to represent both the municipality and the municipal employee in civil rights lawsuits and in other lawsuits based upon the employee's official acts.

The starting point is G.L. c. 268A, §17(c) which prohibits a municipal attorney such as a city solicitor or town counsel from representing anyone other than the municipality in connection with the lawsuit in which the municipality is a party or has a direct and substantial interest. Exempted from this prohibition is representation "in the proper discharge of the [municipal attorney's] official duties."

In 1982, the Commission ruled that a municipal attorney would violate §17(c) by representing both a municipality and private party in the same lawsuit, irrespective of the similarity of the interests. EC-COI-82-46. The Commission noted that the proper discharge of his municipal duties did not include also representing private parties. The Supreme Judicial Court affirmed the Commission's ruling in 1984. **Town of Edgartown v. State Ethics Commission,** 391 Mass. 82 (1984). In light of the **Edgartown** decision, the Commission has received a number of inquiries from municipal attorneys raising two distinct questions:

1. Does G.L. c. 268A, §17 permit a municipal attorney to represent both the municipality and municipal employee in defense of a civil rights action where the complaint alleges liability solely in the employee's official capacity?

2. Does G.L. c. 268A, §17 permit a municipal attorney to represent the municipality and municipal employee in defense of a civil rights action where the complaint alleges liability in the employee's individual capacity as well as official capacity?

In both cases, G.L. c. 268A, §17 will generally not preclude such multiple representation, although restrictions under the Code of Professional Responsibility may apply.

1. For the purposes of G.L. c. 268A, §17, it is appropriate for a municipal attorney to defend a municipal employee in a lawsuit based upon the employee's official acts. The authority for such representation derives from the municipal charter, ordinance, or by-law which establishes the powers and responsibilities of the municipal attorney.[1]/

The municipal attorney's obligation to defend the municipality in legal actions necessarily carries with it the authority to represent the employees whose official acts are the basis of the legal action. See, **Dunton v. County of Suffolk,** 729 F.2d 903, 907 (2nd Cir., 1984) ["municipalities commonly provide counsel for their employees and themselves when both municipality and employee are sued"]. The representation of municipal employees is therefore within the "proper discharge of the [attorney's] official duties" as long as the municipal attorney's appointing official is aware of and has authorized the attorney's representation. See, EC-COI-83-20.

This is not to say that the authority can be appropriately exercised in every case. For example, where the interests of the municipality and municipal employee are adverse, the representation, even if authorized, is prohibited under Canon 5 of the Code of Professional Responsibility, Canons of Ethics and Disciplinary Rules Regulating the Practice of Law, S.J.C. Rule 3:07. See, **Dunton v. County of Suffolk, supra** suggesting that the competing interests may frequently require disqualification; **Martyn v. Donlin,** 148 Conn. 27 (1961); Massachusetts Bar Association Ethics Committee Informal Opinion, 80-2. Further, even assuming that disqualification is not mandated, the municipal attorney may decline representation of the municipal employee where there is a perceived conflict of interest. **Filippone v. Mayor of Newton,** 392 Mass. 622 (1984).

Section 17, however, does not require disqualification. What §17 says is that, given sufficient authorization, the proper discharge of a municipal attorney's duties can reasonably extend to representing a municipal employee in a lawsuit based upon the employee's official acts.

2. The application of §17 does not differ when a municipal attorney represents a municipal employee who has been sued in both the employee's official and individual capacity. At the outset, G.L. c. 268A, §17 does not deal satisfactorily with the question of representation in an employee's official and individual capacity. G.L. c. 268A, §17 was drafted prior to the

[1]/The position of municipal attorney is not defined within the General Laws but rather has developed according to the legal service needs of each municipality. Randall and Franklin, **Municipal Law and Practice,** c. 10, §227. On the state level, the authority of the Attorney General to represent state employees in defense of their official acts is well-established. See, G.L. c. 12, §3.

passage of recent civil rights statutes, the passage of indemnification statutes covering municipal employees (G.L. c. 258) and the Supreme Court decision in **Monnell v Department of Social Services,** 436 U.S. 658 (1978) which found that municipalities could be held liable under 42 U.S.C. 1983 for employee's actions taken pursuant to municipal policy. Although the representation of an employee **solely** in the employee's private capacity is proscribed by §17, see **Town of Edgartown, supra,** the propriety of representation in both the employee's official and individual capacity has not been previously addressed by the Commission. As a matter of sound policy, the Commission concludes that the proper discharge of a municipal attorney's duties can also reasonably extend to representing a municipal employee in the employee's official and individual capacity, provided that appropriate authorization has been given by the attorney's appointing official.

The primary concern of §17 is that the interests of the municipality may potentially be diminished by competing private loyalties. **Town of Edgartown, supra.** However, the primary concern raised by the representation of municipal employees at issue is not that the interests of the municipality may be diminished, but rather that the employee may not receive adequate representation in view of the attorney's presumed loyalty to the municipality. The adequacy of an employee's representation is a matter more appropriately addressed by the Code of Professional Responsibility and by the trial judge on a case by case basis. **Dunton v. County of Suffolk, supra; Kevlik v. Goldstein,** 724 F.2d 844 (1st Cir. 1984); **Shadid v. Jackson,** 521 F. Sup. 87 (E.D. Tex. 1981); EC-COI-84-39.

The Commission's conclusion is also based on practical considerations that are consistent with the Commission's obligation to give G.L. c. 268A a workable meaning, **Graham v. McGrail,** 370 Mass. 133, 140 (1976). To mandate the municipality to provide separate representation in all cases where municipal employees have been sued in both their official and individual capacity would create a financial hardship on the municipality, and would result in an inefficient use of municipal attorneys. Further, the application of §17 should not depend upon the strategic decision of whether the plaintiff has named a municipal employee in his individual as well as official capacity for liability purposes.

For the purposes of §17, the propriety of the attorney's representation should rest initially with the attorney's appointing official, who is in a position to determine whether the interests of the municipality will be preserved by authorizing the additional representation. Such representation is, of course, subject to the restrictions of the Code of Professional Responsibility which may require separate representation on a case-by-case basis.

DATE AUTHORIZED: September 25, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-114

FACTS:

You are an official with state agency ABC and previously were employed by state agency DEF.[1]/ One of the projects that DEF worked on was a development. The developer you worked with during that period of time recently commissioned an artist to create a series of prints. You state that these prints would likely be valued at over $50.00. The developer would like to offer these prints as a gift to ABC. The developer does not presently have any business with ABC, and it is unclear whether it will have any such business in the future.

QUESTION:

Would G.L. c. 268A permit ABC to accept these prints?

ANSWER:

Yes, subject to the conditions set forth below.

DISCUSSION:

The sections of G.L. c. 268A relevant to the question you ask are §§3 and 23. Section 3(b) 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. Although the prints would constitute something of substantial value,[2]/ this section is not applicable to the facts you have presented because the prints would not be for your personal use.[3]/ The result obviously would be different if the prints were a gift to you personally and not a gift to ABC which would remain with ABC.

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.

Again, since the prints are not being given for your personal use but rather for use by ABC in its offices, the Commission does not find that acceptance of the prints constitutes use of official position to secure an unwarranted privilege. Finally, because the donor does not have any present business with ABC, ABC's acceptance of the prints would not give reasonable basis that you or ABC would be improperly influenced by the donation. In order to avoid creating such an impression should the developer have subsequent dealings with ABC, you should notify your appointing official, the Governor, of the gift and of the fact that it is a gift to ABC and not to you personally.

DATE: October 16, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-116

FACTS:

You are an attorney in private practice in a City (City) and were formerly the City Solicitor. One of your partners is the current City Solicitor.

You state that two potential clients wish to hire you as a consultant. Each potential client plans to develop property in the City, one for residential purposes, the other for business and industrial purposes. Both clients will eventually be applying for permits from City agencies.

QUESTION:

Does G.L. c. 268A permit you to be hired as a consultant by such clients?

ANSEWER:

Yes, although you are subject to the restrictions described below.[1]/

DISCUSSION:

G.L. c. 268A, §18(d) prohibits a partner of a municipal employee from acting as agent or attorney for 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 in which the municipal employee participates or over which such employee has official responsibility. See EC-COI-84-48. As the City Solicitor, your partner is considered a municipal employee for the purposes of the conflict law, and you are therefore subject to the §18(d) restriction.

The issue you raise concerns the inclusiveness of the phrase "acting as agent or attorney." Inasmunch as acting as "agent," as well as acting as "attorney," is proscribed, formal legal representation is not required: merely speaking or writing on behalf of a non-government party would be acting as an "agent." See Buss, **The Massachusetts Conflict of Interest Statute: An Analysis,** 45 B.U.L. Rev. 299, 326 (1965). Thus, the Commission has repeatedly held that preparing and/or signing clients' government contracts, submitting their applications, acting as their advocates in application processes as well as personally appearing before governmental agencies on their behalf constitutes "acting as an agent or attorney." See, e.g. EC-COI-84-6; 83-78.[2]/

You state that you would not appear before or contact any municipal agency or individual on your private clients' behalf, and that you would not prepare any documents for them regarding applications to or correspondence with any municipal agencies or individuals. The issue remains, however, whether your being hired to solely give advice to such clients regarding their development projects and the nature of the groups and individuals before whom they will be appearing for licenses would violate §18(d). The Commission concludes that it would not, for the following reasons.

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[1]/[identifying footnote omitted].

[2]/See **Commonwealth v. Famigletti,** 4 Mass. App. 584 (1976) (an item worth $50 constitutes substantial value under this statute).

[3]/See EC-COI-83-110 (This citation refers to a previous Commission advisory opinion including the year it was issued and its identifying number. This and all other advisory opinions, with identifying information deleted, are available for public inspection at the Commission office).

[1]/As City Solicitor, your partner is subject to a number of provisions of the conflict law. See G.L. c. 268A, §§17, 19, 20, 23. If he has any questions regarding the limitations the conflict law places on his activities, he should contact the Commission.

[2]/These citations refer to previous Commission conflict of interest opinions including the year they were issued and their identifying numbers. Copies of these and all other advisory opinions (with identifying information deleted) are available for public inspection at the Commission office.

Commentators on both Chapter 268A and its federal counterpart, 18 U.S.C. §201 et seq., state that the language used suggests that it is mainly representative activity which was intended to be covered. Buss, supra at 327. See also Perkins, **The New Federal Conflict of Interest Law**, 76 Harv. L. Rev. 1113, 1146-47 (1963) [which stated that "acting as agent or attorney" would not encompass mere assistance rendered to a private employer on government contract matters at the company offices or plant where no communication with government officials is involved, since the "representative activity" referred to in the legislative history of the federal conflict law would be absent]. The definition of "attorney" as one who acts on behalf of another[3]/ further supports this interpretation.

To the extent that the Attorney General and the State Ethics Commission have taken a broader view of what constitutes acting as an "attorney," they have limited their interpretations to expanding what is representative rather than including non-representative activities such as giving advice or rendering a legal opinion. In Attorney General Conflict Opinions 37, 100 and 154, preparing and submitting returns with respect to various states taxes or corporate cetificates of condition was considered acting as agent or attorney. In EC-COI-84-28, the Commission focused on the prohibition against acting as a private party's spokesperson before a government agency, yet also included participation in the contract negotiation process and the signing of documents and correspondence in connection with a government contract as proscribed activities. See also EC-COI-84-6; 83-145; 83-24. Conversely, the Commission has specifically stated that participation in a private employer's internal board discussions or votes would not be considered "acting as agent or attorney." EC-COI-84-28. The distinguishing feature appears to be the "acting on behalf of" factor present in spokesmanship, negotiation, and the signing of documents and submission of applications. The rationale is that publicly acting on behalf of private clients on matters in which your partner participates as a municipal employee raises the appearance of potential impropriety: i.e. influence peddling, the use of insider information and favoritism — all at the expense of the city. The rendering of purely in-house advice does not appear to raise the same concerns. As the Justice Department flatly stated in discussing 18 U.S.C. Section 207,[4]/ the federal counterpart to G.L. c. 268A, §5 and §18, that prohibition does not preclude "activities which may fairly be characterized as no more than aiding or assisting another." See Perkins, supra at 1155. Based on the foregoing, the Commission concludes that the rendering of advice to private clients which you propose would not constitute "acting on behalf of" those clients and thus would not be prohibited by §18(d).

As you are probably aware, §18(a) and §18(b) restrict your activities as a former City Solicitor. Section 18(a) prohibits you from acting as agent or attorney or receiving compensation from 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 in which you [as opposed to your partner] participated as a municipal employee. For the purpose of this permanent prohibition, each new application, contract, case, determination is a different particular matter. "Acting as agent or attorney" would be interpreted as discussed above. Section 18(b) further prohibits you for one year after your employment ceased from personally appearing before any agency of the city as agent or attorney for anyone other than the city in connection with any particular matter as previously described which was within your official responsibility[5]/ during your last two years of municipal employment.

Finally, due to your past position as City Solicitor, you are subject to two of the standards of conduct set forth in §23 of the conflict law as a former municipal employee. Specifically, you are prohibited from accepting employment or engaging in any business or professional activity which will require you to disclose confidential information which you gained by reason of your official position or authority, or from using such information to further your personal interests. See G.L. c. 268A, §23(¶3). Thus, while you may make use of the expertise you gained as a City Solicitor in the Advice you gave your present clients, you may not advise them on internal municipal procedures, standards or other information not otherwise available to the public.

DATE AUTHORIZED: October 16, 1984

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[3]/Black's Law Dictionary 117 (5th ed. 1979).

[4]/The federal prohibition against "acting as agent or attorney" for anyone other than the United States is further clarified by the following language: "or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States)..." See 18 U.S.C. §207.

[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).

CONFLICT OF INTEREST OPINION
NO. EC-COI-84-117

FACTS:

You are a member of the Board of Selectmen of a Town (Town). You are also a practicing attorney with law offices in the Town. You have developed land and built houses in the Town in the past and will be building more homes and condominiums in the future. To conduct this development business, you have set up two real estate trusts. The ABC Trust name you and another individual as trustees, with your wife and the individual as the trust's beneficiaries. Your wife and son, you and another individual are listed as trustees of the DEF Trust, with you and your wife as beneficiaries..

QUESTION:

Does G.L. c. 268A allow you to deal with the Town or any of its boards on behalf of either of these trusts?

ANSWER:

No.

DISCUSSION:

As member of the Board of Selectmen, you are a municipal employee for the purposes of G.L. c. 268A, and are therefore subject to that law's provisions. Section 17(c) prohibits a municipal employee from acting as the agent or attorney for anyone other than the town or a municipal agency in connection with any particular matter[1]/ in which the same town is a party or has a direct and substantial interest. Applications to various town boards for sewer permits or abatements, zoning changes, variances, etc. constitute particular matters for Chapter 268A purposes. Because town boards will be making determinations on such applications, they are considered particular matters in which the town is a party. Alternatively, "[i]t is hard to hypothesize a 'particular matter' involving municipal action in which it can be said with assurance that the municipal interest is indirect or insubstantial." Braucher, **Conflict of Interest in Massachusetts,** in Perspectives of Law: Essays for Austin Wakeman Scott 1, 16 (1964). The remaining issue under §17(c), then, is whether you are "acting as the agent or attorney for anyone other than the town" by dealing with the town or any of its boards on behalf of the two trusts.

A trust is a fiduciary relationship with respect to property in which one person, the trustee, holds legal title to the trust property subject to enforceable equitable rights in another, the beneficiary. See, generally, 1 Scott on Trusts §2.3 (3d ed. 1967). In other words, a trust is essentially a legal device where one or more persons manage property for the benefit of others. A trustee's legal duties are imposed by law, and arise "because of a manifestation of an intention of the settlor to create the relation and to impose the duties and of the trustee to assume the duties." Id. at §2.8. The beneficiaries have the ownership interest in the property. At its core, a trust is a legal device which represents the separation of legal and equitable title in property.

A trust is therefore a distinct legal entity. This fact distinguishes your interest in a trust from other property interests you may have which do not have a separate legal identify. For example, §17(c) would not prohibit you from appearing before municipal boards in relation to issues concerning your own house. The rationale is that you cannot be your own "agent or attorney." Agency assumes the presence of a principal and an agent, and an attorney is defined as "one who acts on behalf of another." Black's Law Dictionary 117 (5th ed. 1979). Where you are representing your own property interest, and that interest does not have a legal identity apart from you, the separate identity of the advocate envisioned in the terms "agent" and "attorney" is lacking.[2]/

As a trustee, however, you are acting on behalf of another. As the legal representative of the trust, any appearances before municipal boards are on behalf of that trust, a distinct legal entity. Regardless of whether you and immediate family members are the sole beneficiaries of that trust, such appearances fall within the purview of the §17(c) prohibition. You would be acting as the agent or attorney for someone other than the town or a municipal agency (the trust) in connection with a particular matter in which the same town is a party or has a direct and substantial interest (sewer permits, zoning changes, etc.).

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[1]/ 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).

[2]/ Compare EC-COI-83-24 [state employee is prohibited by G.L. c. 268A, §4 (state equivalent to §17) from acting as agent on behalf of his private consulting firm in its efforts to obtain state contracts].

Moreover, you do not qualify for any exemptions under §17. As a member of the Board of Selectmen in a town with a population greater than five thousand persons, you do not qualify as a special municipal employee.[3]/ See G.L. c. 268A, §1(n). Similarly, your position as selectman negates the applicability of the fiduciary exemption [4]/ to your situation. Your duties as a trustee do qualify you as a fiduciary. However, your election to office puts the final requirement out of the exemption, approval by your appointing authority, out of reach. See, **District Attorney for the Hampden District v. Grucci,** 1981 Mass. Adv. Sh. 2125, 2128 n. 3; EC-COI-84-3 [discussing the unavailability for the §19 exemption procedure, which requires a determination by an appointing official, to an elected official]. The Commission therefore concludes that §17(c) prohibits you from dealing with any municipal boards on behalf of either trust while you remain an elected Board of Selectmen member.

DATE AUTHORIZED: October 16, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-119

FACTS:

You are the general counsel for the Massachusetts Technology Park Corporation (MTPC), a recently established public instrumentality of the commonwealth. See G.L. c. 40J, §§1-11. One goal of MTPC is to establish and operate educational centers containing design, fabrication and testing facilities and equipment for post-secondary academic and training programs in the field of semi-conductor and micro-electronic technologies. **Id.,** §1.

MTPC is governed by a twenty-three member unpaid board of directors. Eight of the members appointed by the governor are chief executive officers or officials of businesses involved in the design and manufacture of semi-conductor or micro-electronics components or products. **Id.,** §3. The MTCP enabling statute establishes a fund for the purpose of financing the costs of operating a training center in semi-conductor and micro-electronic technologies. **Id.,** §5. Participating businesses and institutions are expected to provide, at no charge to MTPC, support to the center in the form of equipment, machinery, and qualified individuals for training purposes. **Id.,** §§5, 6(b)(4). The MTCP executive director serves as the chief liaison officer to the participating businesses and institutions in order to enhance their support of and participation in the activities of the center. **Id.,** §7.

Pursuant to G.L. c. 40J, §§5, 6, two participating corporations have arranged for the MTPC to use the services of their employees. The first, ABC, has loaned DEF to MTCP on a full-time basis for two years. During this period, ABC will continue to pay for DEF's salary and fringe benefits. The second, GHI, has loaned JKL on a full-time basis for one year. Although, under the current arrangement, MTPC will reimburse GHI for JKL's salary and have GHI assume the fringe benefit costs, you will soon be requesting GHI to donate JKL's salary.

Both ABC and GHI are represented by individuals on the MTPC board of directors, and MTPC expects to receive substantial charitable contributions from both corporations.

QUESTIONS:

1. Do the loan arrangements between ABC, GHI and MTPC place DEF or JKL in violation of G.L. c. 268A?

2. What limitations does G.L. c. 268A place on the ABC and GHI representatives to the MTPC board of directors?

ANSWERS:

1. Although the loan arrangements do not inherently violate G.L. c. 268A, certain conditions must be satisfied.

2. The members of the boards of directors will be subject to the limitations set forth below.

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[3]/ Paragraph 5 of G.L. c. 268A, §17 provides the following exemption for special municipal employees: "A special municipal employee shall be subject to [§17] paragraphs (a) and (c) only in relation to a particular matter (a) in which he has at any time participated as a municipal employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special municipal employee who serves on no more than sixty days during any period of three hundred and sixty-five consecutive days.

[4]/ The "fiduciary exemption" contained in G.L. c. 268A, §17 ¶7 reads as follows: "This section shall not prevent a municipal employee, including a special employee, from acting with or without compensation, as agent or attorney for or otherwise aiding or assisting members of his immediate family or any person for whom he is serving as guardian, executor, administrator, trustee or other personal fiduciary 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."

DISCUSSION:

1. MTPC is a state agency for the purpose of G.L. c. 268A, and its directors, officers and employees are "state employees" under that law. See, G.L. c. 40J, §3; EC-COI-83-41.[1]/ Although DEF and JKL will not be technically on MTPC's payroll, they will nonetheless be regarded as state employees for G.L. c. 268A purposes, because they are performing services on a full-time basis for a state agency and are supervised and evaluated by the executive director of a state agency. See, EC-COI-81-117.

a. DEF

As a state employee, DEF is subject to three relevant sections of G.L. c. 268A. The first, G.L. c. 268A, §4(a), prohibits him from receiving compensation from any non-state party 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, unless the receipt of compensation is provided by law for the proper discharge of his official duties. DEF would not be in violation of this section by virtue of his receiving his salary and fringe benefits from ABC, a non-state party, because the arrangement is authorized under the MTPC enabling statute, G.L. c. 40J, §§5, 6 and is therefore consistent with the proper discharge of his official duties. See, EC-COI-84-110.[3]/

Under the relevant provisions of G.L. c. 268A, §6, DEF may not participate,[4]/ in his MTPC capacity, in any particular matter in which ABC has a financial interest. Should a matter affecting ABC's financial interest come before him, he must refrain from participating in the matter and advise the official responsible for appointment to his position and the Commission of the nature and circumstances of the particular matter and make full disclosure of such financial interest; the appointing official shall thereupon either:

> (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. Copies of such written determination shall be forwarded to the employee and filed with the Commission by the person who made the determination.

Based upon the information you have provided, it does not appear likely that matters affecting ABC's financial interest would come before DEF. However, should such a situation arise, the §6 disqualification and notice procedures must be followed.

The final relevant section is G.L. c. 268A, §23 ¶3 which prohibits state employees from improperly disclosing confidential information acquired as the result of state employment. The point of this paragraph is that, despite the overlapping private and public interests which come into play in implementing the MTPC enabling statute, DEF is a state employee, and his loyalties must remain with the state as long as he provides services to the state.

b. JKL

The provisions of G.L. c. 268A which were previously discussed in DEF's situation will also apply to JKL. Two additional points should be made, however.

1. For the purposes of G.L. c. 268A, §4(a), it is irrelevant whether MTPC actually pays for JKL's salary or if GHI decides to donate JKL's services. If the state pays for JKL's salary, then §4(a) is not at issue because JKL's compensation would not, in fact, be derived from anyone other than the commonwealth. If JKL's services are donated by GHI, then, like DEF, his receipt of compensation from GHI would be provided by law for the proper discharge of his official duties.

2. Because you expect that matters affecting GHI's financial interest may regularly come before JKL, thereby triggering the §6 disqualification and notice process, JKL's appointing official may wish to formalize the permission for JKL to participate in the matters by filing a written determination with the Commission. Given the expectation of frequent participation by JKL and GHI matters, an annual written determination to the Commission would satisfy the purposes of G.L. c. 268A.

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[1]/These citations refer to prior Commission conflict of interest opinions including the year they were issued and their identifying numbers. Copies of these and all other advisory opinions are available (with identifying information deleted) for public inspection at the Commission offices.

[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 contribution to MTPC by a participating organization of the services of an employee for purposes beyond teaching would be consistent with the overall purposes for establishing MTPC. See, G.L. c. 40J, §10 requiring a liberal construction of G.L. c. 40J to effect its purpose. The failure of participating businesses to provide sufficient contributions can result in the dissolution of MTPC. G.L. c. 40J, §6.

[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, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

2. **MTPC board of directors**

Under G.L. c. 268A, §6, members of the MTPC board of directors must refrain from participating in any particular matters in which, in relevant part, a business organization for which they serve as an officer or employee has a financial interest. This disqualification is emphasized in the MTPC enabling statute, G.L. c. 40J, §3 which provides

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

The two members of the MTPC board of directors from ABC and GHI are therefore disqualified from participating in any decision or other particular matter in which, respectively, ABC or GHI have a financial interest. Consistent with G.L. c. 268A, §6 and c. 40J, §3, advance notice of the matter must be submitted to the MTPC board of directors and the Commission. Following disclosure, G.L. c. 40J, §3 precludes their further participation in the matter. The four-part procedure outlined in your advisory opinion request[5]/ would satisfy the purposes of G.L. c. 268A, §6.

DATE AUTHORIZED: November 8, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-122

FACTS:

You are currently employed by state agency ABC. You are responsible for investigating complaints filed against facilities within the regulatory authority of ABC. Previously, you were a facility licensor for ABC for three and a half years. In that capacity, you conducted a provisional study on a program that the DEF Corporation was planning to operate. DEF subsequently decided not to open the program. You have also provided technical assistance to DEF. Your last contact with DEF on behalf of ABC was approximately two months ago. The XYZ Corporation is now considering purchasing the DEF buildings. DEF will continue as a separate non-profit corporation. You do not know if XYZ will have any other involvement with DEF. XYZ is also licensed by ABC. You have been the licensor assigned to XYZ and are presently working with XYZ on a plan for compliance as a result of a recent licensing study.

You are considering a position as the Assistant Executive Director at DEF. You have submitted your resume to DEF and have met with the representatives of DEF concerning the position.

QUESTIONS:

1. What limitations does G.L. c. 268A place on you as a state employee negotiating for private employment?
2. What limitations does G.L. c. 268A place on you if you leave state service?

ANSWER:

You are subject to the limitations discussed below.

DISCUSSION:

Current Limitations as a State Employee

As an enforcement specialist for ABC, you are a state employee within the meaning of G.L. c. 268A, §1(q), the conflict of interest law, and are therefore subject to the restrictions of that statute. The sections of the law relevant to your present status as a state employee are sections 6 and 23.

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[5]/The MTPC board has adopted the following procedures:

(1) as per M.G.L.A. Ch. 40J, Section 4(1), the specifics of each loaned employee relationship shall be detailed in the MTPC's annual report;

(2) as per M.G.L.A. Ch. 40J, Section 3, paragraph 4, such loaned employee relationships are to be dislcosed to the MTPC's Board of Directors and recorded in the minutes of the Board Meeting as an "interest or involvement" of the donor corporation and, further, a director of such a donor corporation will refrain from participating in any Board or Committee decision relative to such relationship or to the work product which is specifically generated thereby;

(3) both DEF and JKL shall be required to file annual disclosure statements with the State Ethics Commission; and

(4) in the case of JKL, his recommendations shall be subject to further review.

Section 6 of G.L. c. 268A, in relevant part, prohibits you from participating[1]/ in any particular matter[2]/ which affects the financial interest of a business organization with which you are negotiating or have any arrangement concerning prospective employment. Should such matters come before you, you would be required by §6 to notify your appointing official of the particular matter in which the business organization has a financial interest. Your appointing official must then 1) assign the particular matter to another employee or 2) assume responsibility for the particular matter or 3) make a written determination to be filed with the Commission that the interest is not so substantial as to be likely to affect the integrity of services delivered. Only upon your receipt of the written determination in 3), above, could you participate in these matters.

License determinations are particular matters as defined in §1(k). Any complaints which you investigate will also be considered particular matters under the statute. Section 6 applies even if you do not have the final decision making responsibility. If you are involved in any stage of the licensing or monitoring of the facility programs, you would be deemed to be participating in the matter as defined in G.L. c. 268A. For example, if you personally involve yourself in the making of a decision by recommending a course of action, you would be participating in the matter. Accordingly, once you responded affirmatively to the job opening at DEF and met with the representatives of DEF regarding the assistant executive director position, you were "negotiating concerning prospective employment with a business organization" which has a financial interest in matters which may come before you as an ABC employee. Therefore, you may not participate in your ABC capacity in any particular matter in which DEF has a financial interest, unless you receive written permission from your appointing official. If you accept the DEF position, §6 will continue to apply until you leave ABC.[3]/ Alternatively, should you discontinue negotiations with DEF and fail to be selected for the assistant executive director position, §6 would not disqualify you from participating thereafter in matters in which DEF has a financial interest.[4]/

You should also be aware that G.L. c. 268A, §23 contains standards of conduct which will apply to your ABC conduct with XYZ. In particular §23(¶2)(3) prohibits you from, by your conduct, giving reasonable basis for the impression that any person can improperly influence you 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. While it is unclear what role, if any, XYZ has in DEF, except for its purchase of DEF's buildings, the fact that you may be working in XYZ buildings in your private capacity may raise questions as to the impartiality of your ABC dealings with XYZ. You should discuss with your appointing official safeguards which can be implemented to avoid your creating the impression of unduly favoring XYZ. As you have suggested, having another ABC staff person work with you on XYZ's plan for compliance may reduce the appearance of conflict.

Post-Employment Limitations as a Former State Employee

Following the completion of your services with ABC, you will be a former state employee and subject to the restrictions of G.L. c. 268A, §§5 and 23. Section 5(a) prohibits a former state employee from acting as the agent for, or receiving compensation from anyone other than the state in connection with a 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. Applying this provision to the facts of your case, you would be permanently barred from receiving compensation from or acting as agent or attorney for DEF or any other non-state party in matters that you previously worked on as a state employee. For example, if DEF decided to set up the program for which you previously completed an ABC study, you could not act on behalf of DEF to obtain the initial ABC license. Relicensure is considered a separate particular matter from the original licensing application. You would therefore not be restricted from acting on behalf

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[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, county or municipal 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]/In view of the financial connection between XYZ and DEF, the §6 prohibition will generally also apply to your official ABC activities which affect XYZ's financial interests. It will be up to your appointing official to assess the impact of such a matter on DEF. Where the impact is too indirect, speculative or insignificant, the appointing official will have the authority under §6 to allow you to participate.

[4]/In the event that your negotiations with DEF are unsuccessful, you should be aware that §23 ¶2(3) will apply to you. This restriction would prohibit you from creating the impression that your official ABC duties will be unduly affected by the fact that your negotiations with DEF were unsuccessful. Consistent with guidelines in the §23 discussion, above, you should discuss with your appointing official safeguards to avoid creating this improper impression.

of DEF in a relicensure proceeding where your ABC activities did not include participation in the relicensure application.[5]/

Finally, you should be aware that §23(¶3)(1) and (2) will also apply to your activities as a former state employee. Under this section a former state 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. In view of the complaint and licensure information to which you have had access as an ABC licensing official, you should keep the provisons of this section in mind following the completion of your ABC services.

DATE AUTHORIZED: November 8, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-123

FACTS:

You are a member of the ABC School Committee. Your wife's brother is a teacher in the ABC school system.

QUESTION:

To what extent may you participate in the budget review process of the ABC School Committee?

ANSWER:

You will be subject to the following restrictions under G.L. c. 268A, the conflict of interest law.

DISCUSSION:

The Commission does not ordinarily render advisory opinions concerning the application of G.L. c. 268A to municipal employees inasmuch as G.L. c. 268A, §22 requires municipal questions to be referred to the city solicitor. However, because the ABC's Law Department has joined in your request, the Commission deems it appropriate to issue this opinion.

As a school committee member, you are a municipal employee for the purposes of G.L. c. 268A, and are therefore subject to that law's provisions. G.L. c. 268A, §1(g). Section 19(a) prohibits a municipal employee from participating as such an employee in a particular matter in which, in relevant part, a member of his immediate family[1]/ has a financial interest.[2]/ The objective of this provision is to eliminate in advance the pressure that otherwise might be brought to bear on public employees when faced with situations where there are competing public and private considerations.[3]/

To understand the restrictions §19(a) places on municipal employees, one must first analyze the definitions of "financial interest," "participate," and "particular matter." Chapter 268A does not contain a definition of "financial interest." The Commission has previously held that "any financial interest, no matter how small, is enough to trigger §19(a)," although "that interest must be direct and immediate, or at least reasonably foreseeable." EC-COI-84-98.[4]/ Yet an interest shared with a substantial segment of the public, e.g. the financial interest of every town taxpayer in the town's school budget, is not a "financial interest" for §19 purposes. **Graham v. McGrail,** 370 Mass. 133, 138-139 (1976). "The interest of a school employee in his own compensation, on the other hand, is unquestionably a 'financial interest,' and §19(a) unequivocally attributes such an interest to a member of the school committee if the employee is a member of his immediate family." **Id.** at 139.

The two remaining terms are defined in the conflict of interest statute. Section 1(j) of Chapter 268A 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." "Particular matter" is defined as "any judicial or other proceeding,

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[5]/Section 5(b) imposes further limitations on appearances by former state employees before state agencies on matters which came under their official responsibility, during the two-year period prior to their departure from the state. This restriction would not appear to apply to your situation, since you participated in those matters rather than delegated responsibility to other ABC employees.

[1]/"Immediate family" is defined in the conflict of interest law as "the employee and his spouse, and their parents, children, brothers and sisters." G.L. c. 268A, §1(e).

[2]/Because school committee members are elected and not appointed, the §19 exemption procedure is not available to you. See, **District Attorney for the Hampden District v. Grucci,** 1981 Mass. Adv. Sh. 2125, 2128, n. 3.

[3]/See **Buss, The Massachusetts Conflict of Interest Statute: An Analysis,** 45 B.U.L. Rev. 299, 301 (1965).

[4]/This citation refers to a previous Commission conflict of interest opinion, including the year it was issued and its identifying number. Copies of advisory opinions (with identifying information deleted) are available for public inspection at the Commission office.

application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding,. . ." G.L. c. 268, §1(k). To discuss, vote, or to participate in the formulation of a matter to vote is to participate in the matter. See **Graham v. McGrail** at 138. Inasmuch as the formulation of a school budget may include a multitude of distinct decisions, and "decision" is included within the definition of "particular matter," the Courts in **Graham v. McGrail** concluded that:

> "both the language and the policy of §19(a) forbid a school committee member to participate in such a decision when his child's [i.e. an immediate family member's] private right is directly and immediately concerned, at least if there is any controversy over the decision. A decision to increase the child's salary seems to us to be a particular matter in which the child has a financial interest, even though a number of other employees are given similar increases. Inclusion of sufficient funds in the budget may be an essential step toward such a decision. If that step is presented for decision, and if the step can be taken without the member's participation, he must not participate.
>
> We must give the statute a workable meaning. . . .[T]his means that it is permissible for the committee to give separate consideration to particular budget [line] items. Once an item has been approved by a majority vote of a qualified quorum, it may be included in a consolidated vote on part or all of the budget, and a member who withdrew during the separate consideration may participate in the consolidated vote, unless there is reconsideration of the item separately considered."
>
> **Graham v. McGrail,** 370 Mass. 133, 140 (1976).

In summary, "[s]chool committee members may not participate in any way in the formulation, adoption or revision of any aspect of the budget or a collective bargaining strategy or position which may relate to the wages, hours or conditions of employment of any member of his or her immediate family employed by the school department. This principle must be followed both if the family member will be directly and immediately affected or if it is reasonably foreseeable that the family member's interest will be affected." EC-COI-84-98. Thus, you may not discuss, vote, or otherwise participate in any line item concerned with teacher salaries. Likewise, you would violate §19(a) by participating in labor relation subcommittee negotiations concerning teacher salaries or conditions of employment. A §19 violation would also result from your participation on a school committee motion to instruct the superintendent to put together a budget, the "bottom line" of which will be level-funding compared with last year, but requiring that teacher salary raises will be given. In all of these instances, it is reasonably foreseeable that your brother-in-law's interest will be affected.

You may, however, participate in the discussion and vote on other line items which will not directly affect your brother-in-laws financial interest. For example, if you had abstained from the discussion and vote on level-funding the budget while maintaining teacher raises, you could later participate in the trimming of other line items necessary to fund such raises.[5]/ The issue at the point is no longer whether or not teachers should be given raises, but rather where the cuts should fall to fund those raises in a level-funded budget. Similarly, under the **Graham v. McGrail** rationale, you may vote on the overall school budget, provided that such a vote does not include a reconsideration of the separate line item of teacher salary increases.

Finally, you and all Committee members should be aware of the provisions of §23 which sets forth general standards of conduct applicable to all public employees. That section prohibits public employees from

> using or attempting to use their official position to secure unwarranted privileges or exemptions for themselves or others [§23 (¶2)(2)];
>
> by their conduct giving reasonable basis for the impression that any person can improperly influence or unduly enjoy their favor in the performance of their official duties, or that they are unduly affected by the kinship, rank, position or influence of any party or person [§23(¶2)(3)]; and

[5]/This conclusion assumes that the line item under consideration does not otherwise involve a matter in which your brother-in-law has an interest.

accepting employment or engaging in any business or professional activity which will require them to disclose confidential information which they gained by reason of their official position or authority and from using that information to further their personal interests. [§23(¶3)(1) and (2)].

Section 23 focuses not only on actual conflicts of interest but also on appearances of conflicts. Thus, all members should be careful that any action they take is impartial and that there is no basis for any perception that it is not. Additionally, any committee members with immediate family members employed by the school department should be sure that no pressure is put on the other members to act in a way that would be beneficial to their family members in particular. Adherence to the restrictions of both §19 and §23 is necessary to protect the integrity of the school committee's actions and to maintain the public's confidence in those actions.

DATE AUTHORIZED: November 8, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-125

FACTS:

You are a city councilor in the City of ABC (City). You have been appointed by the Chief of Police to the position of reserve police officer. This appointment was made from a civil service list based on seniority. The position is not funded and has not been funded for the next fiscal year. The city council votes on each budget line item for city departments. In the future, the city council may authorize police reserve officers to be paid. Until the police reserve officers are funded, they will not be called upon for duty.

QUESTION:

What limitations does G.L. c. 268A place on your being a city councilor and a reserve police officer for the city?

ANSWER:

You are subject to the limitations discussed below.

DISCUSSION:

Initially, the Commission advises you that, as a city councilor, you are a "municipal employee" within the meaning of G.L. c. 268A, §1(g).[1]/ For the purposes of the question you pose, the relevant sections of G.L. c. 268A are §§19, 20, and 23.

1. Section 19

As a municipal employee, you are subject to the restrictions of G.L. c. 268A, §19(a) which disqualifies you from taking certain actions in your city councilor capacity. Specifically, §19 prohibits you from participating[2]/ in any particular matter[3]/ in which you have a financial interest.[4]/ This section seeks to ensure honesty in government by preventing public employees from advancing their own interest at the expense of the public. Where it is obvious or reasonably foreseeable that your private interest in the reserve police officer position will be affected by your official action, then the provisions of §19 will apply. See EC-COI-84-98. Consequently, if the police department submitted in its budget to the city council a proposal to fund the reserve officers, you would be prohibited from participating in any vote on the police department budget because you would have a financial interest in reserve officers receiving compensation. Once the police budget has been approved by the other members of the city council, you would be able to participate in a consolidated vote of the entire budget. See **Graham v. McGrail,** 370 Mass. 133, 140 (1976).

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[1]/For the purposes of G.L. c. 268A, "municipal employee" is defined as a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, 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).

[2]/For 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).

[3]/For 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]/Although §19 provides an exemption procedure under which appointed municipal employees may be allowed to participate in matters which affect their financial interest, this exemption is not available to you as an elected official.

2. Section 20

This section prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city in which the city is an interested party. By serving as a city councilor and as a reserve police officer, you would be performing services for two separate "municipal agencies."[5]/ If you received compensation for the reserve police officer position, you would have a financial interest in a contract within the meaning of §20. See **In the Matter of Kenneth R. Strong,** 1984 Ethics Commission 195. Accordingly, you would be prohibited from maintaining a paid employment arrangement with the police department while you remain a city councilor.[6]/

3. Section 23

As a municipal employee, you are subject to the standards of conduct contained in §23. This section prohibits you from accepting other employment which will impair your independence of judgment in the exercise of your official duties. In this regard, your duties and responsibilities as an elected public official may inherently conflict with your private interest as a reserve police officer. In effect, you have a contract for future employment with the police department. Although it is unclear when police reserve officers will be funded, the likelihood of your employment with another municipal agency inherently clouds your activities as a city councilor. In particular, your ability to participate on the city council in such police matters as collective bargaining, appointments and policy will be affected by your holding the position of reserve police officer. The question will inevitably arise whether you are using your position as city councilor to further the interests of the city, your constituents, the police department, or your own situation as a prospective employee. Additionally, §23 provides that by your conduct you should not 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 rank, position or influence of any party or person. Your ability to exercise independence of judgment on behalf of the public is undermined by the impression that you may want to favor the police department for your own personal gain as a reserve police officer. You should therefore refrain from participating as a city council member on all matters relating to the police department while you remain eligible for appointment as a reserve police officer.

DATE AUTHORIZED: November 8, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-127

FACTS:

You are a justice of the District Court Department of the Trial Court of the Commonwealth. The son of a friend of yours is employed by an advertising agency that is producing an advertising campaign for a Corporation. The son has asked if he can use your name in one of the television advertisements. You would be identified in the advertisement as a member of the judiciary. The advertisement would be shown only in the New York area, and you would not be paid for the use of your name.

QUESTION:

May you, consistent with G.L. c. 268A, allow a commercial entity to use your name in one of its advertisements?

ANSWER:

No.

DISCUSSION:

Justices of the District Court Department are "state employees" for purposes of G.L. c. 268A inasmuch as they perform services for a state agency within the meaning of G.L. c. 268A, §1(p).[1]/ For purposes of the

[5]/For purposes of G.L. c. 268A, "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. G.L. c. 268A, §1(f).

[6]/Although §20 does provide exemptions to the prohibition of maintaining a financial interest in two municipal contracts, you are ineligible for the exemptions. Section 20(b) is not available to you because of the role the city council plays in the budget approval of the police department. Section 20 also contains an exemption which in pertinent part allows a selectman to hold another position in a town as long as that member does not vote or act on any matter which is within the purview of the agency by which he is employed. . . This exemption applies solely to members of boards of selectmen. See EC-COI-83-38, **In the Matter of Kenneth R. Strong, supra.** Section 20(f) does not apply because the population of the City exceeds 35,000.

[1]/G.L. c. 268A, §1(p) defines "state agency" as any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town.

question you have posed, the relevant section of G.L. c. 268A is §23. Section 23 contains general standards of conduct applicable to all state, county and municipal employees, and it deals not only with actual conflicts of interest but also with the appearance of such conflicts. Section 23 serves to supplement the other provisions of G.L. c. 268A, and it generally is applicable when there is any sort of overlap between personal and public interests. In particular, §23(¶2)(2) provides that no state employee shall

> "use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others."

The Commission concludes that this paragraph prohibits your proposed activity.

In previous opinions construing §23(¶2)(2), the Commission has focused its inquiry on two criteria; (1) whether the activity or conduct in question exceeds the customarily expected use of a public employee's office, and (2) whether the activity or conduct benefits a private or personal, as distinct from a public interest.[2]/ Applying these principles to the facts you have presented, the use of your name in an advertisement for a commercial entity's product is not conduct or activity which is customarily expected of members of the judiciary. Additionally, the use of your name clearly would be benefitting a private interest. The Commission addressed a situation somewhat analogous to yours in EC-COI-83-82. There, the head of a state regulatory agency had been asked to appear in a film written and produced by a private individual as a profit-making venture. The subject matter of the film involved the area regulated by the agency. The Commission concluded that the agency head could participate only as long as his appearance did not create the impression that the film was state-sponsored, and as long as he avoided using any laudatory language which might be interpreted as an endorsement of the film. His participation was limited to statements directed to the topic of the law in general and the field it regulates rather than the merits of the film. Creating the impression of state endorsement of a private money-making project would have constituted a violation of §23(¶2)(2). The facts you have presented can be distinguished from the foregoing in that although the agency head would have been lending the prestige of his office to a private venture merely by appearing in the film, his participation was limited to those things which might be customarily expected by an agency head, i.e. certain public relations activities in connection with the agency and it's work. There is no such connection in your situation between your judicial functions and the business of the Corporation. Furthermore, members of the judiciary are expected by the public to assume and maintain a neutral posture in their official activities as well as in some of their private activities. "Unquestionably a judge is entitled to lead his own private life free from unwarranted intrusion. But even there, subjected as he is to constant public scrutiny in his community and beyond, he must adhere to standards of probity and propriety higher than those deemed acceptable for others. More is expected of him, and since he is a judge, rightfully so." **In the Matter of Troy,** 364 Mass. 15, 71 (1973).

Thus, the Commission concludes that the lending of the prestige of your office to the Corporation for the purpose of its selling its own products constitutes an unwarranted privilege to the Corporation. The appearance of your name and identity in the commercial might, in the eyes of some viewers, imbue the Corporation's product with a degree of credibility it might not otherwise have.[3]/ There is no reason why the Corporation should be the beneficiary of such an impression. The facts that the advertisement would be shown only in the New York area and that you would not be paid for the use of your name do not alter the result. The unwarranted privilege is conferred on the Corporation merely by allowing it to use your name.

The standards contained in §23 generally and §23 (¶2)(2) in particular are complementary to the text and purposes of the Code of Judicial Conduct. **Knight v. Margate,** 86 N.J. 374 (1981), EC-COI-84-27. Canon 2(B) of the Code provides that a judge ". . .should not lend the prestige of his office to advance the private interests of others." Permitting your name to be used in an advertisement for a Commercial entity's product would appear to be the type of activity proscribed by Canon 2.

DATE AUTHORIZED: November 8, 1984

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[2]/See e.g. EC-COI-82-112 (prohibiting members of the General Court from using state supplies and personnel in furtherance of their private interests); EC-COI-83-87 (prohibiting members of the General Court from receiving excessive travel reimbursements pursuant to speaking engagements before private organizations). Contrast EC-COI-83-102 which held that a member of General Court may sign a letter used to solicit gifts from local merchants for a raffle that is part of a voter registration drive. This result was based on the Commission's conclusion that such an endorsement was within the range of activities customarily expected of legislators. (These citations refer to previous conflict of interest opinions issued by the Commission, including the year they were issued and their identifying numbers. Copies of these and all other advisory opinions, with identifying information deleted, are available for public inspection at the Commission's offices.)

[3]/See e.g. U.S. v. Curtis, 644 F.2d. 263, 273 (3rd Cir. 1981) and Woodruff v. Tomlin, 593 F.2d. 33, 42 (6th Cir. 1979) addressing the problems inherent in members of the judiciary appearing as character witnesses in court proceedings.

CONFLICT OF INTEREST OPINION NO. EC-COI-84-128

FACTS:

You are the Secretary of the Executive Office of Public Safety (EOPS). The Governor is planning to initiate a major state-wide campaign to bring public attention to the problem of the use and sale of drugs and alcohol in the state's high schools and junior high schools and to encourage local school departments to focus attention on and develop programs to help eliminate the problem. The EOPS and the Governor's Statewide Anti-Crime Council staff have to date been the primary coordinators of the efforts to develop this program, which is expected to be similar in scope to the Governor's anti-drunk driving campaign.

To help fund this campaign, contributions will be sought from private sources. Such contributions would be used to hire a state-wide program coordinator; produce public service television and radio ads, posters, brochures; and to develop educational materials for teacher training and distribution to students.

QUESTION:

Does G.L. c. 268A permit you, as the EOPS Secretary, to solicit contributions from drug or liquor companies, distributors or private drug and alcohol treatment centers to help fund this effort?

ANSWER:

Yes, as described below.

DISCUSSION:

You are a state employee for the purposes of G.L. c. 268A. As a state employee, you are subject to the standards of conduct set forth in §23 of the confict of interest law. In relevant part, G.L. c. 268A, §23(¶2) states that no state employee shall

> (2) use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others; or
>
> (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. . .

These standards essentially serve as a general code of ethics and address courses of conduct raising conflict questions as well as conduct which creates the appearance of conflict.

In light of these standards, the issue raised by your request is whether you would be soliciting contributions from private entities which fall within the regulatory authority of your state office. For example, the Commission has previously held that a member of a state regulatory board may not solicit political contributions in connection with his campaign for local office from businesses subject to the board's regulation. EC-COI-82-61.[1]/ Such conduct creates the impression that businesses which contribute can improperly influence him in the performance of his official duties. This is true whether or not the solicited businesses have matters pending before the board at the time of the solicitations.

As the Secretary of EOPS, you have the responsibility for conducting comprehensive planning regarding the functions of EOPS and coordinating the activities and programs of the state agencies within EOPS. G.L. c. 6A, §4. You are also charged with the duty to review and act on budgetary and other financial matters concerning such agencies, and to recommend periodically to the governor any changes you deem desirable in the laws relating to the services, procedures or practices of those agencies. **Id.** EOPS is responsible for the protection of the public from injury to persons or property arising from criminal acts, negligence, natural or man-made disasters, or civil disturbances, by acting to prevent such acts or events from occurring, and by cooperating with and aiding local and federal agencies in similar activities. More specifically, the Department of Public Safety within EOPS focuses on enforcement issues through its Division of State Police, Criminal Information Bureau and Narcotics Section, and Office of Investigation and Intelligence. See generally G.L. c. 22, §1 **et seq.** The agencies within EOPS are not responsible for licensing liquor or drug companies or monitoring the practices of alcohol and drug treatment facilities.[2]/ In summary, the authority of your office over drug and alcohol companies and treatment facilities does not extend to licensing procedures but does include enforcement matters.

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[1]/This citation refers to a previous Commission conflict of interest opinion including the year it was issued and its identifying number. Copies of advisory opinions (with identifying information deleted) are available for public inspection at the Commission office.

[2]/Such powers lie with the Alcoholic Beverages Control Commission within the Executive Office of Consumer Affairs and divisions of the Department of Public Health and the Department of Mental Health within the Executive Office of Human Services. See, e.g., G.L. c. 138 §18 and §19; G.L. c. 17, §§1-14; G.L. c. 123, §§39-55.

Given the limited authority of your office, as described above, the Commission concludes that you will not violate G.L. c. 268A, §23(¶2)(2) by soliciting contributions from drug and alcohol companies or treatment facilities. Your position as a Secretary of an Executive Office necessitates a certain amount of public relations work. While EOPS' focus is primarily on enforcement matters, crime prevention and accident prevention work is also involved. In that sense, your participation in raising funds for the Governor's prevention of drug and alcohol abuse campaign can reasonably be seen as part of your official duties.[3]/ Moreover, lending the prestige of your office to the fundraising effort in this case will not inure to the benefit of a private individual, but rather to a state-sponsored project which will serve the public interest. Compare EC-COI-83-82. The "unwarranted privilege" which constitutes a §23 (¶2)(2) violation is therefore absent.

The related question under §23(¶2)(3) revolves around whether your fundraising efforts will give reasonable basis for the impression that contributing companies and facilities can improperly influence you in the performance of your official duties. For example, while your office does not regulate the licensing of such entities, you do have the authority to prioritize the enforcement activities within EOPS. You should therefore avoid giving the impression that contributing companies can influence that discretion in any way. For example, you should not base your enforcement priorities solely on whether a company or industry has contributed to the campaign. Given the remoteness of such an opportunity, the Commission concludes that §23(¶2)(3) does not outright prohibit your proposed solicitation of contributions. Compare, Commission Compliance Letter 82-2, 1982 Ethics Commission 80, 83.

DATE AUTHORIZED: November 8, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-129

FACTS:

You are an associate attorney with a lawfirm (Firm). You have recently been asked by state agency (ABC) to serve as its labor counsel. You will be the primary attorney responsible for the labor work, although other Firm associates may assist you with legal research under your supervision. You would represent ABC solely with respect to labor relations and would appear on ABC's behalf before federal and state courts and administrative agencies. You do not expect to work on behalf of ABC for more than sixty days or eight hundred hours during any three hundred sixty-five day period.

QUESTIONS:

1. Would you be a "state employee" under G.L. c. 268A by accepting the ABC labor counsel offer?
2. What limitations would G.L. c. 268A place on your activities following your acceptance of the ABC labor counsel offer?
3. What limitations would G.L. c. 268A place on other Firm associates and partners?

ANSWERS:

1. Yes.
2. and 3. You and the associates and partners will be subject to the limitations set forth below.

[3]/The legislature recognized that the Secretary of an Executive Office may well be called upon to participate in fundraising efforts, and provided for the mechanics of such involvement as follows:

> "The secretary may, subject to the approval of the commissioner of administration, apply for and accept on behalf of the commonwealth any funds, including grants, bequests, gifts or contributions, from any person. Such funds shall be deposited in a separate account with the state treasurer and received by him on behalf of the commonwealth. All such funds may, subject to rules and regulations promulgated by the commissioner of administration, be expended by the secretary, in accordance with law."
>
> G.L. c. 6A, §6.

DISCUSSION:

1. The provisions of G.L. c. 268A apply to any individual who performs services for a "state agency" within the meaning of G.L. c. 268A, §1(p).[1]/ Although ABC is a self-supporting agency, it is nonetheless a state agency for the purposes of G.L. c. 268A. [citations omitted]. Inasmuch as you will be advising and representing the agency, your anticipated services would make you a state employee for the purposes of G.L. c. 268A. To the extent that your annual hours of ABC service are not expected to exceed eight hundred, you will be a "special state employee" within the meaning of G.L. c. 268A, §1(o).[2]/ A consequence of special status is that you will be eligible for certain exemptions to G.L. c. 268A which are not available to full-time employees.[3]/

2. The two sections of G.L. c. 268A which are relevant to your situation are §4 and, to a lesser extent, §23.

a) Under §4, as applied to you as a "special state employee," you will be prohibited from representing a non-state party in relation to any particular matter[4]/ in which a state agency is a party or has a direct and substantial interest if the matter is one in which you have either participated or have had official responsibility[5]/ as an ABC employee. If you serve for more than sixty days in any three hundred sixty-five day period, the prohibition will apply to any matter pending in the ABC.

Examples of prohibited matters would be any lawsuit, representation proceeding, petition, or determination for which you provide advice or representation for ABC.[6]/ Because you will not be performing services for the ABC for more than sixty days in any three hundred sixty-five day period, you may represent private clients in matters pending in the ABC, as long as you have not participated in or have official responsibility for the matter as counsel to ABC. This result will continue to apply as long as you do not exceed the sixty day limit.

Two points should be made with respect to calculating your days served for the purpose of the sixty day limit. First, if you serve for part of a day performing services under your arrangement with the ABC, you will be considered as having served for a complete day.[7]/ See, EC-COI-80-31. Second, if you assign a Firm associate to perform your ABC work under your supervision, you will be considered as having served on each day in which the associate performs such services, even though you may not have performed billable services yourself on such days. The statute recognizes that special state employees whose service in a one-year period exceeds sixty days are likely to possess and exercise influence with respect to their agency's actions; G.L. c. 268A, §4 therefore prohibits such employees from privately dealing with any matter pending in their state agency. It would frustrate the statutory policy to permit special state employees to avoid reaching the sixty day limit by assigning their work to other employees in the lawfirm. Such a construction would elevate technical form over substance in a way which would undermine the statute. Compare, EC-COI-80-31; 83-37; 83-125; 84-31.

You should also be aware that G.L. c. 268A, §23 might become relevant to your situation at a later time. Specifically, §23(¶2)(2) prohibits you from using your

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[1]/G.L. c. 268A, §1(p), "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.

[2]/G.L. c. 268A, §1(o), "special state employee," a state employee:

(1) Who is performing services or holding an office, position, employment or membership for which no compensation is provided, or

(2) Who is not an elected official and

(a) Occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment, or

(b) In fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special state employee shall be in such a status on days for which he is not compensated as well as on days on which he earns compensation.

[3]/You state that you are in the process of having your ABC appointing official classify your position as that of a "special state employee" with appropriate written notice to the Commission. See, G.L. c. 268A, §1(o)(2)(a). This classification would confirm your special employee status if your annual hours were to exceed eight hundred.

[4]/G.L. c. 268A, §1(k), "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.

[5]/G.L. c. 268A, §1(i), "official responsibility," 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.

[6]/It is unnecessary to determine whether you would be deemed to also have official responsibility for the particular matters in which you participate at ABC, because these matters are already subject to the §4 prohibition.

[7]/You should keep accurate time records of your ABC services.

official position to secure an unwarranted privilege for yourself or others. Assuming that the ABC becomes unionized and you are called upon to determine ABC bargaining strategy and particularly the level of funding to be allocated for collective bargaining, the fact that you also represent private clients seeking limited funds from the ABC may raise potential §23 problems. Because this situation is hypothetical, and in any event not likely to occur for some time, you should renew your opinion request with the Commission should this hypothetical situation become foreseeable.

3. Based upon your current status as an associate, the conflict of interest law will not place additional restrictions on partners or associates in the Firm. Because you are not a partner, the §5(d) restrictions do not apply to the private activities of partners with respect to your ABC responsibilities.

Further, based upon the information you have provided, the Firm associate to whom you may occasionally assign ABC work would not be considered a "state employee" for the purposes of G.L. c. 268A. However, should the assignment arrangement become more regular and result in the ABC's expectation that the particular associate will assist you in performing ABC's labor work, then the associate would become subject to G.L. c. 268A. Compare, EC-COI-83-165; 80-84.

DATE AUTHORIZED: November 27, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-135

FACTS:

You are an official with state agency ABC. In that capacity you administer certain programs.

You are currently being considered for appointment as Honorary Consul of DEF. You anticipate that your primary functions would include contributing to DEF's development through an advocacy role, and providing service to the DEF community.

QUESTION:

Does G.L. c. 268A permit you to maintain your ABC position while also serving as Honorary Consul to DEF?

ANSWER:

Yes, subject to the conditions set forth below.

DISCUSSION:

As an ABC official, you are a "state employee" for the purposes of G.L. c. 268A. Two sections of that law are relevant to your situation.

1. Section 4(c)

This section prohibits you from acting as the agent or attorney for anyone other than the commonwealth 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. This section reflects the principle that a "person cannot serve two masters" and that public officials should not be permitted to step out of their official roles to assist private parties or persons in their dealings with government. See, Perkins, **The New Federal Conflict of Interest Law,** 76 Harv. L. Rev. 1113, 1120 (1963). Section 4 precludes circumstances which might lead to a conflict of loyalties by public employees. See, **Town of Edgartown v. State Ethics Commission,** 391 Mass. 82, 89 (1984).

Section 4(c) does not prohibit all private advocacy, but only advocacy which calls the state's interest into play. For example, if you were to assist DEF residents in processing immigration applications before federal agencies, the prohibition of §4(c) would not apply because the state is not a party to or directly and substantially interested in the immigration applications before federal agencies. On the other hand, if you were to assist DEF citizens in submitting Section 8 housing applications to the state Office of Communities and Development, or by appearing on their behalf before that agency, the §4(c) prohibition would apply because the state has a direct and substantial interest in the Section 8 housing applications. The propriety of your advocacy, therefore, will turn on whether the state is a party to or has a direct and substantial interest in the matter for which you are advocating the interests of the DEF community. Given the hypothetical nature of your question and the difficulty in foreseeing each particular matter which may arise under §4(c), the Commission cannot prepare a complete list of prohibited and permissible matters. You should, however, bear in mind the §4(c) standards and renew your opinon request if you are unsure about specific matters as they arise.

[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 23**

As a state employee, you are also subject to G.L. c. 268A, §23. In particular §23(¶2)(3) prohibits you 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. This paragraph is intended to avoid situations which raise questions over the integrity and impartiality of your work as an ABC official. Potential issues under §23 may arise because the constituency which is affected by the exercise of some of your official duties is the same constituency which you would service as Honorary Consul. In particular, questions such as the appropriateness of certain ABC decisions for newly arrived members of the DEF community may overlap your two roles. As a safeguard to avoid the impression that your ABC work might be unduly affected by your competing loyalties to the DEF community, you should notify your appointing official of the nature of your ABC responsibilities and the extent to which your Honorary Consul role may overlap with those responsibilities. Your appointing official would therefore be responsible for overseeing the potential conflict of interest and for determining how the credibility and impartiality of the agency can be maintained.

Another paragraph of §23, §23(¶2)(2) prohibits you from using your official position to secure an unwarranted privilege or exemption for yourself or others. To comply with this paragraph, you should not use your ABC office and time for your Consul activities. Further, in the course of your advocacy role as Consul, you should avoid creating the impression that you are lending the prestige of your ABC office and the endorsement of ABC to your private position. See, EC-COI-84-127.[2]/

DATE AUTHORIZED: December 20, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-140

FACTS:

You currently serve on a full-time basis as an employee with the Department of Mental Health (DMH). (Description of responsibilities omitted).

You have recently become aware of a request for proposals issued by the state Division of Capital Planning and Operations (DCPO) seeking to rent office space for a DMH office. You expect that DCPO will issue a similar proposal in the near future for office space in the same area. You and two partners own office property in the area and may be interested in responding to the requests for proposals.

Following the enactment of G.L. c. 7, §40G in 1980, St. 1980 c. 579, §12, DCPO became responsible for renting space for use by state agencies. However, the process which DCPO currently uses to rent office space for DMH includes DMH at several key stages. Once DMH notifies DCPO that it needs to rent office space, DCPO authorizes the process to proceed and will place an advertisement requesting proposals in the central register. DMH also places a similar advertisement in the local newspaper. Following the receipt of proposals, DCPO will submit the bids to DMH for its review and recommendation. DMH will thereafter submit a formal recommendation to DCPO, which will make the final selection. DCPO then authorizes DMH to enter into formal lease negotiations with the successful bidder. The final lease will be signed by DCPO, the bidder and DMH, with the Attorney General approving the form of the lease. The money for payment of the lease will come from the DMH budget. Problems incurred by DMH during the tenancy will be addressed generally to the Attorney General, although occasionally DCPO may become involved in correcting the problems.

QUESTIONS:

1. In view of your status as a DMH employee, does G.L. c. 268A permit you to lease office space for use by DMH?
2. If the answer to question no. 1 is "No," may your partners lease office space for use by DMH?

ANSWERS:

1. No.
2. No.

DISCUSSION:

As DMH employee, you are a state employee for the purposes of G.L. c. 268A. Section 7 of G.L. c. 268A generally prohibits state employees from having a financial interest in a contract made by a state agency. An office space lease signed by DMH and DCPO would be a contract made by a state agency. Because you own the building in which the office space is located and would be leasing the space to DMH, you would have a finan-

cial interest in the lease. Therefore, absent your eligibility for an exemption under G.L. c. 268A, §7, your financial interest in the lease would be prohibited as long as you remain a DMH employee.

Prior to 1983, it was virtually impossible for a full-time state employee to contract with other state agencies. However, following the enactment of St. 1982, c. 612, the General Court created an exemption for state employees under §7(b).[1]/ A primary condition for your qualification for the exemption is that you not be employed by the contracting agency or by an agency which regulates the activities of the contracting agency, and not participate in or have official responsibility for the activities of the contracting agency.

As a signatory to the lease, DCPO is a contracting agency. Further, in view of the role which DMH currently plays in the lease award process, DMH is also a contracting agency for the office space which it seeks to rent. Specifically, a process which involves DMH in the advertising, selection, negotiation, signatory, budgetary and utilization stages necessarily makes DMH a contracting agency along with DCPO. This is not to say that the Commission will always treat DMH as a contracting agency. When DCPO achieves its goal of administering G.L. c. 7, §40G without the current practice of participation by the user state agencies, then the Commission's conclusion may change. However, based on the current practice, both DCPO and DMH are contracting agencies for §7 purposes. Therefore, since your financial interest would be in a contract made by DMH, a contracting agency which employs you, you will not qualify for the §7(b) exemption. No other exemptions are available to you.

The application of §7 will continue as long as you have a financial interest in the lease. If your partners were to pursue the request for proposals and enter into a lease with DMH and DCPO, the prohibition of §7 would continue to apply because, as a partner, you would retain a financial interest in your partners' lease of the building space. Assuming that you terminated the partnership and divested yourself of any ownership interest in the building, your former partners would be free to contract with DCPO and DMH.

DATE AUTHORIZED: December 20, 1984

CONFLICT OF INTEREST OPINION EC-COI-84-141

FACTS:

You are a member of the General Court. You would like to become involved, in your private capacity, in a rehabilitation project. You and your business partner, a non-state employee, would seek financing of the project through an issuance of industrial development revenue bonds. The issuance of such bonds is governed by G.L. c. 40D. The bond issuance process occurs in the following way. If a municipality decides, either by vote of the city council or by vote of the town meeting, that it is essential to the economic well-being of the municipality to attract new industry to or expand existing industry in the city or town, it may establish an industrial development financing authority. The municipality, acting by or through the authority, has the power to issue bonds to finance development projects consistent with the purpose of ensuring the economic well-being of the municipality. These bonds to not represent a debt of the municipality but are payable solely from the income or revenue received in connection with the development project. Before a municipal authority can issue industrial development bonds it needs to obtain a "Certificate of Convenience and Necessity" (certificate) from the state Department of Commerce and Development (DCD). Before the certificate can be issued, the local

[1]/G.L. c. 268A, §7(b) exempts 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.

[2]/As a state employee, you are also subject to the mandatory disqualification procedures of §6 if matters come before you affecting the financial interests of a business organization of which you are an officer. Inasmuch as the matters requiring your official participation do not affect the financial interests of DEF, §6 will not limit your activities.

financing authority has to submit a certificate application to the Massachusetts Industrial Finance Agency (MIFA) containing all the particulars of the development project and the proposed bond issuance.[1]/ MIFA reviews the application to ensure, among other things, that it complies with the purposes of the statute, that the developer is a responsible party, that the public interest is protected, and that all financing arrangements are adequate. If, after review, MIFA makes a favorable recommendation to DCD, DCD promptly issues a certificate. If the MIFA recommendation is unfavorable, it must state its reasons and offer the applicant an opportunity to submit an application amended so as to meet MIFA's objections. MIFA also has the authority to impose conditions that it deems to be in the public interest on any proposal before it, for example, requiring the local authority to award construction contracts only after competitive bidding.

QUESTION:

Does G.L. c. 268A permit you to participate as a developer in a project to be financed by an issuance of industrial development revenue bonds?

ANSWER:

Yes, subject to certain limitations.

DISCUSSION:

As a member of the General Court you are a state employee and therefore are subject to the provisions of G.L. c. 268A, the conflict of interest law. The sections of the law applicable to the question you have asked are §§4, 7 and 23.

1. Section 4

Section 4 provides in relevant part that no state employee may act as agent or attorney for anyone other than the commonwealth or a state agency in connection with any particular matter[2]/ in which the commonwealth or a state agency is a party or has a direct and substantial interest. Members of the General Court are exempt from this provision, however, no member may personally appear for any compensation other than his legislative salary before any state agency unless:

(1) the particular matter 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.

Even though the financing for your proposed development would come primarily from industrial development revenue bonds issued by a local authority, MIFA, which is a state agency, obviously has a direct and substantial interest in any bond issuance as evidenced by G.L. c. 40D, §12. Thus you could not, under §4, appear personally for compensation before MIFA in connection with the local authority's application for a certificate because such an appearance would not be in relation to a ministerial matter or a quasi-judicial proceeding. See e.g. EC-COI-84-79.[3]/

2. Section 7

Section 7 provides in relevant part that a state employee may not have 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. The Commission has held in the past that a bond is a contract. See e.g., EC-COI-83-113, 83-147. However, even though you probably would be considered to have an indirect financial interest in the prospective bond issuance, the bonds are to be issued by a

[1]/ According to G.L. c. 40D, §12, the application does not need to give MIFA any documentation as to the price at which the bonds are to be sold or matters dependent on such price, such as redemption provisions.

[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]/ This citation refers to a previous advisory opinion issued by the Commission, including the date it was issued and its identifying number. Copies of this and all other advisory opinions are available for public inspection, with identifying information deleted, at the Commission offices.

municipal authtority rather than by a state agency or authority. The fact that MIFA is involved in the issuance of the bonds does not make MIFA a party to any contract. Therefore §7 does not prohibit you from engaging in the development project.[4]/

3. Section 23

As a state employee, you are also subject to the provisions of G.L. c. 268A, §23 which, in relevant part, prohibit you from using your official position to secure unwarranted privileges for yourself or others and, by your conduct giving reasonable basis for the impression that any person can unduly enjoy your favor in the performance of your official duties. In view of the approval role which MIFA will play in the issuance of the bonds to finance your project, your official dealings with MIFA should be guided by the §23 principles. In particular, should you be called upon to vote on legislation affecting MIFA during the period of MIFA's consideration of the bond approval, you might be creating the impression that you will unduly favor MIFA. To avoid raising such questions, the safest course would be for you to refrain altogether from any official dealings with MIFA during the period of its consideration of the bond approval. See, EC-COI-84-56.

DATE AUTHORIZED: December 20, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-142

FACTS:

You serve on a full-time basis as the assistant town clerk in town ABC. You were initially appointed by the town clerk to this position in (date omitted) and have been reappointed every three years. In 1983, you were appointed by the town manager as a member of the board of health. In that position you receive annual compensation of six hundred dollars and serve for an average of ten hours weekly. Prior to your appointment as a board of health member, the town manager placed an advertisement in the local newspaper seeking applicants, reviewed your resume together with others, and interviewed you.

[4]/We need not consider limitations imposed by G.L. c. 268A on your partner's activities since, according to the information you have given us, §5 appears to be inapplicable.

QUESTIONS:

1. Does G.L. c. 268A permit you to maintain your paid board of health position while also serving as assistant town clerk?

2. Assuming that you do not qualify for an exemption under G.L. c. 268A, §20 which would permit you to maintain the two positions, are you eligible under the exempting language of St. 1984, c. 5?

ANSWERS:

1. Yes, but only if you reduce your annual hours worked as a board of health member and receive an exemption from the board of selectmen.

2. No.

DISCUSSION:

1. Section 20(b)

In your capacity as assistant town clerk, you are a municipal employee for the purposes of G.L. c. 268A and are therefore subject to the restrictions of G.L. c. 268A, §20. This section generally prohibits municipal employees from having a financial interest in a second contract made by a municipal agency of the same town. Employment contracts and other arrangements by which individuals perform services in exchange for compensation are treated as contracts for the purposes of §20. See, **In the Matter of Kenneth R. Strong**, 1984 Ethics Commission ____. Your position with the board of health gives you a financial interest in a municipal contract. Therefore, absent your compliance with one of the statutory exemptions, your receipt of compensation from the board of health will place you in violation of G.L. c. 268A, §20.

On the basis of the Commission's review of the exemptions potentially available under §20, you appear to be eligible for one. Paragraph (b) exempts from the §20 prohibition

> 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. . .

As assistant clerk, you do not participate in, have official responsibility for, or regulate the activities of the board of health. The publicly advertised process by which you were appointed as a board of health member was sufficiently open to satisfy the "public notice" condition. See, E-COI-83-95; 83-97. Further, your board of health services are not required as part of your assistant clerk duties and are performed outside of your normal assistant clerk working hours. However, in order to qualify for the exemption, you must satisfy the following conditions:

(a) your annual hours of service as a board of health member must be reduced to five hundred;

(b) you must file a written notice to the town clerk disclosing your financial interest in the board of health contract;

(c) the town manager must file a written certification concerning the non-availability of board of health employees to perform your services and

(d) the board of selectmen must approve the exemption of your financial interest from §20.

Aside from ¶20(b), no other exemptions are available to you under §20. If you are unable to satisfy the §20(b) conditions, you may maintain your board of health position but must forego the annual salary for the position.[1]/

2. St. 1984, c. 5

Assuming that you do not qualify for the §20(b) exemption, the Commission advises you that the recently-enacted amendment to G.L. c. 41, St. 1984 c. 5, entitled "an act relative to the compensation of certain city and town clerks," will not apply to you as an assistant clerk. This statute provides that

[n]otwithstanding the provisions of chapter two hundred and sixty-eight A, any clerk of a city or town who also serves in any other position for such city or town may in addition to any compensation to which he may be entitled as such city or town clerk receive such additional compensation for such additional services as the selectmen, town meeting, town council or mayor and city council may provide.

It is not entirely clear whether the statute applies to all individuals who are employed in clerks offices, including assistant clerks, or merely to those individuals who hold the position of city or town clerk. For the following reasons, the Commission concludes that the latter construction is more appropriate and that the General Court did not intend to supersede the application of §20(b) to you as an assistant clerk.

The 1984 amendment was added to an existing chapter of the General Laws, G.L. c. 41, which addresses the powers and duties of municipal clerks. Sections 18 and 19 of G.L. c. 41 authorize the establishment of the positions of assistant city clerk and assistant town clerk and give the positions an identity separate from their appointing officials. Had the General Court intended to include assistant clerks within the new exemption, it could easily have expressed that intent.

An examination of the legislative history which culminated in the passage of St. 1984, c. 5 also confirms the limtited scope of the amendment. The original legislation, 1984 Senate Document No. 1190, was filed by the Massachusetts City Clerks Association and was entitled "an act to further define the powers and duties of city and town clerks." All of the written testimony submitted to the Joint Committee on Local Affairs during its hearing on the bill, as well as the Committee staff's own analysis of the bill, indicate that the scope was intended to apply only to those individuals who serve as town clerks. There is no suggestion that either the sponsors or committee regarded the scope of the bill to be broader.

Further, the Commission's construction is guided by sound policy considerations. The prohibition of §20 reflects a strong legislative policy designed to discourage

[1]/You are also a "municipal employee" as a board of health member. Because your position has been classified as a position held by a special municipal employee, your financial interest in your assistant clerk contract falls within the §20(c) exemption for special municipal employees. However, you should disclose to the town clerk your dual employment arrangement.

employees from using their insider status to gain multiple contracts, and to make opportunities for such contracts available to the non-employee public. Absent a clearly-expressed legislative intention to override the provisions of G.L. c. 268A with respect to assistant town and city clerks, the Commission will not presume that intent. This construction is consistent with the maxim that statutes granting exemptions from clearly articulated public policy obligations should be construed narrowly. See, **Colorado Department of Social Services v. Department of Health and Human Services,** 558 F. Supp. 337 (D Colo., 1983); **Department of Environmental Quality Engineering v. Hingham,** 15 Mass. App. 409, 411 (1983).

DATE AUTHORIZED: December 20, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-144

FACTS:

You are the chairman of a state board of registration (Board). Among the Board's powers is the approval of applications for certain licenses (identifying information omitted). The Board may require either an oral or written examination, depending on certain factors.[1]/ The board is not limited to granting a fixed number of annual approvals, and will grant such approvals to any qualified applicant.

One of the Board members, has applied to the Board for approval of a certain license.

QUESTION:

Does G.L. c. 268A permit you to review and determine the merits of the application of one of your Board members?

ANSWER:

Yes, subject to the conditions set forth below.[2]/

DISCUSSION:

As a member and chairman of the Board, you are a "state employee" for the purposes of G.L. c. 268A. As a state employee, you are subject to the restrictions of G.L. c. 268A, §23(¶2)(3) which prohibits you 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. Issues under this section inevitably arise when members of a state agency must evaluate the qualifications of one of their peers. Absent safeguards, the process may create the perception in the eyes of the public, and, more specifically, of individuals who are competing with the member applicant, that the member will receive more favorable treatment than outsiders with similar qualifications.

One safeguard to protecting the integrity of the process applies not to you but to the member applicant.[3]/ These safeguards require that the member disqualify himself from any official participation[4]/ in the consideration of his application, G.L. c. 268A, §6, and refrain from using his official position to secure an unwarranted privilege or exemption for himself, G.L. c. 268A, §23(¶2)(2) (for example, by expediting the processing of his application).

With respect to your situation, nothing in G.L. c. 268A inherently prohibits you from evaluating the qualifications of the member applicant. See, EC-COI-84-40 in which the Commission issued an opinion to one of its members seeking guidance on the propriety of his remaining on the Commission while serving as the City of Boston Corporation Counsel. However, you should be aware that the more objective the process of evaluating the merits of the member applicant is, the less likelihood there will be that the Board has created the impression of undue favoritism. To the extent that the Board will be reviewing the member's application pursuant to the objective standards of (identifying regulation omitted), there are relatively few opportunities in the process for subjective bias by the reviewing members. In particular, the decision as to the kind

[1]/(Identifying regulation omitted)

[2]/Although this advisory opinion is addressed to you, you may share the information with the six other Board members who are similarly situated.

[3]/If deemed desirable, the member applicant may seek a formal advisory opinion from the Commission addressing in more detail the limitations of G.L. c. 268A.

[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, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

of examination to be administered, i.e., oral as opposed to written, is determined by objective criteria. You should bear the principles of §23(¶2)(3) in mind, however, in administering and evaluating the members' oral examination.[5]/ In that regard, it is suggested that you make a full written record of the reasons supporting whatever decision you reach on the application.

DATE AUTHORIZED: December 20, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-145

FACTS:

You are a justice of the District Court Department of the Trial Court of the Commonwealth. As the first justice of the ABC Division of the Department, you are the administrative head of that division and of its personnel, pursuant to G.L. c. 211B, §10 and G.L. c. 218, §6. Among the types of personnel employed in your division are clerks, assistant clerks, and courtroom procedures clerks. Clerks and assistant clerks are positions created and provided for by statute. In contrast to these positions, courtroom procedures clerks are not statutorily established positions. The procedures clerk position is essentially a clerical one which pays a lower salary and which does not carry with it the same authority that clerk and assistant clerk positions have.

Pursuant to G.L. c. 276, §57 clerks and assistant clerks are authorized to collect bail from persons who have been arrested for committing criminal offenses.[1]/ That section also provides for the appointment by justices of the superior court of special bail commissioners who are authorized to collect bail from criminal defendants. These bail commissioners perform their services when the courts are not in session, and they are permitted by court rules to collect a set fee for their services from any defendant they admit to bail.

QUESTION:

Does G.L. c. 268A permit courtroom procedures clerks to serve as bail commissioners, pursuant to G.L. c. 276, §57?

ANSWER:

No.

DISCUSSION:

Courtroom procedures clerks are state employees as that term is defined in G.L. c. 268A[2]/ and as such are subject to the provisions of that statute. The section of the law applicable to the question you have asked is §4. Section 4 provides in pertinent part that no state employee shall otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation[3]/ from anyone other than the commonwealth in connection with a particular matter[4]/ in which the commonwealth or a state agency is a party or has a direct and substantial interest. In EC-COI-83-143[5]/ the Commission addressed the question of whether a full-time state employee could also serve as a bail commissioner. Its conclusion was that such an arrangement was prohibited by §4 for the following reasons. First, the fee received by bail commissioners constitutes compensation originating from someone other than the commonwealth or a state agency, specifically the defendant. Second, the bail commissioner's fee is received in connection with a particular matter, in this case an arrest, judicial proceeding or determination. Third, 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 would be brought by the commonwealth against the defendant. Last, the Commission concluded

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[1]/Although G.L. c. 276, §57, in listing those people who are authorized to take bail, states that district court clerks are permitted to do so, the "Rules Governing Persons Authorized to Take Bail" promulgated by the superior court indicate that district court clerks and assistant clerks are authorized to do so.

[2]/For purposes of G.L. c. 268A, "state employee" is defined 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, including members of the general court and executive council. G.L. c. 268A, §1(q).

[3]/For 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 sevices rendered or to be rendered by himself or another. G.L. c. 268A, §1(a).

[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).

[5]/This citation refers to a previous Commission advisory opinion including the year it was issued and its identifying number. Copies of this and all other advisory opinions are available for public inspection, with identifying information deleted, at the Commission offices.

[5]/Enclosed is a copy of the Code of Conduct for Employees of the Division of Registration in the Executive Office of Consumer Affairs. Some of the provisions, notably §1, 3, and 4 supplement the principles discussed above.

that the fee was not provided for by law for the proper discharge of official duties since it was not being received by the bail commissioner in connection with the duties he performed in his full-time state job. In terms of whether the fee in question is provided for by law in the proper discharge of official duties in the facts you have presented, it is clear from a reading of G.L. c. 276, §57 and the accompanying rules that courtroom procedures clerks are not specifically authorized to do so in the performance of their duties. Therefore, the Commission concludes that a courtroom procedures clerk's receipt of a fee for acting as a bail commissioner would constitute a violation of G.L. c. 268A, §4.

DATE AUTHORIZED: December 20, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-146

FACTS:

You currently serve as a full-time employee in the governor's office. (Identifying information omitted). You are considering leaving the governor's office to work for ABC, a lobbyist. You plan to serve as a lobbyist before the legislative branch, the budget bureau of the Executive Office of Administration and Finance, and the Executive Office of Human Services.

QUESTION:

During the one-year period after leaving the governor's office, does G.L.c. 268A permit you to serve as legislative agent before the General Court, the budget bureau, or the Office of Human Services?

ANSWER:

You may serve as legislative agent before the General Court, the budget bureau and office of human services, subject to the limitations set forth below.

DISCUSSION:

As a full-time employee in the governor's office, you are a "state employee" for the purposes of G.L. c. 268A. The provisions of G.L. c. 268A apply to your activities both during the period in which you remain a state employee, and during the period following the termination of your employment with the governor's office.

1. **Current Limitations**

As a state employee, you are subject to the standards of conduct contained in G.L. c. 268A, §23. Two provisions are relevant to your situation. The first, §23 (¶2)(3) prohibits you 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. Issues under this section would arise if, during the period of your negotiation or arrangement for future employment with ABC, you are called upon by the governor's office to review and make a recommendation concerning legislation in which ABC has been involved as legislative agent. Inasmuch as your current responsibilities are ministerial and do not include a substantive review of the merits of legislation, you will not be creating the impression of undue favoritism toward ABC in your official capacity. However, you should remain aware of the principles of this paragraph.

Of greater importance are the restrictions contained in §23(¶3), which prohibit you from

> (1) accepting employment or engage in any business or professional activity which will require you to disclose confidential information which you have gained by reason of your official position or authority;
>
> (2) improperly disclosing materials or data within the exemptions to the definition of public records as defined by section seven of chapter four, and were acquired by you in the course of your official duties nor use such information to further your personal interests.

In view of your insider status within the governor's office, you necessarily have access to strategic information concerning the governor's position on legislation. For example, in light of the expected legislative prorogation during December, you have access to information and strategy concerning bills which the governor intends to sign or pocket veto. Because both the information and strategy are confidential, you may not disclose them to ABC or use them to further your personal interests.[1/]

[1/]The mandatory disqualification and notification procedures contained in G.L. c. 268A, §6 do not apply to your situation. Your involvement does not rise to the level of "participation," the matters which you review do not constitute "particular matters," and the interest of ABC in legislation for which it lobbies cannot be characterized as financial.

2. **Post-Employment Limitations**

Aside from the aforementioned confidentiality provisions, the only restriction in G.L. c. 268A relevant to your situation is §5(e), which provides as follows:

> A former state employee or elected official including a former member of the general court, who acts as legislative agent, as defined in section 39 of chapter 3, for anyone other than the commonwealth or a state agency before the governmental body with which he has been associated within one year after he leaves that body, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.[2]/

The one-year bar would clearly apply to your legislative agent activities before the governor's office, but would not apply to your activities before the General Court. Whether §5(e) would also apply to your activities before the budget bureau and Office of Human Services, which are agencies within the executive branch, is less clear. The Commission has not previously addressed the question of whether the scope of the term "governmental body" in G.L. c. 268A, §5(e) applies to all executive branch agencies or merely the particular state agency at which the person was employed. For the reasons stated below, the Commission advises you that the §5(e) restriction will apply only to your activities before the Governor's office.

The term "governmental body" is defined neither in G.L. c. 268A, §5(e) nor in the definition provisions of G.L. c. 268A, §1. However, the term is defined in G.L. c. 268B, §1(h),[3]/ and the Commission concludes that the General Court intended the G.L. c. 268B definition of "governmental body" to apply to G.L. c. 268A, §5(e) as well.

Both G.L. c. 268B and G.L. c. 268A, §5(e) were enacted in 1978 as the culmination of an effort to strengthen the public's confidence in its officials. See, 1978 House Doc. No. 5151; St. 1978, c. 210. Moreover, both the Supreme Judicial Court and Commission have confirmed the relationship between G.L. c. 268A and G.L. c. 268B; specifically, that financial information disclosed through G.L. c. 268B may identify potential violations of G.L. c. 268A. See, **Opinions of the Justices,** 375 Mass. 795, 810, 811; **In the Matter of John R. Buckley,** 1980 Ethics Commission 2, 8. Because the two laws were enacted contemporaneously and relate to the same subject, the G.L. c. 268B definition of governmental body may be appropriately applied to G.L. c. 268A, §5(e) as well. See, **Commonwealth v. Baker,** 368 Mass. 58 (1975); **Pereira v. New England LNG Co. Inc.,** 364 Mass. 109 (1973).

For the purposes of G.L. c. 268B, the governor's office is treated as a different governmental body from the executive offices such as administration and finance and human services. Not only does the G.L. c. 268B, §1(h) definition distinguish state agencies, but also G.L. c. 268B, §3(j) expressly identifies the governor's office as a separate governmental body from the executive offices. See, G.L. c. 268B, §3(j)(8), (9).[4]/

The application of the definition of governmental body rests on the name and organizational location of the agency rather than on the functional accountability of one agency to another. Had the General Court intended to incorporate into the definition those agencies which are functionally accountable, it could have done so. Cf. EC-COI-80-66 (application of §4 to special state employees in matters pending in their state agency turns on operational dependence of state agencies). Even accepting that the budget bureau plays a role in the governor's budget process, the governor has a deliberative function separate from the budget bureau in determining budget priorities, deciding how much to recommend in each line item of the annual budget, deciding whether to veto a line item passed by the General Court, and deciding whether and when to release funds. The purpose of G.L. c. 268A, §5(e) was to establish a one-year cooling off period for former state employees who might otherwise be in a position to take undue lobbying advantage of former associates whose loyalties they acquired as state employees. The budget bureau is an agency within the fiscal affairs division of the Office of Administration and Finance, which in turn is an agency under the governor. See, G.L. c. 7, §4B; c. 6, §17; c. 7, §4. In view of the intervening state agency layers between the budget bureau and governor's office, you will not be in a position to take undue lobbying advantage of your former associates.

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[2]/The two other paragraphs of §5 relevant to former state employees will not limit your ABC activities, since the legislation for which you would lobby ABC in 1985 would not be a particular matter within your previous responsibility.

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

[4]/Moreover, the Commission's Rules regarding the designation of public officials under G.L. c. 268B envision that certain governmental bodies may be within the control of larger governmental bodies. See, 930 CMR 2.02(8).

Accordingly, the §5(e) restrictions will not apply to your legislative agent activities before the budget bureau or the Office of Human Services.

DATE AUTHORIZED: December 20, 1984

CONFLICT OF INTEREST OPINION NO. EC-COI-84-147

FACTS:

The Board of Trustees of a state institution passed a resolution to assist in establishing a holding company for a system of non-profit and for-profit entities which would help produce revenues for the state institution. The board of the holding company would be selected by the institution's board, and would include four (4) institution or subsidiary trustees and two (2) persons specifically identified by their institution positions.

QUESTIONS:

1. Would board members of the holding company be considered state employees within the meaning of G.L. c. 268A?
2. If so, how would G.L. c. 268A apply to company Board members?

ANSWERS:

1. Yes.[1]/
2. Company Board members would be subject to the limitations set forth below.

DISCUSSION:

1. **Status of a Company Board Members as State Employees**

Chapter 268A defines 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). The issue of whether company Board members are considered state employees therefore depends upon whether the holding company is a state agency, which is defined by the conflict of interest law as "any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town." G.L. c. 268A, §1(p).

Prior opinions of the Commission have identified several criteria useful to an analysis of whether a particular entity is a public instrumentality for the purposes of G.L. c. 268A. The three deciding factors in this case are

> (a) the impetus for the creation of the entity (e.g. legislative or administrative action);
>
> (b) the entity's performance of some essentially governmental function;
>
> (c) the extent of control exercisable by government officials or agencies over the entity.

None of these factors standing alone is dispositive. The Commission considers the cumulative effect produced by the extent of each factor's applicability to a given entity, as well as analyzing each factual situation in light of the purpose of the conflict of interest law. Keeping these precedents in mind, the Commission concludes that the holding company's trustees would be performing services for a state agency within the meaning of c. 268A.

a. **Creation**

As a private corporation, the holding company would be created by filing the necessary articles of organization and bylaws with the Office of the Secretary of State pursuant to G.L. c. 180. However, the impetus for the formation of the holding company came from the members of the institution Board, who are state employees, in the form of a resolution to assist in the establishment of [a holding company to help produce revenues for the institution]. [Citation omitted]. The institution Board is presently the body which governs the activities of the institution and its subsidiaries. The Commission concludes that the creation of a corporation to perform a part of those duties, namely to maintain the competitiveness of one of its subsidiaries through the development of new ventures, constitutes the creation of an independent state instrumentality. While it may be true that the holding company's organizational structure is that of a corporation rather than a traditional public sector agency or department,

[1]/This advisory opinion is based on the facts as you relate them to be at the present time. It does not exclude the possibility of a different result should those facts change.

the application of c. 268A cannot be conditioned on the organizational status of an entity. **In the Matter of Louis L. Logan,** 1981 Ethics Commission 40, 45. Just as a housing authority is independent from municipal government yet considered a municipal agency for Chapter 268A purposes, the holding company's separate corporate identity under G.L. c. 180 does not preclude it from being a state instrumentality within the meaning of Chapter 268A. Moreover, the permanent character of the holding company distinguishes it from the temporary, ad hoc advisory role of those groups the Commission has regarded as exempt from the definition of state agency. Compare EC-COI-82-139; 82-81; 80-49. See also EC-COI-84-55.

b. **Governmental Function**

For the reasons stated above, the Commission finds that the holding company will be performing an essentially governmental function. The Commission recognizes that the [list of the potential revenue-producing activities of the holding company omitted] are activities which can be either publicly or privately performed. However, the underlying function of searching out new revenue producers for the subsidiary is a government function because the subsidiary is included within the [institution], a state institution. The fact that this function would be carried out by a corporation organized under c. 180 does not change the character of that function from public to private. Because the Legislature has delegated to the institution Board the responsibility for financing and managing the institution, which includes the subsidiary, efforts to protect the financial viability of the subsidiary are within the domain of state responsibility.[2]/

Thus, it is the public purpose behind the development of new sources of revenue, coupled with the interrelation between the holding company and the institution discussed below, which results in the holding company's performance of a governmental function.

c. **State Agency or Government Control Exercisable Over the Holding Company**

The proposed bylaws of the holding company provide for the make-up of the company's Board of Trustees as follows:

> [Omitted citation refers to the four institution or subsidiary trustees and the two persons specifically identified by their institution positions].

Thus, six members of the company's Board, which "shall at all times consist of at least nine (9) but not more than eleven (11) persons" will be institution-affiliated public employees. **Id.** The Commission has previously found that the fact that a majority of an entity's Board of Trustees are public officials or employees is not conclusive evidence that an entity is public. See, e.g. EC-COI-84-65. Yet the proposed bylaws of this company further provide that all company trustees "shall be selected by the institution Board of Trustees from a slate of nominees approved by the subsidiary's Board." [Citation omitted]. In other words, both the selection process and the composition of the company's Board of Trustees are state dominated. Because that Board is entrusted with administering the funds and directing the policy of the company, the Commission concludes that the amount of state control exercisable over the holding company via the selection of its Board renders that company a state instrumentality.

2. **Application of G.L. c. 268A to Company Board Members**

a. **Section 8A**

> "No member of a state commission or board shall be eligible for appointment or election by the members of such commission or board to any office or position under the supervision of such commission or board. No former member of such commission or board shall be so eligible until the expiration of thirty days from the termination of his service as a member of such commission or board."

Whether §8A precludes the appointment of an institution Board member to the company Board depends upon whether the company is under the "supervision" of the institution Board. The Commission has previously found that an entity is not under the supervision of a state board for §8A purposes where the entity is independent from the board with respect to its finances,

[2]/Compare [citation omitted], whereby the Maryland Legislature specifically created a private corporation to run the existing institution. Until this legislative act was taken, the institution was considered a public entity and its employees were subject to the state's ethics law. Even in passing the law, the Maryland Legislature recognized that the Corporation would still maintain important public entity attributes, and allowed current employees to choose between retaining their state employee status as institution employees or being considered purely private employees of the new Corporation. [Citation omitted].

operational control and organization. EC-COI-84-25. The factors the Commission considered in that opinion included the following:

(1) absence of operational management and regulation on the part of the institution or board over the entity;

(2) the entity's utilization of its own private counsel, accounting and printing services; and

(3) the entity's independence in funding, grant decisions and personnel decisions.

Based on these criteria, the Commission finds that the company would not be subject to the direct management and regulation of its activities by the institution Board. The ongoing operations of the company will be managed by an Executive Director and other staff. The company's finances will be separate from the institution's, and the company will keep separate financial books and ledgers, retain its own accounts and attorneys, and purchase its own goods and services. From this absence of direct supervision on the part of the institution or the institution Board, the Commission concludes that §8A does not outright prohibit members of the institution Board from being appointed as members of the company's Board.[3]/

b. Section 7

Section 7 prohibits a state employee from having a financial interest in a second state contract. The commission finds that this prohibition is not applicable to company Board members. All institution affiliated members of the company Board are serving in that capacity by virtue of their institution positions. Therefore, the Commission finds that their service as state employees for the company and the institution is connected to only one state contract, their original institution contract. See EC-COI-84-148.

DATE AUTHORIZED: December 20, 1984

[3]/The threshold for finding "supervision" for §8A purposes is higher than for finding the factor of "exercisable government control" in establishing jurisdiction under c. 268A. The fact that company Board members are selected by, and serve at the pleasure of the institution Board establishes a sufficient nexus between the institution and the company to bring the latter under the umbrella of the term state agency within the meaning of c. 268A. See Op. Atty. Gen. March 24, 1972, p. 105. That selection power does not, however, constitute "supervision" under §8A.

CONFLICT OF INTEREST OPINION NO. EC-COI-84-148

FACTS:

You are a member of an unpaid state Committee (Committee). (Description of enabling legislation omitted). The Committee also disburses federal funds in the form of grants to private non-profit agencies and state agencies. ABC is among the state agencies which receives funds from the Committee.

You have recently become employed by ABC. Prior to assuming that position, you terminated professional associations which you had with two private agencies which contract with ABC.

QUESTION:

May you remain a member of the Committee while employed by ABC?

ANSWER:

Yes.[1]/

DISCUSSION:

As a member of the Committee, you are a state employee as defined in the conflict of interest law, G.L. c. 268A. Because you are unpaid for your Committee membership, you are also a special state employee in that position under G.L. c. 268A, §1(o).

Section 7 of the conflict of interest law prohibits a state employee from having a financial interest in a contract made by a state agency. It is clear that you have a financial interest in your Department employment arrangement which is considered a contract for §7 purposes. However, the Commission concludes that the Committee's enabling legislation calls for representatives of ABC to serve on the Committee, and that the legislation contemplates that the Committee will have dealings with the agencies its members represent.

(Discussion of identifying enabling legislation omitted).

Thus, employees of ABC and other public agencies were intended to serve on the Committee as contemplated by the Governor in administering the federal

[1]/To the extent that EC-COI-84-99, issued to you in August, 1984 is inconsistent with this opinion, it is overruled.

act as well as by Congress in creating such an advisory group. This means that it is by virtue of your employment arrangement with ABC that you are serving on the Committee. Such a situation is analogous to a state employee serving **ex officio** on a board or council. Because service in both capacities is tied to one state contract, i.e. the original state employment contract, such an individual would not have a §7 prohibited financial interest in another state contract. Likewise, the Commission concludes that your financial interest does not violate §7 because it originates in your employment arrangement with ABC, the contract which forms the basis for your Committee membership as well.

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EC-COI-84-1 — A state licensing official may open a business employing his sons within the trade he licenses provided that 1) he does not represent the business or its employees before any state agency, 2) he does not participate as a state official in any matter in which he or a member of his family has a financial interest and 3) he strictly complies with the provisions of §23. The latter requirement means that he must not convey to his sons any confidential information regarding board examinations or procedures and may not discuss with board members or employees any complaints involving his business, his sons, or his competitors.

***EC-COI-84-2** — A full-time employee of a town water department may work after hours as a special police officer for the town in accordance with a February, 1984 amendment to c. 268A, §20 which permits municipal employees to work part-time in the "police, fire, rescue, or ambulance department of a town or any city with a population of less than 35,000 inhabitants."

EC-COI-84-3 — A town counsel may employ in his private law practice a member of the board of selectmen provided the selectman does not participate, as a selectman, in any matter affecting the financial interest of the law firm, including the selection and terms of employment of town counsel. Nor may the selectman work as a law firm employee on legal matters within the responsibility of town counsel.

EC-COI-84-4 — An official of the Office for Children (OFC), which is responsible for approving applications of governmental bodies that wish to serve as foster home and adoption agencies, may serve on the advisory board of a governmental body seeking such approval. However, the official must refrain from any involvement as an advisory board member in the advisory board's application to the OFC and must receive approval from his appointing official to continue supervising the OFC employees who will be reviewing the application.

EC-COI-84-5 — Employees of a private corporation which contracts with a state agency are not considered state employees unless they have been expressly designated in the contract as persons for whose services are being contracted.

***EC-COI-84-6** — A state official who serves as a member of a board of directors of a corporation whose activities are monitored by his state agency must abstain from participating as a state employee in any matter in which the corporation has a financial interest including such matters as the approval of submissions. Further, the state employee may not represent the corporation or any of its clients before a state agency or regulatory board.

EC-COI-84-7 — A state employee who drafted legislation for one state agency creating a program administered by another state agency may assist the second state agency in an uncompensated advisory capacity. The state employee may also participate as a selectman in approving the town's application for state aid under the program.

EC-COI-84-8 — An employee of the state Banking Commission may serve as a paid consultant and expert witness in a lawsuit between a private party and a state-chartered commercial bank.

EC-COI-84-9 — A former employee of the Appellate Tax Board (ATB) who is now a municipal attorney is prohibited from receiving compensation from or acting as an agent or attorney for any non-state party in relation to any submission, application or determination in which he participated as a tax board employee. The employee is also prohibited from appearing for one year before any state agency in relation to particular matters which had been under his official responsibility for two years prior to his resignation.

***EC-COI-84-10** — A state employee may serve as the chairman of the board of directors of a bank, and may maintain a substantial ownership interest in the bank, subject to several conditions. The bank must divest its financial interest in state contracts which do not qualify for an exemption under §7. The employee may not participate in his state capacity in any matter in which either he or the bank has a financial interest, and he may not act as the bank's agent in its dealings with state agencies.

EC-COI-84-11 — The conflict of interest law permits an individual to work for a state agency while that agency leases property from that employee's adult children.

***EC-COI-84-12** — A district attorney's office may contract with the Department of Public Welfare (DPW) to prosecute non-support cases and may use these DPW funds to augment the salaries of the employees of the district attorney reflecting their increased responsibilities provided the employees of the district attorney receive one paycheck for their services.

***EC-COI-84-13** — A part-time employee of the Massachusetts Rehabilitation Commission (MRC) has a prohibited interest in his spouse's contract with MRC where 1) 80 percent of her income is derived from MRC referrals, 2) the proceeds are deposited in the account of a professional corporation of which the state employee is the majority shareholder and president, and 3) the proceeds are used to pay for the office expenses incurred in her MRC examinations.

***EC-COI-84-14** — A former municipal tax assessor may privately assess property which he previously assessed as a town employee because the second assessment is a different particular matter from the first assessment in view of changes made to the property between the two assessments.

EC-COI-84-15 — A full-time police officer may be awarded a contract to install radio system equipment in his town's fire department because he has complied with the conditions for an exemption to §20.

***EC-COI-84-16** — The conflict of interest law does not prohibit two agencies from contracting with eachother where the heads of the agencies are married. However, if the awarding commissioner becomes aware of a significant breach of contract by the contracting department and does not pursue that breach, there would be a violation of §23. Nor could these commissioners divulge to each other information acquired in their official capacities that would further eachother's personal interests.

***EC-COI-84-17** — A state employee who takes an unpaid leave of absence for three months is not a state employee for G.L. c. 268A purposes during the period of the leave, and therefore would not violate §7 by having a financial interest in a second state contract during that period. However, a period of absence from state employment due to vacations, holidays, personal time or illness would not insulate that employee from employee status; because during that period he would be receiving commonwealth benefits attributable to the leave period.

***EC-COI-84-18** — An unpaid appointee to the Special Commission on Hazardous Waste Liability (Special Commission) is a special state employee for purposes of the conflict of interest law. As such the appointee would be prohibited under §4 from receiving compensation from anyone other than the Commonwealth or acting as an agent for any non-state party in relation to any findings of the Special Commission and in relation to any special, as opposed to general, legislation proposed by the Special Commission. Section 6 would prohibit the employee from participating as a Special Commission member in any "particular matter," such as special legislation, in which he or his corporation had a financial interest. He could, however, participate in issues that did not constitute particular matters but in which he or his corporation had a financial interest such as public hearings, studies of pertinent questions, and the submission of general legislation.

EC-COI-84-19 — A state police officer may serve as a member of the board of directors of a local development corporation. However, §4 would limit his representational activities on behalf of the development corporation. Under §6 the employee could not participate as a state police officer in any "particular matter" such as arrests, controversies and decisions in which the development corporation has a financial interest.

***EC-COI-84-20** — The activities of a law firm which represents clients before a state agency are not restricted on the basis of the employment of one of its associates as a special assistant attorney general. As a special state employee, the special assistant attorney general, who by virtue of that position represents the interests of the commonwealth, may not represent his law firm's utility clients in matters before the state agency where the Attorney General is or becomes an intervenor if he works more than 60 days during the year as a special assistant attorney general.

EC-COI-84-21 — The former chairman of a state task force may now work for one of the groups represented on that task force, because he would not be working on matters in which he previously participated as a task force member.

*EC-COI-84-22 — An investigator for a state regulatory agency may either operate a business or be employed by a business in the regulated area provided that:

1. he does not act as an agent for his own or another's business with regard to applications for permits or licenses or investigations carried out by his state agency;

2. he does not participate as a state employee in matters relating to complaints and investigations of competing businesses or in licensing determinations affecting his or his employer's business, and

3. he strictly complies with the confidentiality requirements of §23.

EC-COI-84-23 — A full-time investigator for a state regulatory agency may provide cleaning, maintenance and security services after hours to the general public provided that:

1. he does not represent the cleaning/security business in obtaining state contracts;

2. he refrains from investigatory complaints involving businesses that hired him to do cleaning or security or involving competitors of businesses that hired him;

3. he complies with the conditions of §7 for obtaining contracts with the state, and

4. he does not use his state position to solicit customers for his outside business.

EC-COI-84-24 — A town moderator and chairman of a town by-law committee is a municipal employee for the purposes of G.L. c. 268A. Because he is an associate with a private law firm, rather than a partner, the firm is not prohibited from representing private clients in matters involving the town.

*EC-COI-84-25 — A former member of a state board of regents may accept a position as executive director of a non-profit corporation which assists programs for a university. The 30-day waiting period contained in §8A is not applicable because his position is not under the supervision of the board.

EC-COI-84-26 — A member of a state regulatory agency may also serve as an unpaid member of the editorial board of a national journal. He may do so under §4 because he will not be acting as an agent for the journal or its board and will not be compensated. Under §23 he must take great care not to exploit access to confidential information about his state agency's policies for the benefit of the journal and its board.

*EC-COI-84-27 — The receipt of lodging reimbursement by a state employee does not create a financial interest in a contract made by a state agency within the meaning of §7. A one-time arrangement under which a state employee would pay the lodging reimbursement to another state employee for the use of the employee's condominium would not violate §23. However, if employed on a more frequent basis, it would become an unwarranted privilege.

EC-COI-84-28 — A judge may serve as an unpaid member of the board of directors of his health care insurer provided he does not act as the insurer's agent or attorney in relation to a particular matter of direct and substantial interest to the Commonwealth. He may not participate, as a judicial officer, in any case involving the financial interest of the insurer.

EC-COI-84-29 — A state police officer may also maintain a private law practice as long as he avoids those matters in which the Commonwealth or a state agency is a party or has a direct and substantial interest. He is also prohibited from using resources available to him as a police officer to further his private law practice.

*EC-COI-84-30 — An attorney who serves as a special state employee for more than 60 days a year and who is an associate in a private law firm may represent private clients before state agencies, although not before the agency employing him and not in cases where his agency is an intervenor.

*EC-COI-84-31 — A former state employee who previously participated in the denial of an application filed by a private institution, may not now work for that institution in a new application to the former agency because the application involves the same controversy as the first application and is therefore the same particular matter.

EC-COI-84-32 — A special state employee who is a member of a board of examiners of a trade and is also the owner and president of a contracting firm regulated by the board may contract with state agencies other than his own board. He may not participate in board decisions affecting the licensure of his own business or his competitors.

*EC-COI-84-33 — A full-time state employee whose regular duties involved performing program services for a state agency may not be paid additionally by that agency to provide the same program services outside of his normal working hours.

EC-COI-84-34 — A construction firm which is owned by a state employee may be hired as a subcontractor under a project receiving funding from the Massachusetts Housing Finance Agency because the employee qualifies for the exemption under §7(b). That exemption allows a state employee to have a financial interest in a state contract where the individual is not employed by the contracting agency and does not participate in or have official responsibility for the activities of that agency; the contract was made after public notice; and the employee files a disclosure statement with the Ethics Commission.

*EC-COI-84-35 — A full-time state university employee may serve as a county commissioner and chairman of a board of selectmen. However, he may not, while county commissioner, continue to serve as the representative of the town to the advisory board to the county commissioners. Nor may he, as county commissioner, participate in decisions or particular matters that affect the financial interests of the town in a direct and immediate way. As a state employee, he may not partipate in any review of town proposals.

EC-COI-84-36 — A company owned by a county commissioner may contract with a district court to perform services. The contract would be with a state, rather than a county agency, and so would not violate §14. Likewise, the contract would not violate §11 because it is not a matter of direct and substantial interest to the county.

EC-COI-84-37 — A county employee may work for his wife's cleaning company under a contract with a district court. The contract would not violate §14 because it is a particular matter to which a state, rather than a county agency, is a party. Likewise, the contract would not violate §11 because it is not a matter of direct and substantial interest to the county.

*EC-COI-84-38 — A part-time official of a regional housing authority is considered a special county employee for the purposes of the conflict law. The Commission defers to a state agency's ruling that he may not also act as the attorney for a local housing authority within the same region, based on potential conflicts under §11 and §23 (¶2)(1). Section 11 would not prohibit him from representing property owners and municipalities in relation to state housing subsidy applications and grants because they are not particular matters of direct and substantial interest to the county.

*EC-COI-84-39 — A part-time city solicitor may privately represent a defendant who was arrested by state police for violations of state gambling statutes, since the proceeding would not be a matter in which the city was a party or had a direct and substantial interest. The solicitor is also advised that his question raises concerns under the Code of Professional Responsibility.

*EC-COI-84-40 — A member of the State Ethics Commission may also serve as the City of Boston (City) corporation counsel, subject to several limitations. He may neither participate as a Commission member in any matter involving the City or employees of the City, nor have access to confidential Commission materials related to such matters. Further, he may not act as corporation counsel in any matters falling within his official responsibility as Commission member.

EC-COI-84-41 — A part-time management analyst for a state agency may also serve as a management consultant to a private corporation that receives some funding as a vendor for that state agency. The employee's involvement in selecting a new executive director for the corporation would not violate §4 because the selection would not be a matter of direct and substantial interest to the state.

EC-COI-84-42 — A part-time employee of the department of corrections may consult to a non-profit corporation because the consultation would be neither in relation to a particular matter of direct and substantial interest to the state nor paid out of department of corrections funds.

EC-COI-84-43 — A state employee who previously worked for a state agency which administers a benefit plan covering state employees may now consult to non-state parties concerning benefit plans on the municipal level. However, he may not act as the agent or attorney for such parties before state agencies.

EC-COI-84-44 — An attorney for a town and a municipal agency may also be a candidate for and serve as a member of the General Court, subject to certain limitations. As a candidate, §23 would prohibit the exploitation of his public municipal positions in connection with his political campaign. As a member of the General Court, he would have to abide by the §4 and §6 legislator provisions as well as the §23 standards of conduct.

EC-COI-84-45 — A former state employee is not prohibited by §5 from assisting a municipal agency in negotiations with a private company, even though connected with the same project with which he was associated as a state employee. The Commission does not generally view an entire project as a particular matter for §5 purposes, but rather evaluates the various decisions, determinations and proceedings related to a project and the former state employee's role in them.

***EC-COI-84-46** — State institutional school teachers who work for the Department of Education for ten months annually are treated as special state employees during the two month summer period. Such teachers would not qualify for an exemption available to special employees so as to allow them to teach in a summer program funded by DOE because they "participate in the activities of the contracting agency" as DOE teachers during the rest of the year. However, they would qualify for a separate exemption since the students in the program are recipients of public assistance, and the other criteria of the public assistance exemption are met.

***EC-COI-84-47** — A state employee who is negotiating for future employment with a firm which prepares cost reports which are submitted to his agency as part of the agency approval process may not participate in the approval process for those businesses which submit reports prepared by the firm.

***EC-COI-84-48** — A selectman is a municipal employee. Because the towns by-laws authorize selectmen to settle or defend lawsuits brought against the town, a law partner of the selectman may not continue to represent a plaintiff in a lawsuit against the town.

EC-COI-84-49 — An employee of a non-profit corporation which has a contract with the Department of Mental Health (DMH) is not a state employee under G.L. c. 268A where the contract between DMH and his employer does not specifically contemplate using his services.

***EC-COI-84-50** — A recently appointed member of a local housing authority may retain her full-time position as executive director of a private community service organization which has programs involving the housing authority, as long as she maintains safeguards designed to insulate her from any overlapping functions.

***EC-COI-84-51** — An employee of the Department of Food and Agriculture (DFA) may not enter into a contract with DFA for the sale of the development rights of farmland which he owns.

EC-COI-84-52 — A municipal police officer may run for the office of Governor's Councillor. During his candidacy, the §23 standards of conduct will prohibit him from using the resources of the Police Department to further his candidacy. Once elected, he may continue to serve as a police officer without violating §4 provided that he does not act as a police officer in any matter within the purview of the Council, pursuant to the §4 "municipal exemption." He would also have to abide by §6 and §23 restrictions regarding his dual governmental positions.

***EC-COI-84-53** — A district court employee may not participate in any cases in which his spouse, a private attorney, has filed an appearance. The employee may participate in ministerial acts in cases where members or associates of the spouse's lawfirm are involved, but may not engage in any discretionary acts in such cases.

***EC-COI-84-54** — A former employee of the State Ethics Commission may now work for the United States Attorney in relation to a referral from the Commission. Although he participated in the initiation and oversight of the Commission's investigation into the matter, he did not participate in the referral of that matter by the Commission. Section 5 therefore does not prohibit his prosecution of the indictment related to the referral report. However, provisions under the Code of Professional Responsibility might be relevant.

***EC-COI-84-55** — Members of the Statewide Health Coordinating Council are state employees for the purposes of G.L. c. 268A. To the extent that the Council's by-laws propose conflict of interest standards which are not any less restrictive than G.L. c. 268A, the Commission will defer to those standards.

***EC-COI-84-56** — A chairman of a legislative committee may also serve as a part-owner and attorney for a private development team with respect to a proposal to a municipal agency. Section 23 issues would be raised, however, if he were to have dealings on behalf of the team with people or entities which have a distinct and unique interest before him in the General Court.

EC-COI-84-57 — A state employee may also serve as a partner in an accounting firm, subject to certain limitations. In particular, he may not perform accounting services for clients in relation to proceedings before any state agency, and his partner may not act as agent for a person or business in connection with any matter in which the state employee has participated or which is under his official responsibility.

EC-COI-84-58 — A bank officer may serve as an unpaid appointee in a state position which involves the supervision of financial investment, subject to certain limitations. Under §6, he may not participate as a state employee in investment decisions where his bank is a potential recipient of those funds. However, his status as a bank officer, standing alone, would not give him a financial interest in investments his state board makes with the bank.

EC-COI-84-59 — Following the filing of an appropriate disclosure statement under §7(d), a special state employee may maintain her financial interest in a contract made by a second state agency, inasmuch as she neither participates in nor has official responsibility for any of the activities of the contracting agency.

EC-COI-84-60 — A consultant to a state agency which reviews budget requests submitted by a second agency which employs the consultant's spouse must refrain from reviewing or making specific recommendations affecting his spouse's agency's budget requests.

***EC-COI-84-61** — A member of the General Court may become involved in the marketing of real estate tax shelters, provided he does not market those shelters to persons at a time when they have a specific interest in a piece of legislation pending before him, or to persons who are subject to his direct authority. Following the completion of his legislative service, he would not be prohibited by §5 from marketing shelters since the shelters were not matters in which he participated or had official responsibility as a legislator.

EC-COI-84-62 — A part-time town counsel may continue to serve as an elected, unpaid member of a town board, because his official responsibilities include advising all town departments except that board.

***EC-COI-84-63** — A state employee may not commercially market, for his own benefit, devices which he designed and developed in the course of his state employment.

***EC-COI-84-64** — G.L. c. 268A, §25 addresses the suspension of persons under indictment for misconduct. It does not, however, preclude resuming the payment of the salary of an indicted municipal employee whose proceedings have terminated by 1) an acceptance by the court of a plea of nolo contendere, 2) placement of the cases on file, 3) an agreement that claims to salary for the period of indictment be relinquished, and 4) agreement that acceptance for the plea of nolo contendere does not constitute a finding of guilt.

***EC-COI-84-65** — The trustees of the George Robert White Fund are not "municipal employees" for the purposes of G.L. c. 268A. The Fund was created by an individual's will, does not expend public funds, and finances projects which are not essentially governmental functions. The trustees owe a duty of loyalty to the Fund rather than the City of Boston, and any redress for a trustee's breach of that duty lies in the law of trusts.

EC-COI-84-66 — Members of a grants review committee organized by the state Administering Agency for Developmental Disabilities and drawn from within and outside of state government to review and make non-binding recommendations on funding proposals are state employees within the meaning of §1(q) because: they participate in a statutorily-required disbursement of money, they must do their work within substantive agency guidelines, they will become a permanent part of the funding process, and they are performing an essentially governmental function.

***EC-COI-84-67** — A part-time consultant to a legislative committee may accept appointments from state and federal courts to represent indigent criminal defendants. He would not violate §4 because he is a special state employee and has neither participated in, nor had official responsibility for criminal prosecutions in his state job. He would not have an impermissible financial interest in a state contract because he would qualify for an exemption available to a special employee, as himself, who does not participate in or have official responsibility for any of the activities of the contracting agency.

EC-COI-84-68 — An unpaid member of the State Board of Education (Board) may be employed by a private vendor which is funded by another state agency without violating §7. Although the Board issues regulations which affect the agency, the interrelation does not rise to the level of substantial participation or official responsibility for the activities of the agency, therefore qualifying her for a §7(d) exemption.

EC-COI-84-69 — A consultant may be employed on a part-time basis by two state agencies, subject to the conditions of §7(d). As a special state employee, he will not have a prohibited §7 financial interest in more than one state contract as long as he does not participate in or have official responsibility for any of the activities of the contracting agency and files a disclosure of his financial interest in the contract with the Ethics Commission.

***EC-COI-84-70** — A state agency head may use state personnel and state-owned computers to key-punch registration information for a national conference where the conference is interconnected with the business of that department, in furtherance of the public interest and not toward partisan political ends, and his appointing official approves the use of state resources for that purpose.

***EC-COI-84-71** — A state employee, who is also an officer and board member of an organization which plans to submit a technical assistance application to his agency, will be subject to substantial limitations under §§4, 6 and 23 with respect to the application and any subsequent technical services rendered. Specifically, §4(c) prohibits him from being the organization's agent concerning the application or before any state agency, and §6 prohibits him from participating in the agency review of the organization's application. He would only be permitted to perform services under a contract between the organization and his agency if he followed the disclosure and determination procedures of §6.

EC-COI-84-72 — A special assistant district attorney may also serve as the part-time chairman of a municipal commission within the same county. He would violate neither §4 nor §17 because his activities and salary in the municipal and state positions would not be in relation to particular matters of direct and substantial interest to the state and city, respectively.

EC-COI-84-73 — A counselor employed by a state agency may serve as an unpaid member of the board of directors of a non-profit organization which has contracts with her agency. However, she is prohibited by §6 from participating as an agency employee in any matter in which the organization or one of its competitors has a financial interest. Such matters would include referral of her clients to the organization and funding applications submitted by the organization to her agency. She is also prohibited by §4(c) from acting as agent or spokesperson for the organization before her agency.

EC-COI-84-74 — A full-time DMH employee may receive additional state compensation for part-time services performed within a 24-hour-a-day DMH facility provided he meets all the conditions of the social services exemption to §7. Such criteria include not being compensated for more than four hours (at a rate not exceeding step one of job group XX of the general salary schedule) in any day in which he is otherwise compensated by the commonwealth, and a certification by the head of the facility to the Ethics Commission setting forth the critical need for the employee's services.

EC-COI-84-75 — A town clerk is required by Chapter 409 of the Acts of 1983 to provide a copy of G.L. c. 268A, §23 only to those appointed or elected officials to whom she administers an oath of office following the January 1984 effective date of Chapter 409.

EC-COI-84-76 — A city council member may purchase for development some land located in the city. However, he is prohibited by §19 from participating as city councillor in connection with any matter in which he or a business organization with which he is associated has a financial interest, for example issues about zoning or building permits, or industrial revenue bonding. He would be prohibited by §17(c) from acting as agent or attorney for the development project before any city agency or other forum in connection with any matter in which the city is a party or has a direct and substantial interest.

EC-COI-84-77 — Section 7, which prohibits a state employee from having a financial interest in a contract made by a state agency, clearly prohibits an individual from collecting two full-time state salaries. However, §7(d) exempts from that prohibition a special state employee who neither participates in nor has official responsibility for the activities of the contracting agency. Thus, a DMH employee could maintain her full-time faculty position at a state university if the hours in her DMH position were reduced to enable her appointing official to classify her position as that of a special state employee.

***EC-COI-84-78** — An assistant town counsel may have a private law practice on the side and share office space with two other attorneys. He may also perform legal work for one of the other attorneys without violating §17 as long as he does not work on any matter in which the town is a party or has a direct and substantial interest. However, the attorneys must be careful to avoid creating the public appearance of a partnership or §18(d) will place limits on their activities in connection with clients they represent in matters in which assistant town counsel participates as a municipal employee. In this regard the municipal employee's name should not be linked with the other two attorney's names in the law office title on the letterhead. To avoid raising issues under §23 his name should not appear in any form on the letterhead of the attorney he shares space with when the letterhead is used in connection with matters that other attorney has involving the town.

***EC-COI-84-79** — Under the special provisions of §4 applicable to legislators, a member of the General Court who is also an attorney may not represent a client for compensation in an inquiry before a state agency where (1) the inquiry is not ministerial, (2) the inquiry is not a quasi-judicial proceeding, and (3) the appearance is not before a court of the Commonwealth. It is immaterial that the inquiry could possibly lead to a court proceeding by some other state agency.

*EC-COI-84-80 — Employees of a large public agency which leases space to a sandwich shop may accept a ten percent sandwich discount which is also available to other neighboring public and private employees. However, those agency employees who are directly involved in the negotiation and monitoring of the lease should establish safeguards to avoid creating the impression that they will unduly favor the sandwich shop.

*EC-COI-84-81 — A member of the state board of registration of nursing may also serve as an unpaid member of a nursing school accreditation board within the National League of Nursing (NLN). She may act on behalf of the NLN because the accreditation decisions are not matters of direct and substantial interest to the commonwealth. Further, the NLN will not have a financial interest in any decisions or other particular matters in which she participates as a board of registration member.

EC-COI-84-82 — A full-time state employee may also serve as an officer and director of a corporation which receives funding from state agencies, subject to several limitations. She may not solicit contracts or otherwise act as the corporation's agent with respect to its funding applications because such contracts and applications are particular matters of direct and substantial interest to the state. She must also avoid participation as a state employee in any contract proposal submitted by the corporation.

EC-COI-84-83 — A state employee may not solicit funds on behalf of a non-profit corporation before state agencies or private associations with whom the employee works in his state position. Because the corporation for which he is an officer has a financial interest in its funding proposals, he must refrain from participating in those proposals as a state employee.

EC-COI-84-84 — A state employee may consult after hours with a private company on an out-of-state project which is not a matter of direct and substantial interest to the commonwealth. However, should his state duties involve reviewing work proposed by the company, he must establish safeguards with his appointing official to avoid creating the impression that he will unduly favor the company.

EC-COI-84-85 — A Department of Mental Health employee may also be paid under a second state contract to transport recipients of public assistance, because the employee satisfies the public assistance exemption conditions under §7.

*EC-COI-84-86 — In view of the operational independence of the Brockton District Court and the Boston Juvenile Court, a psychiatrist may consult part-time with both courts following the filing of a financial disclosure statement under §7(d).

*EC-COI-84-87 — Absent a gubernatorial exemption under §7(e), a member of the designer selection board (DSB) would violate §7 if his firm entered into an architectural and engineering contract with the state Executive Office of Communities and Development. The member would not qualify for the other exemption available to special state employees because of the DSB's official responsibility over the EOCD selection procedures.

EC-COI-84-88 — A former municipal employee may now represent a client with whom he had official dealings while serving as a municipal employee, because the negotiations involve new matters in which he did not previously participate. He may not disclose to his client confidential information which he acquired in his former position.

*EC-COI-84-89 — A municipal attorney's association with two other attorneys in a corporation separate from his law practice does not constitute a partnership within the meaning of the statute. He may not act as attorney or agent for the corporation in any proceeding before any municipal agency on any matter in which the town is a party or has a direct and substantial interest. He may not participate in his municipal capacity on any matter in which he or his corporation has a financial interest.

*EC-COI-84-90 — A school committee member would violate §20 if one of his partners in a profit-sharing partnership received money under a contract for performing legal services for the school committee. Sections 19 and 23 further prohibit the school committee member from participating as a member in matters in which the partner has a financial interest, such as the decision to retain the partner.

EC-COI-84-91 — A town counsel may also serve as the counsel to a local housing authority only if he satisfies all the criteria of the §20(b) exemption.

*EC-COI-84-92 — A member of a municipal commission will not be deemed to have a financial interest in his emancipated son's employment contract with the commission, because the member has no legal duty to support his son. However, the member must refrain from participating in any commission personnel decision affecting his son's financial interest, and must abstain from any discussion with other commission members concerning his son's employment.

*EC-COI-84-93 — An attorney may not serve as a member of a state agency while also consulting for the Attorney General in a proceeding challenging the state agency. However, he may continue his consultation for the Attorney General in other proceedings which do not directly involve the state agency.

*EC-COI-84-94 — A consultant specifically named in a contract between a court-appointed Special Master and a state agency is considered a state employee by virtue of his performing services for instrumentalities of the court. During the term of the contract, he will be subject to the provisions of §4 and §23 with regard to his outside professional activities. The restrictions of §5 will apply to any partners, and to his own outside activities once he leaves his state consultant position.

EC-COI-84-95 — A state employee is prohibited by §4(c) from acting as his corporation's representative or spokesperson before any state agencies. Moreover, as long as he remains a state employee and maintains his ownership interest in the corporation, any contracts with the state will have to comply with the §7(b) exemption conditions.

*EC-COI-84-96 — A municipal planning board member is prohibited by §19 from participating in a decision on the issuance of a special permit since he owns land which abuts the proposed development. He is ineligible for either exemption under §19(b) because (1) he is elected, and so cannot be exempted by his appointing official, and (2) his interest is unique and not "shared with a substantial segment of the population of the municipality."

EC-COI-84-97 — A private attorney may represent clients before a Board for which his spouse is general counsel because his spouse is screened from all contact with matters in which he or his associates are involved. However, as a municipal employee under contract with a municipal council, he may not represent private clients before a board or council of the municipality.

*EC-COI-84-98 — School committee members who have immediate family members teaching in the school system are subject to §19 and §23 restrictions on their participation in teacher-related matters. Any financial interest, no matter how small, will trigger the §19 prohibition against participation in matters in which an immediate family member has a financial interest; however, that interest must be direct and immediate, or reasonably foreseeable.

EC-COI-84-99 — Absent a gubernatorial exemption under §7(e), a state employee may not simultaneously serve as a member of a state committee which disburses grant monies to his own state agency.

EC-COI-84-100 — A state employee who has some official dealings with local redevelopment authorities may, in his private capacity, submit a development proposal to a local authority with his business partners because the state is not a party and does not have a direct and substantial interest in the proposal. He should be careful, under §23, to ensure that his official dealings with the authority are not influenced by his private business with it.

***EC-COI-84-101** — The director of a non-profit agency which has a partnership agreement with the Department of Mental Health (DMH) would violate §3 by offering a cash "incentive award" to DMH employees assigned to his clinic since he would be offering something of substantial value for or because of a state employee's official acts.

EC-COI-84-102 — A lawyer employed by a private hospital may also serve on the board of the Mental Health Legal Advisors Committee (MHLAC), a state agency. He may not, under §4, work on any particular matter for the hospital in which MHLAC is also involved. Also, he may not, under §6, act as an MHLAC member in any matter in which the hospital has a financial interest.

EC-COI-84-103 — An employee of the Department of Environmental Quality Engineering (DEQE) may serve on his town's sewer commission under the §4 municipal exemption as long as he does not vote or act on any matters within the purview of DEQE.

***EC-COI-84-104** — A trustee of a state hospital in his private capacity is employed as a corporate engineer. The chairman of the board of the company for which he works privately has taken a private position on a proposed land transfer which will come before the hospital board of trustees. The engineer may participate as a board of trustees member in that matter because his employer does not have a financial interest in it. However, he must take measures (as explained in the opinion) to comply with the standards of conduct set out in §23.

EC-COI-84-105 — A member of the General Court would violate §7 by entering into a housing subsidy contract with a regional housing authority which is under contract with the Executive Office of Communities and Development. However, to avoid undue hardship to the current tenant, and because the local housing authority will soon be administering these federal housing subsidies, the Commission, as it has done in other similar situations, will stay enforcement of §7 in his situation for a nine-month period.

EC-COI-84-106 — A county employee would not violate either §11 or §14 by acting as the agent of a product supply company in soliciting contracts with the state since the county has no interest in dealings between the company and the state, and no county agency will have an interest in or be a party to the contracts he is seeking.

***EC-COI-84-107** — An attorney who represents indigent defendants in a county bar advocate program may also accept a part-time position with the district attorney's office. He will be considered, however, a special state employee and, accordingly, would not be able to represent defendants in matters being handled by that district attorney's office if he serves in the part-time position for more than 60 days in any one year. He is also advised of the limitations §23 places on his dual role, particularly with respect to the prosecution of individuals whom he has previously represented.

***EC-COI-84-108** — A member of the General Court serving on a medical malpractice tribunal established by G.L. c. 231, §60B may not be compensated for his services because he would have a financial interest in a ccontract made by a state agency. He may, however, serve on the tribunal on an unpaid basis.

***EC-COI-84-109** — A state employee would violate §7 if he purchased a building with a tenant who received a rent subsidy under a state contract. To avoid undue hardship on the current tenant, the prohibitions will be applied following the conclusion of that tenancy.

EC-COI-84-110 — A state employee may serve as his agency's representative on a corporate board of governors because his membership would be in the proper discharge of his official duties. However, absent receipt of permission from his appointing official, he may not participate in his state capacity in matters in which the corporation has a financial interest.

EC-COI-84-111 — A state employee may become owner of a nursing home as long as he takes no action in his state job which would affect the home's financial interest, as long as the nursing home does not have any contracts with the state as prohibited by §7, and as long as he does not act as agent for the nursing home in any matter in which the state is a party or has a direct and substantial interest as prohibited by §4.

EC-COI-84-112 — A state employee may privately treat individuals who have been referred through the Massachusetts Employee Assistance Program, because his treatment would not be a matter of direct and substantial interest to the commonwealth or a state agency. However, he may not accept referrals of clients who are employed by his agency or are under his official responsibility.

***EC-COI-84-113** — An employee of a state agency and former director of the agency's computerized information system is prohibited by §4 from being paid by non-state parties in relation to matters submitted to the agency's system. Section 4 does not outright prohibit him from developing a separate competitor system, but he will have to comply strictly with the §23 standards of conduct in doing so.

***EC-COI-84-114** — A state agency may accept a gift of artwork from a private party as long as the party has no official dealings with the agency and the gift is used by the agency for office display rather than for the personal use by the agency head or employees.

EC-COI-84-115 — An attorney with the Department of Revenue may also run a real estate business, subject to several restrictions. He may neither act as an agent in state leases or other matters involving state agencies, nor contract with the state. He must refrain from any official participation in state tax matters affecting his business and must not use state resources such as telephones, copy machines and clerical personnel for his private work.

***EC-COI-84-116** — A former city solicitor, who is now a law partner of the current city solicitor, may not represent private clients before city agencies. He may, however, provide advice to private clients in city-related matters as long as he does not act for the clients in a representative capacity.

***EC-COI-84-117** — A selectman is prohibited by §17(c) from appearing before municipal boards as an attorney on behalf of two real estate trusts. As an elected municipal official, he does not qualify as a special municipal employee or for the §17 fiduciary exemption.

EC-COI-84-118 — A part-time town attorney is a special municipal employee, and, following disclosure under §20(c), may contract to perform part-time legal services for municipal agencies unrelated to the one for which he works.

***EC-COI-84-119** — An arrangement whereby private corporations loan a staff person to the Massachusetts Technology Park Corporation while continuing to pay their salary does not violate G.L. c. 268A, although certain safeguards must be followed under §6 and §23 (¶2)(3). Any agency board of directors members who are affiliated with a private corporation must also disqualify themselves from participating as board members in matters affecting their companies' financial interests.

EC-COI-84-120 — A state employee may serve as a municipal conservation commission member, provided that he does not vote or act on any matter in his municipal capacity which is within the purview of his state agency.

EC-COI-84-121 — The chair of a state board of registration may hold a license for a business under the board's authority and hire a manager to run the business. However, she may not act as the business' agent in any application or proceeding before the

board, and may not participate in her board capacity in any matter in which her company has a financial interest.

*EC-COI-84-122 — A state employee must refrain from officially participating in any matter affecting the financial interest of an entity which is considering him for a full-time position. Should he accept private employment with the entity, he will be subject to §5 and §23 restrictions as a former state employee.

*EC-COI-84-123 — School committee members may not participate in the formulation, adoption or revision of any aspect of the budget or collective bargaining strategy or position which may relate to the wages, hours or conditions of any member of their immediate family employed by the school department.

EC-COI-84-124 — A special state employee would not violate the conflict law by virtue of a contract between another state agency and a private company which employs him on a part-time basis where he (1) has no ownership interest in the company, (2) will not be working for the company on the state contract, and (3) has no dealings in his official capacity with that state agency.

*EC-COI-84-125 — A city councilor who was appointed as a reserve police officer to begin serving once the position is funded is immediately subject to §19 and §23 prohibitions against participating as a city councilor in any police matters. If the position is funded and he performs services in that position, he will be in violation of §20 since he will then have a financial interest in a municipal contract, i.e., his employment contract.

EC-COI-84-126 — The director of a state regulatory agency must exercise caution in dealing with applications submitted by a business organization whose financial manager is his brother-in-law. While neither §6 nor §23 outright prohibit his official dealings with the organization, he should notify his appointing officials and review safeguards which can be established to avoid creating the impression of undue favoritism.

*EC-COI-84-127 — A judge may not use his name in a corporate television advertisement to be shown out of state where he would be identified as a member of the judiciary. Lending the prestige of his office to the corporation for the purpose of selling its products constitutes an unwarranted privilege to the corporation.

*EC-COI-84-128 — Section 23 does not prohibit the Secretary of the Executive Office of Public Safety from soliciting contributions from drug and liquor companies and treatment facilities to help fund a state anti-alcohol and drug abuse campaign in the state's schools. Lending the prestige of his office to this fundraising effort will not inure to the benefit of a private party, and the opportunity for such companies and facilities to influence him in his official duties is remote. Further, such fundraising efforts are within the Secretary's statutory authority.

*EC-COI-84-129 — An associate in a law firm may serve as labor counsel for a state agency, subject to the limitations applicable to special state employees. In particular, if he serves for more than sixty days in any one-year period, he may not represent private clients in any matters pending in that state agency. For the purpose of calculating the sixty-day period, the state agency labor work performed for him by other firm employees under his supervision would be counted as a day in which he performs services.

EC-COI-84-130 — The superintendent of a Department of Mental Health (DMH) facility may also work after hours for an accrediting organization, subject to the limitations of §4 and §6. In particular, he may not work for the organization in the accreditation review of the DMH facility for which he is superintendent, and may not participate as superintendent in contracts with the organization.

EC-COI-84-131 — A supervisor with the Department of Social Services may not assist a private psychologist after hours in providing counselling services to state college students under a state contract. The supervisor must also refrain from privately treating clients who have been referred by a state agency.

EC-COI-84-132 — A member of the state Designer Selection Board is a special state employee. He may also work for another state agency because, in his Board capacity, he does not participate in or have official responsibility for the activities of that agency.

EC-COI-84-133 — A town counsel who is also an insurance agent may not have a financial interest in insurance policies made with the town. He may accept commissions based on policies in effect after the termination of his town counsel services.

EC-COI-84-134 — An outgoing member of the General Court may represent and be sponsored by the General Court at a management development seminar at the National Conference of State Legislators.

***EC-COI-84-135** — A state official may also serve as the honorary consul to a foreign country, subject to the restrictions of §4 and §23. For example, the official may not advocate the interests of the country's residents in securing housing through applications before state agencies because the state has a direct and substantial interest in the applications. The official should also notify her appointing official in those situations in which her official state duties service the same constituency for which she is providing consul services.

EC-COI-84-136 — An employee with the state Committee for Public Counsel Services may also hold office as a selectman, subject to the restrictions of §4 and §23. In view of the "municipal exemption" to §4, he will be subject to comparatively few restrictions. However, because the selectmen serve as local police commissioners, he must refrain from certain conduct when the two roles overlap. For example, he could not supervise the defense of a case being prosecuted by his town's police department.

EC-COI-84-137 — An unpaid member of a Department of Mental Health (DMH) area board may also serve as an unpaid member of the board of directors of a DMH vendor, subject to the restrictions of §4 and §6.

EC-COI-84-138 — A member of the General Court who approved the overall budget of the Executive Office of Communities and Development (EOCD) would not violate G.L. c. 268A if his spouse participated as broker in the sale of land to a developer for a housing project funded by a local housing authority under EOCD. The financial interest of the spouse in the General Court's approval of EOCD's budget is too remote and speculative.

EC-COI-84-139 — A state official may not participate in the negotiation, execution or oversight of a contract between her agency and a law firm in which her spouse is a partner. She may work together with members or employees of the law firm but must establish safeguards with her appointing official to avoid creating the impression that she will be unduly affected by her spouse's relationship with the firm.

***EC-COI-84-140** — A full-time Department of Mental Health (DMH) employee who also owns rental property would violate §7 if he rented office space to DMH.

***EC-COI-84-141** — A member of the General Court may participate as a developer in a rehabilitation project financed by the issuance of industrial development revenue bonds. The bonds would not constitute a contract made by a state agency for the purposes of §7. However, the legislator may not appear personally for compensation before the Massachusetts Industrial Finance Agency in connection with the bond authorization.

***EC-COI-84-142** — A full-time assistant town clerk may continue to be employed by the town board of health only if she satisfies the conditions for exemption under G.L. c. 268A, §20(b). Because she is an assistant clerk rather than the town clerk, she does not qualify for the town clerk's exemption under G.L. c. 41, §19I.

EC-COI-84-143 — A private attorney may also serve as the part-time legal counsel to county commissioners, subject to certain limitations. In particular, neither he nor his partner may represent private clients in matters in which he has participated or which are within his official responsibilities as legal counsel.

***EC-COI-84-144** — A state regulatory board must follow safeguards to avoid creating the impression that it will unduly favor one of its members who is applying for a license from the board.

***EC-COI-84-145** — A courtroom procedures clerk would violate G.L. c. 268A, §4 if he were also paid through defendants' fees as a bail commissioner since he would be receiving outside compensation in relation to matters of direct and substantial interest to the state. The authority for court personnel to collect bail includes only district court clerks and assistant clerks and does not extend to courtroom procedures clerks.

***EC-COI-84-146** — A former employee in the governor's office may, within the one-year period following her termination of services, serve as a legislative agent before the General Court, the Budget Bureau and the Executive Office of Human Services. However, for the purposes of G.L. c. 268A, §5(e), her lobbying activities would be prohibited before the governor's office, the "governmental body" with which she was formerly associated.

***EC-COI-84-147** — Where the board of trustees of a state institution passed a resolution to assist in establishing a holding company of revenue-producing entities for the state institution, and where the company's board would be selected by the institution's board and would include institution-affiliated persons, the company's (unpaid) board members would be considered special state employees and G.L. c. 268A restrictions will apply to them.

***EC-COI-84-148** — A member of an unpaid state committee may also remain in a full-time position with a state agency which has official dealings with the committee. Because the committee's enabling legislation calls for representatives of the state agency to serve on the committee and contemplates that the committee will have dealings with the agency, the member's service in both capacities is treated as one contract for the purposes of §7.

COMMISSION ADVISORIES